1-1-1998

Addressing an Industrywide Health Insurance Crisis by Spreading the Cost: Has Congress Violated the Constitution?

Jay E. Grenig
Marquette University Law School, jay.grenig@marquette.edu

Publication Information
Jay E. Grenig, Addressing an Industrywide Health Insurance Crisis by Spreading the Cost: Has Congress Violated the Constitution?, 1997-98 Term Preview U.S. Sup. Ct. Cas. 326 (1998).

Case at a Glance

This case challenges the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992. Application of the Act in this case requires a company that left the coal mining business years ago to pay health insurance premiums for more than 1,400 retired coal miners and their dependents. Now the Supreme Court decides whether the Act is a deprivation of property in violation of the Due Process Clause or a taking of property in violation of the Takings Clause.

Addressing an Industrywide Health Insurance Crisis by Spreading the Cost: Has Congress Violated the Constitution?

by Jay E. Grenig

PREVIEW of United States Supreme Court Cases, pages 326–330.

Jay E. Grenig is professor of law at Marquette University Law School, Milwaukee, WI; (414) 288-5377.

The Coal Industry Retiree Health Benefit Act of 1992 (the "Coal Act" or the "Act"), 26 U.S.C. §§ 9701-22 (1994), can require a company that is no longer in the coal mining business to pay for the health benefits of retired miners and their dependents. One such company, Eastern Enterprises ("Eastern"), which ceased coal mining some 27 years ago, claims that the Act violates the Fifth Amendment's Due Process and Takings Clauses. U.S. CONST. amend. V, cls. 2, 3.

ISSUE

Does the Coal Act violate either the Due Process Clause or the Takings Clause by assessing premiums to a former coal mine operator for the health care benefits of retired, former employees and their dependents when the operator has been out of the coal mining business for some 27 years and has not contributed in any direct way to the health-benefit funding crisis that prompted Congress to pass the Act?

FACTS

Eastern owns Boston Gas Company, New England's largest distributor of natural gas, and Midland Enterprises, Inc., a leading barge operator on the nation's inland waterways. Eastern conducted extensive coal mining operations from 1946 through 1965. During that time, Eastern was a signatory to collective bargaining agreements — the National Bituminous Coal Wage Agreements ("NBCWA(s)") — between leading coal companies and the United Mine Workers of America ("UMWA").

Eastern terminated its direct involvement in coal mining at the end of 1965 when it transferred its coal mining operations to a new and wholly owned subsidiary, Eastern Associated Coal Corporation ("Associated"). From 1966 to 1987, Associated was a signatory to various NBCWAs. In 1987, Eastern ceased its indirect involvement in coal mining when it sold its entire interest in Associated to Peabody Holding Company.

EASTERN ENTERPRISES V. KENNETH S. APFEL, COMMISSIONER OF SOCIAL SECURITY, ET AL.
DOCKET NO. 97-42

ARGUMENT DATE:
MARCH 4, 1998
FROM: THE FIRST CIRCUIT

Effective on February 1, 1993, some 27 years after Eastern ceased its direct coal mining operations and six years after it divested itself of all coal mining interests, the Commissioner of Social Security (the "Commissioner"), the administrator of the Coal Act, assigned 1,493 Coal Act beneficiaries to Eastern. Of the assigned beneficiaries, 376 were retired miners who had worked for Eastern at some time between 1946 and 1965, and 1,117 were spouses or children of the retired miners. As a result of these assignments, Eastern has been assessed a total of $16,836,791 for health care premiums through September 30, 1997. Because the Act requires that Eastern be assessed annual premiums for the life of each assigned beneficiary, its projected liability totals more than $100 million.

Challenging the assignment of beneficiaries, Eastern sued the Commissioner, the UMWA Combined Benefit Fund and the Fund's trustees (collectively, the "Fund") in federal district court. Eastern claimed that the Coal Act, as applied to it, violates the Due Process Clause and constitutes an uncompensated taking of Eastern's property for a public purpose in violation of the Takings Clause.

The district court ruled against Eastern in an unreported opinion. The court reasoned that the Coal Act was a rational response to the health-benefit funding crisis that gripped the coal industry in the 1970s and 1980s when industry consolidation left fewer and fewer companies to fund the health care benefits of retirees and their dependents.

The First Circuit affirmed. 110 F.3d 150 (1st Cir. 1997). The appeals court agreed with the district court that the Coal Act did not violate the Due Process Clause. Said the court, Congress had the constitutional authority to enact the Coal Act, and the Act itself is a rational solution to the problem Congress identified. As to Eastern's Takings Clause claim, the First Circuit relied on language from *Concrete Pipe & Products of California v. Construction Laborers Pension Trust,* 508 U.S. 602, 614 (1993), **ABA Preview** 145 (Nov. 30, 1992). In that case, the Supreme Court observed that "it would be surprising indeed to discover" that a statute that does not violate the Due Process Clause nonetheless violates the Takings Clause.

The Supreme Court granted Eastern's petition for a writ of certiorari, and the First Circuit's decision is now before the Court for review. 118 S. Ct. 334 (1997).

Case Analysis

Motivated principally by miners' demands for decent health care and retirement benefits, the UMWA called a nationwide strike in 1946. President Truman responded by nationalizing the coal mines to prevent a nationwide industrial paralysis. Following execution of the Krug-Lewis Agreement, the crisis ended and the Government relinquished control of the mines. A key component of the settlement was creation of a multiemployer welfare and retirement benefit plan.

The UMWA and the Bituminous Coal Operators' Association (the "BCOA"), a multiemployer group of coal producers, executed the first NBCWA in 1947 after the mines returned to private control. The 1947 NBCWA specified terms and conditions of employment in the coal mines and continued providing the health care and pension benefits to miners begun under the Krug-Lewis Agreement.

A successor NBCWA was signed in 1950. In return for union concessions regarding mechanization of the mines, the BCOA agreed to create a health care and retirement fund financed by a per-ton levy on coal mined by signatory operators. The 1950 fund received employer contributions and used them to provide benefits to current and retired miners and their dependents. Several NBCWAs were negotiated and executed during the next two decades; none of them altered the industry's basic approach to benefits.

Demographic changes and the passage of the Employee Retirement Income Security Act in 1974 led to a restructuring of the coal industry's benefit plan. The 1974 NBCWA established four separate multiemployer plans: two covering pension benefits and two dealing with health care and related benefits. One of the health care plans provided benefits to miners who retired before 1976; the second provided benefits to miners who retired on or after January 1, 1976. The 1974 NBCWA explicitly guaranteed lifetime health care benefits for enrolled miners and their dependents.

The 1978 NBCWA incorporated a new provision to ensure health care benefits for "orphaned" retirees — retired miners whose employers had abandoned coal mining or did not employ UMWA members. The 1978 NBCWA also obligated signatory operators to increase contributions to the benefit plans during the three-year term of the agreement if and when required and guaranteed sufficient funding for the schedule of medical benefits set forth in the agreement. Further, the 1978 NBCWA contained an "evergreen" provision that obligated signatories to make contributions as required under the 1978 NBCWA and "any successor agreements thereto in accordance with the con-

(Continued on Page 328)

tribution formulas set forth in the agreement."

The economic factors prompting the changes and guarantees contained in the 1974 and 1978 NBCWAs continued to plague the coal industry. In particular, the cost of health care rose steeply throughout the 1980s, the number of orphaned miners increased dramatically as more and more operators fled the industry, and an aging workforce swelled the ranks of retired miners. By 1990, the contributions from a shrinking number of coal producers proved insufficient to fund the four benefit plans established in the 1974 NBCWA, and the plans were awash in red ink.

When the UMWA struck the Pittston Coal Company for nearly 11 months in 1989–90, the Secretary of Labor intervened, brokered a settlement, and set up the Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission" or the "Commission") to study the industry's problems and recommend ways of rejuvenating the benefit plans. In late 1990, the Coal Commission issued a report concluding that retired miners and their dependents had legitimate expectations of lifetime health care benefits based on commitments made under the terms of the various NBCWAs.

The Coal Commission further concluded that the financial condition of the benefit plans would continue to deteriorate. The Commission reached a consensus that "contribution obligations should be statutorily imposed on past signatories, . possibly reaching back to the signatory class of 1978."

Congress responded to the report by enacting the Coal Act. The Act combined the four pension and health care plans into a single UMWA-sponsored entity called the Combined Fund. It also created a complex system intended to ensure that all retirees eligible to receive health care benefits from the preexisting plans would obtain them from the Combined Fund.

The Act directs the assignment of every eligible beneficiary to a "signatory operator," an entity that is, or was, a signatory to a NBCWA and remains in business. An entity is considered to be in business if it "conducts or derives revenue from any business activity, whether or not in the coal industry. 26 U.S.C. § 9701(c)(7). The Act requires a signatory operator to pay premiums to the Combined Fund sufficient to defray the estimated annualized health care costs for all beneficiaries assigned to the signatory operator and an additional amount to provide coverage for orphaned retirees.

The assignment of beneficiaries is administered by the Commissioner based on a three-tier hierarchy. First, the Commissioner assigns an eligible retired miner to a signatory operator that both signed the 1978 NBCWA or any later NBCWA and most recently employed the miner for two or more years. If no signatory operator fitting that description is in business, the retiree is assigned to the 1978 (or later) signatory operator that employed the miner most recently for any length of time. Finally, if the miner never worked for a 1978 (or later) signatory operator that remains in business, the miner is assigned to a "super-reach back operator," i.e., a signatory operator of any earlier NBCWA currently in business that employed the miner for the longest period of time. Once the assignments are made, the Coal Act authorizes the Combined Fund to assess annual health care premiums on each signatory operator based on the number of retired former employees assigned to it.

Nearly 100,000 persons were eligible under the Coal Act for benefits from the Combined Fund as of October 1, 1994. At least 70 percent of these beneficiaries were dependents of deceased miners. As of October 1, 1994, the Commissioner had assigned more than 70,000 of these beneficiaries to current and former signatory operators and nearly 25,000 beneficiaries were in the orphaned pool. Fewer than 7,000 beneficiaries were assigned to super-reach back operators such as Eastern.

Eastern contends that the Coal Act imposes a new and unforeseeable liability on it to provide lifetime health care benefits to former employees and their dependents even though the employment relationship with Eastern terminated between 30 and 50 years ago. According to Eastern, the Due Process Clause requires a causal connection between the harm addressed by a retroactive statute and the conduct of the parties made liable by the statute. (A *retroactive statute* imposes liability for past conduct that was lawful or permissible when it occurred.) Eastern insists that Congress could not rationally conclude that Eastern engaged in conduct causing any of the harm addressed by the Coal Act.

Asserting that it did not contribute to the funding crisis addressed by the Coal Act, Eastern says it is even more remarkable that the Act reaches back to attach liability after such an astonishing number of years has passed. Eastern reasons that the Coal Act is a potent example of how retroactive legislation can create a degree of unfairness far more serious than is created by prospective legislation, because only retroactive legislation deprives individuals and businesses of legitimate expectations and upsets settled transactions.

The Fund counters that Eastern's effort to slough off all monetary responsibility for its retirees' health care and to shift that responsibility to its former subsidiary overlooks two critical points. First, says the Fund, none of the beneficiaries assigned to Eastern ever worked for Associates; second, every NBCWA was effective only for a term of years, including the ones that referred to a "health services card until death." The Fund asserts that Eastern's undisputed employment relationship with beneficiaries of the Combined Fund and its direct participation in all of the pre-1966 NBCWAs provide ample connection between Eastern's conduct and the health care liability imposed on it by the Act.

Eastern also contends that the Act violates the Takings Clause, relying on *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978). There, the Supreme Court enumerated three factors to be considered in a Takings Clause case: (1) the economic impact of the challenged regulation, (2) the extent to which the challenged regulation interferes with distinct and reasonable investment-backed expectations, and (3) the character of the regulation.

Eastern maintains that the Coal Act subjects it to a staggering assessment bearing no rational relationship to its experience with the benefit plans contained in past NBCWAs in order to solve a problem Eastern played no part in creating. Eastern contends that the Coal Act, as applied to it, constitutes a direct appropriation of its property unrelated to any harm it might have caused. Eastern asserts that the Act imposes an involuntary tax or monetary obligation on conduct concluded by Eastern 30 to 50 years ago and that the economic impact of the Act is out of all proportion to Eastern's involvement with the NBCWAs' benefit plans.

Declaring that the liability imposed on it by the Coal Act was not foreseeable, Eastern says the Act drastically upset its investment-backed expectations. Eastern maintains that at the time it transferred its coal business to Associates in 1965, it reasonably expected that it would have no further benefit liability to former employees. Moreover, Eastern says it surely could not have expected that it would have any benefit liability after selling its interest in Associates to Peabody in 1987.

The Fund answers that Eastern's liability is reasonably related to the company's experience with the benefit plans that eventually became the Combined Fund. According to the Fund, it does not matter for purposes of the economic proportionality of Eastern's liability under the Coal Act that Associates contributed to NBCWAs in the years after Eastern transferred its coal operations to Associates. The Fund stresses that Eastern has been assigned Coal Act liability only for retirees who once worked for Eastern.

With respect to Eastern's investment-backed expectations, the Fund argues that, having contributed to the expectation of lifetime benefits for retirees and their dependents, Eastern had every reason to anticipate that it might be called on to bear some of the financial burden the expectation engendered. Turning to the character of the statute, the Fund asserts that the Coal Act is merely an industry-specific program that readjusts economic burdens and involves no physical occupation, invasion, or appropriation of property.

The Fund also reminds the Supreme Court that the First Circuit's decision in this case is not anomalous. Five other circuit courts of appeals have upheld the constitutionality of the Coal Act against the very same Due Process Clause and Takings Clause challenges Eastern now advances. *Blue Diamond Coal Co. v. Secretary of Health & Human Servs.,* 79 F.3d 516 (6th Cir. 1997); *Holland v. Keenan Trucking Co.,* 102 F.3d 736 (4th Cir. 1996); *Lindsey Coal Mining Co. Liquidating Trust v. Chater,* 90 F.3d 688 (3d Cir. 1996); *Davon, Inc. v. Shalala,* 75 F.3d 1114 (7th Cir. 1996); *LTV Steel Co., Inc. v. Shalala,* 53 F.3d 478 (2d Cir. 1995).

SIGNIFICANCE

The financial stakes in this case are considerable. Eastern, as noted, already has been assessed more than $16 million for health care benefits and faces liability in excess of $100 million if the court rejects its arguments. Judging by the number of friend-of-the-court briefs supporting Eastern, other former coal operators are watching this case carefully because they too are at risk for significant financial liability if Eastern does not prevail.

A ruling for Eastern, however, could make funding of health care benefits for retired miners and their dependents more difficult. The shrinking number of coal operators coupled with the increased number of beneficiaries, many of whom are retired, could place significant additional burdens on existing operators; burdens they could escape if Eastern wins.

(Continued on Page 330)

Attorneys of the Parties

For Eastern Enterprises (John T. Montgomery; Ropes & Gray; (617) 951-7000).

For Kenneth S. Apfel, Commissioner of Social Security (Seth P. Waxman, Solicitor General; Department of Justice; (202) 514-2217).

For United Mine Workers of America Combined Benefit Fund and Trustees of the United Mine Workers of America Combined Benefit Fund (Peter Buscemi; Morgan Lewis & Bockius; (202) 467-7190

For Peabody Holding Company, Inc., Eastern Associated Coal Corporation, and Coal Properties Corporation (Kenneth A. Sweder; Stroock & Stroock & Lavan; (671) 482-6800).

Amicus Briefs

In support of Eastern Enterprises

Joint brief: AlliedSignal Inc., LTV Corporation, and Bellaire Corporation (Counsel of Record: Donald B. Ayer; Jones, Day, Reavis & Pogue; (202) 879-3939);

Davon, Inc. (Counsel of Record: John W. Fischer II; Denlinger, Rosenthal & Greenberg; (513) 621-3440);

Joint brief: Pardee & Curtin Lumber Company and Hillman Company (Counsel of Record: Arthur Newbold; Dechert Price & Rhoads; (215) 994-4000);

Pittston Company (Counsel of Record: A.E. Dick Howard; (804) 293-6668);

Joint brief: Unity Real Estate Company, Barnes & Tucker Company, and Mary Helen Coal Corporation (Counsel of Record: Robert H. Bork; (202) 862-5851);

Washington Legal Foundation (Counsel of Record: Timothy S. Bishop; Mayer, Brown & Platt; (312) 782-0600).

In support of Kenneth S. Apfel, Commisioner of Social Security, et al.

Bituminous Coal Operators' Association, Inc. (Counsel of Record: Clifford M. Sloan; Wiley, Rein & Fielding; (202) 429-7000);

Joint brief: California cities of Long Beach, Los Angeles, Monterey, Oakland, Sacramento, San Diego, San Jose, San Rafael, and Sunnyvale; County of Santa Barbara, California; and the City and County of San Francisco, California (Counsel of Record: John D. Echeverria; Georgetown University Law Center; (202) 662-9850);

Joint brief: Cedar Coal Company and seven other coal companies (Counsel of Record: David M. Cohen; (614) 687-3042);

Freeman United Coal Mining Company (Counsel of Record: Kathryn S. Matkov; Gould & Ratner; (312) 236-2003);

Midwest Motor Express, Inc. (Counsel of Record: Hervey H. Aitken Jr.; Taylor, Thiemann & Aitken; (703) 836-9400);

Joint brief: Ohio Valley Coal Company and Maple Creek Mining, Inc. (Counsel of Record: John G. Roberts, Jr.; Hogan & Hartson; (202) 637-5810);

United Mine Workers of America (Counsel of Record: Grant Crandall; United Mine Workers of America; (202) 842-7200).