No. 30899 - Verizon West Virginia, Inc. et al., Eastern Associated Coal Corporation v. West Virginia Bureau of Employment Programs, Workers' Compensation Division

No. 30900 - Verizon West Virginia, Inc. et al., Weirton Steel Corporation v. West Virginia Bureau of Employment Programs, Workers' Compensation Division

No. 30901 - Verizon West Virginia, Inc. et al., Pine Ridge Coal Company v. West Virginia Bureau of Employment Programs, Workers' Compensation Division

FILED
July 9, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, Justice, dissenting:

In this proceeding three employers, who are self-insured for workers' compensation purposes, appealed an order of the circuit court obligating them to share the burden of retiring a six billion dollar debt[1] that was caused by the State's failure to maintain a Second Injury Reserve Fund from 1947 to 1997. The majority opinion has disingenuously brushed aside the federal constitutional rights of the employers[2] and

[1]The discounted value of the debt is $2.2 billion. However, for the purposes of my dissent, I will refer to the debt's actual value of six billion dollars.

[2]The majority opinion also incorrectly resolved the state constitutional and (continued...)

affirmed the circuit court's decision. For the reasons set out below, I dissent.

I. BACKGROUND

In 1947, the State sought to encourage employers to hire workers that had preexisting injuries. The "carrot" used by the State to encourage employment of injured workers was the creation of the Second Injury Reserve Fund (hereinafter "Second Injury Fund"). *See* Acts 1947, Ch. 164, codified at W. Va. Code § 23-3-1. "The basic intent of the [Second Injury Fund] is to encourage the hiring of the handicapped by not charging an employer for preexisting disabilities[.]" *McClanahan v. Workmen's Comp. Comm'r*, 158 W. Va. 161, 163-64, 207 S.E.2d 184, 186 (1974). The legislature deemed this encouragement to be necessary because workers with preexisting injuries were more susceptible to sustaining other injuries that could collectively result in permanent total disability. *See* W. Va. Code § 23-3-1(d)(1) (1995) (Repl. Vol. 2002) ("If an employee who has a [second injury] becomes permanently and totally disabled through the combined effect of such previous injury and a second injury received in the course of and as a result of his or her employment, the employer shall be chargeable only for the compensation payable for such second injury[.]").

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[2](...continued)
non-constitutional assignments of error. However, my dissent will address only the federal constitutional issues raised in this appeal.

The Acts of 1947 set out a definite and express method for funding the Second Injury Fund. Pursuant to that method,

> [a] portion of all premiums that shall be paid into the workers' compensation fund *by subscribers not electing to carry their own risk* . . ., shall be set aside to create and maintain a surplus fund to cover . . . the second injury hazard, and all losses not otherwise specifically provided for in this chapter.

W. Va. Code § 23-3-1(b) (emphasis added). The record in this case conclusively established that, from 1947 to 1997, the State failed to set aside monies from the Workers' Compensation Fund, as required by W. Va. Code § 23-3-1(b), and place such monies in the Second Injury Fund. As a result of such failure, the Second Injury Fund has an estimated six billion dollar deficit.

In 1997 the State, through its agents the Division of Workers' Compensation and the Performance Council, devised a plan to pay off the six billion dollar Second Injury Fund debt. Under that plan, called Resolution No. 11, self-insured employers were held responsible for helping to pay the Second Injury Fund debt. The State dragged self-insured employers into this deficit under the guise of paying increased "administrative" expenses.

The three self-insured employers in this appeal, Eastern Associated Coal, Pine Ridge Coal Company and Weirton Steel Corporation, challenged the State's authority

to force them to help retire a debt that was created by the State's failure to comply with the law in funding the Second Injury Fund beginning in 1947.[3] The three employers argued at the administrative level, in circuit court, and before this Court, that from 1947 to 1997 "administrative" expenses had never been defined to include payment of the Second Injury Fund deficit. *See Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 116, 219 S.E.2d 361, 366 (1975) ("Except for the small charges for administrative expenses, self-insured employers make no payments into the Workmen's Compensation Fund, because . . . such employers have elected to self-insure the payment of pecuniary compensation and medical attention." (citation omitted)).

The majority opinion has found that, although for fifty years "administrative" expenses for self-insureds did not include payment of the Second Injury Fund deficit, the federal constitution did not prohibit the State from redefining the term to force self-insureds into helping pay a six billion dollar debt that they had no role in creating.

II. RESOLUTION NO. 11 VIOLATES THE CONTRACT CLAUSE

Weirton Steel argued in its reply brief that enforcement of Resolution No. 11 violated the Contract Clause of the federal constitution. The majority opinion, without

[3]The record shows that Pine Ridge and Weirton Steel, as self-insureds, did not subscribe to the Second Injury Fund. Although Eastern Associated was self-insured, it elected to subscribe to the Second Injury Fund.

explanation, totally failed to address this issue. This Court has no rule that precludes addressing the merits of an issue properly raised in a reply brief.[4] In fact, we have previously granted relief based solely upon issues raised in a reply brief. *See State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Div. of Envtl. Prot.*, 191 W. Va. 719, 720 n.1, 447 S.E.2d 920, 921 n.1 (1994) (granting relief even though "[t]he petitioners raise[d] th[e] particular request for relief in their reply brief"). *See also State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Div. of Envtl. Prot.*, 193 W. Va. 650, 653, 458 S.E.2d 88, 91 (1995) (noting that "the relief granted in *Highlands I* was raised in the relators' reply brief"). Consequently, I will address the Contract Clause issue, even though the majority opinion incorrectly failed to do so.

Under Article I, section 10, clause 1 of the United States Constitution, "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]"[5] This Court has noted that "the [C]ontract [C]lause prohibits the passage of a statute or law which impairs

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[4]Prior to 1980, our appellate rules did, in fact, prohibit raising an issue for the first time in a reply brief. *See State v. Starr*, 158 W. Va. 905, 914, 216 S.E.2d 242, 248 (1975) (noting that, under Rule VI, Section 2 of the W. Va. Supreme Court Rules, "'[n]o alleged error or point, not set forth in the brief, shall be raised afterwards, either by reply brief, or in oral or printed argument'"). However, this prohibition was not incorporated into the current West Virginia Rules of Appellate Procedure, which were adopted in 1979 and made effective in 1980.

[5]It is settled law that the Contract Clause applies only to the states and not to the federal government. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732 n.9, 104 S. Ct. 2709, 2719 n.9, 81 L. Ed. 2d 601 (1984), *superceded by statute as stated in I.A.M. Ret. Pension Fund v. Allied Corp.*, 596 F. Supp. 481 (D.D.C. 1984).

the obligation of an existing contract." *Collins v. City of Bridgeport*, 206 W. Va. 467, 475, 525 S.E.2d 658, 666 (1999). "[T]he Contract Clause has been interpreted to apply to legislative impairments of 'public' contracts, or contracts to which the state or its agent is a party." *National Educ. Ass'n-Rhode Island by Scigulinsky v. Retirement Bd. of Rhode Island Employees' Ret. Sys.*, 890 F. Supp. 1143, 1151 (D.R.I. 1995). It has been observed that "the United States Supreme Court has been adamant in holding that 'impairments of a State's own contracts w[ill] face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties.'" *State ex rel. West Virginia Reg'l Jail & Corr. Facility Auth. v. West Virginia Inv. Mgmt. Bd.*, 203 W. Va. 413, 424, 508 S.E.2d 130, 141 (1998) (Davis, C.J., dissenting) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n.15, 98 S. Ct. 2716, 2722 n.15, 57 L. Ed. 2d 727 (1978)). *See also Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1249 (3d Cir. 1987) ("When the state is a contracting party, the legislative judgment is subject to stricter scrutiny than when the legislation affects only private contracts.").

A three-part test is used in analyzing an alleged Contract Clause violation. First, a court must determine whether the challenged law operates "as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722, 57 L. Ed. 2d 727 (1978) (footnote omitted). Second, if the impairment is substantial, the court must determine whether there is "a significant and legitimate public purpose behind the [challenged law.]" *Energy Reserves Group, Inc. v.*

Kansas Power & Light Co., 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L. Ed. 2d 569 (1983). Third, if a legitimate public purpose is demonstrated, the court must determine whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the challenged law's] adoption." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22, 97 S. Ct. 1505, 1518, 52 L. Ed. 2d 92 (1977).[6] Utilizing this test, I will demonstrate that the use of Resolution No. 11 to retroactively impose a six billion dollar Second Injury Fund deficit on the self-insured employers in this case violates the Contract Clause.

A. Substantial Impairment of a Pre-Existing Contract

The first step in a Contract Clause analysis is establishing a substantial impairment of a pre-existing contract. Ascertaining the existence of a substantial impairment of a pre-existing contract also involves a three part test: "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *General Motors Corp. v. Romein*, 503 U.S. 181,

[6]*See* Syl. pt. 4, *Shell v. Metropolitan Life Ins. Co.*, 181 W. Va. 16, 380 S.E.2d 183 (1989) ("In determining whether a Contract Clause violation has occurred, a three-step test is utilized. The initial inquiry is whether the statute has substantially impaired the contractual rights of the parties. If a substantial impairment is shown, the second step of the test is to determine whether there is a significant and legitimate public purpose behind the legislation. Finally, if a legitimate public purpose is demonstrated, the court must determine whether the adjustment is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption.").

186, 112 S. Ct. 1105, 1109, 117 L. Ed. 2d 328 (1992). *See also Renaud v. Wyoming Dep't of Family Services*, 203 F.3d 723, 728 (10th Cir. 2000). I will address each of these factors separately.

1. Contractual Relationship. It has correctly been held that "[a] statutory enactment is generally presumed not to create 'contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Koster v. City of Davenport*, 183 F.3d 762, 766 (8th Cir. 1999) (quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 465-66, 105 S. Ct. 1441, 1451, 84 L. Ed. 2d 432 (1985)).[7] However, "[i]f the language of the statute expressly indicates that the statute is being enacted to form a contract, a determination that the state is party to a binding obligation is clear." *National Educ. Ass'n-Rhode Island by Scigulinsky v. Retirement Bd. of Rhode Island Employees' Ret. Sys.*, 890 F. Supp. at 1152. The mere fact that a

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[7] Finding a public contractual obligation has considerable effect. It means that a subsequent legislature is not free to significantly impair that obligation for merely rational reasons. Because of this constraint on subsequent legislatures, and thus on subsequent decisions by those who represent the public, there is, for the purposes of the Contract Clause, a higher burden to establish that a contractual obligation has been created. For similar reasons, this issue is one of federal, not state law.

Parella v. Retirement Bd. of Rhode Island Employees' Ret. Sys., 173 F.3d 46, 60 (1st Cir. 1999).

statute does not use language expressly creating a contract does not mean that a contract cannot be found in a statute. The United States Supreme Court has noted that, "[i]n general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *United States Trust Co.*, 431 U.S. at 17 n.14, 97 S. Ct. at 1515 n.14. *See also Dadisman v. Moore*, 181 W. Va. 779, 789, 384 S.E.2d 816, 826 (1988) ("A statute is treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature." (citation omitted)). When "language and circumstances" are used to find a contract from a statute, the contract is deemed implied. *See Nieves*, 819 F.2d at 1244 ("[T]he Contract Clause reaches . . . implied contracts. . . .").

In the instant case, the applicable laws do not contain language that expressly creates a contract between the State and the self-insured employers in this case, that is, "[m]ost of the words typically associated with contract formation, such as 'contract,' 'consideration,' 'acceptance,' and 'reliance,' do not appear in the statute[s]." *Perry v. Rhode Island*, 975 F. Supp. 418, 424 (D.R.I. 1997). However, as I will show, an implied contract is clearly established when viewing the language and the circumstances attendant to those laws.[8] *See In re Workers' Compensation Refund*, 46 F.3d 813 (8th Cir. 1995)

[8]A case which helps to illustrate how an implied contract may be found in a statute is *Mississippi ex rel. Robertson v. Miller*, 276 U.S. 174, 48 S. Ct. 266, 72 L. Ed. 517 (1928). In *Robertson* the plaintiff was a former revenue agent for the state of (continued...)

[8](...continued)
Mississippi. During the period that the plaintiff was a revenue agent the State had a statute which permitted him to receive a commission for all suits initiated by him to recover taxes. Shortly after the plaintiff left his position, the State amended the statute to allow his successor to obtain a share of all commissions earned from suits filed by the plaintiff before he left office. Subsequent to the passage of the amended statute the plaintiff's successor obtained commissions from suits initiated by the plaintiff. The plaintiff thereafter filed a lawsuit to prevent his successor from sharing in the commissions. The state trial court applied the amended statute and awarded the plaintiff half of the commissions. The State Supreme Court affirmed.

In the appeal to the United States Supreme Court the plaintiff in *Robertson* argued that the amended statute was not enforceable because it violated the Contract Clause. In a unanimous opinion the Supreme Court agreed with the plaintiff. The opinion in *Robertson* found that the statute in-place when the plaintiff was in office created an implied contract that entitled him to recover a full commission. This issue was succinctly addressed in the opinion as follows:

> It is well understood that the contract clause does not limit the power of a state during the terms of its officers to pass and give effect to laws prescribing for the future the duties to be performed by, or the salaries or other compensation to be paid to, them. But, after services have been rendered by a public officer under a law specifying his compensation, there arises an implied contract under which he is entitled to have the amount so fixed. And the constitutional protection extends to such contracts just as it does to those specifically expressed. The selection of plaintiff to be the Revenue Agent amounted to a request or direction by the State that he exert the authority and discharge all the duties of that office. In the performance of services so required of him plaintiff made the investigations and brought the suits to discover and collect the delinquent taxes. Under the statutes then in force as construed by the highest court of the State, he thereupon became entitled to the specified percentages of the amounts subsequently collected on account of the taxes sued for. The retroactive application of c. 170 would take from him a part of the amount that he had theretofore earned. That

(continued...)

(finding contract between state workers' compensation agency and insurers based upon statute and other documents).[9]

The next step in the analysis requires the application of traditional contract principles to determine the implied contract between the State and the self-insured employers in this case. Part of the applicable contract framework was set out in *National Education Association-Rhode Island by Scigulinsky v. Retirement Board of Rhode Island Employees' Retirement System*, 890 F. Supp. at 1157, as follows:

> In order for an agreement to be enforceable under contract law, the parties must manifest their objective intent to be bound. Such intent is manifested through one party's offer and

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[8](...continued)
would impair the obligation of the implied contract under which he became entitled to the commissions.

276 U.S. at 178-179, 48 S. Ct. at 268 (citation omitted). *See also Fisk v. Jefferson Police Jury*, 116 U.S. 131, 134, 6 S. Ct. 329, 330, 29 L. Ed. 587 (1885) ("[A]fter the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for those services at that rate.").

[9]The case of *General Motors Corp. v. Romein*, 503 U.S. 181, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992) is factually distinguishable from the instant case. In *General Motors* the Supreme Court was asked to determine whether a workers' compensation statute was impliedly incorporated into contracts between employees and employers. The Court found that the statute was not impliedly part of the contract between employees and employers. *But see Nieves*, 819 F.2d at 1244-46 (finding workers compensation statute was incorporated in contract between employees and employer). In the instant case, however, the issue is not whether our workers' compensation laws are part of a contract between employees and employers. The instant case presents the question of whether our workers' compensation laws formed an implied contract between the State and self-insured employers.

> the other party's acceptance of the offer. When the offeror seeks acceptance through an act of performance on the part of the offeree, the offeror proposes a unilateral contract. A unilateral contract consists of a promise made by one party in exchange for the performance of another party, and the promisor becomes bound in contract when the promisee performs the bargained for act.

(Citations omitted). *See also Cook v. Heck's Inc.*, 176 W. Va. 368, 373, 342 S.E.2d 453, 458 (1986) ("The concept of unilateral contract, where one party makes a promissory offer and the other accepts by performing an act rather than by making a return promise, has also been recognized: 'That an acceptance may be effected by silence accompanied by an act of the offeree which constitutes a performance of that requested by the offeror is well established.'" (quoting *First Nat'l Bank v. Marietta Mfg. Co.*, 151 W. Va. 636, 641-42, 153 S.E.2d 172, 176 (1967)). Moreover, in the instant case, the contract between the parties comes under the legal theory of an "implied in fact"contract, not an "implied in law"contract. "An agreement implied in fact is 'founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'"[10] *Hercules, Inc. v. United States*, 516 U.S. 417, 424, 116 S. Ct. 981, 986,

[10]"[A] contract implied in law, sometimes referred to as a 'quasi-contract,' may exist based on principles of equity and to prevent unjust enrichment." *Contship Containerlines, Inc. v. Howard Indus., Inc.*, 309 F.3d 910, 913 (6th Cir. 2002). *See also Johnson v. National Exch. Bank*, 124 W. Va. 157, 161, 19 S.E.2d 441, 443 (1942) (recognizing the importance of distinguishing between quasi-contracts and contracts implied in fact, and observing that quasi contractual obligations "'are imposed by law for purpose of bringing about justice without reference to intention of the parties, the only (continued...)

134 L. Ed. 2d 47 (1996) (quoting *Baltimore & Ohio R.R. Co. v. United States*, 261 U.S. 592, 597, 43 S. Ct. 425, 426-427, 67 L. Ed. 816 (1923)). *See also Johnson v. National Exch. Bank of Wheeling*, 124 W. Va. 157, 19 S.E.2d 441 (1942) (noting that a contract implied in fact "presupposes an obligation 'arising from mutual agreement and intent to promise but where the agreement and promise have not been expressed in words.' It requires a meeting of the minds, just as much as an express contract." (citation omitted)). "In short, an implied-in-fact contract arises when an express offer and acceptance are missing but the parties' conduct indicates mutual assent." *City of Cincinnati v. United States*, 153 F.3d 1375, 1377 (Fed. Cir. 1998). Like an express contract, an implied-in-fact contract requires "an offer and an acceptance supported by consideration." *Art's Flower Shop, Inc. v. Chesapeake & Potomac Tel. Co. of West Virginia, Inc.*, 186 W. Va. 613, 616-617, 413 S.E.2d 670, 673-674 (1991). *See also City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir.1990) (indicating an implied contract requires showing "(1) mutuality of intent to contract; (2) consideration; and, (3) lack of ambiguity in offer and acceptance."). I will now outline separately the offer, acceptance and consideration that formed the implied contract in this case.

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[10](...continued)
apparent restrictions upon the power of the law to create such obligations is they must be of such a sort as would have been appropriately enforced under common-law procedure by a contractual action.'" (citations omitted)).

(a) Offer. The contractual offer[11] made by the State in this case is found in several statutes.[12] First, W. Va. Code § 23-2-1(a) (1995) (Repl. Vol. 2002) obligates all employers to subscribe to and pay premium taxes into the general Workers' Compensation Fund.[13] The general Workers' Compensation Fund was created under W. Va. Code § 23-3-

[11]"The Restatement defines an offer as a 'manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'" *National Educ. Ass'n,* 890 F. Supp. at 1157 (quoting Restatement (Second) of Contracts, § 24).

[12]The relevant statutes cited by me have been amended on numerous occasions during their existence. However, there is no dispute in this case that the relevant parts of the laws herein referenced were applicable to the three employers in this case.

[13]W. Va. Code § 23-2-1(a) (1995) (Repl. Vol. 2002) reads in full:

> The state of West Virginia and all governmental agencies or departments created by it, including county boards of education, political subdivisions of the state, any volunteer fire department or company and other emergency service organizations as defined by article five [§§ 15-5-1 et seq.], chapter fifteen of this code, and all persons, firms, associations and corporations regularly employing another person or persons for the purpose of carrying on any form of industry, service or business in this state, are employers within the meaning of this chapter and are hereby required to subscribe to and pay premium taxes into the workers' compensation fund for the protection of their employees and shall be subject to all requirements of this chapter and all rules and regulations prescribed by the workers' compensation division with reference to rate, classification and premium payment: Provided, That such rates will be adjusted by the division to reflect the demand on the compensation fund by the covered employer.

1(a) (1995) (Repl. Vol. 2002).[14] The methodology for paying premium taxes into the general Workers' Compensation Fund, for an employer who must subscribe to the fund, is a percentage of the employer's gross wages payroll, as set out under W. Va. Code § 23-2-5(a) (1999) (Repl. Vol. 2002).[15] Second, in addition to creating a general Workers'

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[14]W. Va. Code § 23-3-1(a) (1995) (Repl. Vol. 2002) reads in full:

> The commissioner shall establish a workers' compensation fund from the premiums and other funds paid thereto by employers, as herein provided, for the benefit of employees of employers who have paid the premiums applicable to such employers and have otherwise complied fully with the provisions of section five [§ 23-2-5], article two of this chapter, and for the benefit, to the extent elsewhere in this chapter set out, of employees of employers who have elected, under section nine [§ 23-2-9], article two of this chapter, to make payments into the surplus fund hereinafter provided for, and for the benefit of the dependents of all such employees, and for the payment of the administration expenses of this chapter.

[15]W. Va. Code § 23-2-5(a) (1999) (Repl. Vol. 2002) reads in full:

> For the purpose of creating a workers' compensation fund, each employer who is required to subscribe to the fund or who elects to subscribe to the fund shall pay premium taxes calculated as a percentage of the employer's gross wages payroll at the rate determined by the workers' compensation division and then in effect. At the time each employer subscribes to the fund, the application required by the division shall be filed and a premium deposit equal to the first quarter's estimated premium tax payment shall be remitted. The minimum quarterly premium to be paid by any employer shall be twenty-five dollars.
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> (1) Thereafter, premium taxes shall be paid quarterly on

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[15](...continued)
or before the last day of the month following the end of the quarter, and shall be the prescribed percentage of the entire gross wages of all employees, from which net payroll is calculated and paid, during the preceding quarter. The division may permit employers who qualify under the provisions of rules promulgated by the compensation programs performance council to report gross wages and pay premium taxes at other intervals.

(2) Every subscribing employer shall make a gross wages payroll report to the division for the preceding reporting period. The report shall be on the form or forms prescribed by the division, and shall contain all information required by the division.

(3) After subscribing to the fund, each employer shall remit with each premium tax payment an amount calculated to be sufficient to maintain a premium deposit equal to the premium payment for the previous reporting period. The division may reduce the amount of the premium deposit required from seasonal employers for those quarters during which employment is significantly reduced. If the employer pays premium tax on a basis other than quarterly, the division may require the deposit to be based upon some other time period. The premium deposit shall be credited to the employer's account on the books of the division and used to pay premium taxes and any other sums due the fund when an employer becomes delinquent or in default as provided in this article.

(4) All premium taxes and premium deposits required by this article to be paid shall be paid by the employers to the division, which shall maintain a record of all sums so received. Any such sum mailed to the division shall be deemed to be received on the date the envelope transmitting it is postmarked by the United States postal service. All sums received by the division shall be deposited in the state treasury

(continued...)

Compensation Fund for subscribing employers, the State created a Second Injury Fund for workers sustaining multiple injuries with different employers. Under W. Va. Code § 23-3-1(b) the funding method chosen for the Second Injury Fund required "[a] portion of all premiums that [must] be paid into the workers' compensation fund *by subscribers not electing to carry their own risk* under section nine, article two of this chapter, [must] be set aside to create and maintain a surplus fund to cover . . . the second injury hazard[.]"[16]

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[15](...continued)
to the credit of the workers' compensation division in the manner now prescribed by law.

(5) The division may encourage employer efforts to create and maintain safe workplaces, to encourage loss prevention programs, and to encourage employer provided wellness programs, through the normal operation of the experience rating formula, seminars and other public presentations, the development of model safety programs and other initiatives as may be determined by the commissioner and the compensation programs performance council.

[16]W. Va. Code § 23-3-1(b) reads in full:

A portion of all premiums that shall be paid into the workers' compensation fund by subscribers not electing to carry their own risk under section nine, article two of this chapter, shall be set aside to create and maintain a surplus fund to cover the catastrophe hazard, the second injury hazard, and all losses not otherwise specifically provided for in this chapter. The percentage to be set aside shall be determined pursuant to the rules adopted to implement section four [§ 23-2-4], article two of this chapter and shall be in an amount sufficient to maintain a solvent surplus fund. All interest earned on investments by the workers' compensation fund, which is attributable to the surplus fund, shall be credited to

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(Emphasis added.). Third, through W. Va. Code § 23-2-9(a) (1995) (Repl. Vol. 2002), the State created a detailed procedure whereby employers could elect not to subscribe to the Workers' Compensation Fund and the Second Injury Fund, provided the employers met certain stringent financial conditions.[17] This statute allowed qualified employers to

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[16](...continued)
the surplus fund.

[17]W. Va. Code § 23-2-9(a) (1995) (Repl. Vol. 2002) reads in full:

> Notwithstanding any provisions of this chapter to the contrary, the following types of employers may apply for permission to self-insure their workers' compensation risk including their risk of catastrophic injuries. Except as provided for in subsection (e) of this section, no employer may self-insure its second injury risk.
>
> (1) The types of employers are:
>
> (A) Any employer who is of sufficient capability and financial responsibility to ensure the payment to injured employees and the dependents of fatally injured employees of benefits provided for in this chapter at least equal in value to the compensation provided for in this chapter; or
>
> (B) Any employer of such capability and financial responsibility who maintains its own benefit fund or system of compensation to which its employees are not required or permitted to contribute and whose benefits are at least equal in value to those provided for in this chapter.
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> (2) In order to be approved for self-insurance status, the employer must:
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> (A) Have an effective health and safety program at its workplaces; and

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(B) Provide security or bond in an amount to be determined by the compensation programs performance council which shall balance the employer's financial condition based upon an analysis of its audited financial statements and the full accrued value based upon generally accepted accounting principles of the employer's existing and expected liability; and

(C) Security or bond which may be in such form as the commissioner and the compensation programs performance council created pursuant to section one [§ 21A-3-1], article three, chapter twenty-one-a of this code permits.

(3) Any employer whose record upon the books of the division shows a liability, as determined on an accrued basis against the workers' compensation fund incurred on account of injury to or death of any of the employer's employees, in excess of premiums paid by such employer, shall not be granted the right, individually and directly or from such benefit funds or system of compensation, to be self-insured until the employer has paid into the workers' compensation fund the amount of such excess of liability over premiums paid, including the employer's proper proportion of the liability incurred on account of catastrophes or second injuries as defined in section one [§ 23-3-1], article three of this chapter and charged against such fund.

(4) Upon a finding that the employer has met all of the requirements of this section, the employer may be permitted self-insurance status. An annual review of each self-insurer's continuing ability to meet its obligations and the requirements of this section shall be made by the workers' compensation division. This review shall include a redetermination of the amount of security or bond which shall be provided by the employer. Failure to provide any new amount or form of security or bond may, in the division's discretion, cause the employer's self-insurance status to be terminated. The

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voluntarily self-insure all of their workers' compensation obligations, including second injury claims. The State also provided, under W. Va. Code § 23-2-9(b), the manner in which totally self-insured employers would pay premium taxes into the general Workers' Compensation Fund.[18] Fourth, the State provided a mechanism for self-insured employers

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[17](...continued)
security or bond provided by employers prior to the second day of February, one thousand nine hundred ninety-five, shall continue in full force and effect until the performance of the employer's annual review and the entry of any appropriate decision on the amount or form of the employer's security or bond.

(5) Whenever a self-insured employer shall furnish security or bond, including replacement and amended bonds and other securities, as security to ensure the employer's or guarantor's payment of all obligations under this chapter for which the security or bond was furnished, such security or bond shall be in the most current form or forms approved and authorized by the division for use by the employer or its guarantors, surety companies, banks, financial institutions or others in its behalf for such purpose.

[18]W. Va. Code § 23-2-9(b) reads in full:

Each self-insured employer shall, on or before the last day of the first month of each quarter, file with the division a certified statement of the total gross wages and earnings of all of the employer's employees subject to this chapter for the preceding quarter. Each self-insured employer shall pay into the workers' compensation fund as portions of its self-insured premium tax:

(1) A sum sufficient to pay the employer's proper portion of the expense of the administration of this chapter;

(continued...)

to take part in the Second Injury Fund. Under W. Va. Code § 23-2-9(e)(3)(A) self-insured employers subscribing to the Second Injury Fund must pay a specific premium tax.[19] Fifth, under W. Va. Code § 23-2-9(e)(3)(B) self-insured employers who subscribe to the Second Injury Fund, are only liable to an employee for a second injury, and all other compensation for permanent and total disability is paid from the Second Injury Fund.[20]

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[18](...continued)

> (2) A sum sufficient to pay the employer's proper portion of the expense of claims for those employers who are in default in the payment of premium taxes or other obligations;
>
> (3) A sum sufficient to pay the employer's fair portion of the expenses of the disabled workers' relief fund; and
>
> (4) A sum sufficient to maintain as an advance deposit an amount equal to the previous quarter's payment of each of the foregoing three sums.

[19]W. Va. Code § 23-2-9(e)(3)(A) reads in full:

> For those employers which do not self-insure their second injury risk, the premium tax for second injury coverage shall be determined by the rules which implement section four of this article. Such rules may provide for merit rate adjustments of the amount of premium tax to be paid based upon the accrued costs to be determined under generally accepted accounting principles of second injury benefits paid and to be paid to the employer's employees. Until such rules are adopted, the employer's premium taxes shall be determined in accordance with the provisions of chapter one hundred seventy-four, acts of the Legislature, one thousand nine hundred ninety-one.

[20]W. Va. Code § 23-2-9(e)(3)(B) reads in full:

(continued...)

The statutory provisions cited above clearly show that the State made an "offer" to the self-insured employers in this case that permitted the employers to voluntarily opt out of mandatory participation in the State's general Workers' Compensation Fund and its Second Injury Fund, upon meeting certain criteria. The offer also included an option to subscribe to the Second Injury Fund. *See National Educ. Ass'n*, 890 F. Supp. at 1157 ("By enacting a statute in 1987 which allowed plaintiffs to voluntarily join and thereafter contribute to the Retirement System, the General Assembly extended . . . a statutory offer.").

(b) Acceptance. The record in this case is not in dispute in showing that each of the employers in this case accepted the statutory offer to self-insure. "The offer was accepted on the terms that [the State] proposed. Thus, a meeting of the minds was accomplished." *National Educ. Ass'n*, 890 F. Supp. at 1158.

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[20](...continued)

> In case there is a second injury to an employee of any employer making such second injury premium tax payments, the employer shall be liable to pay compensation or expenses arising from or necessitated by the second injury and such compensation and expenses shall be charged against the employer. After the completion of these payments, the employee shall be paid the remainder of the compensation and expenses that would be due for permanent total disability from the second injury reserve of the surplus fund. Such additional compensation and expenses shall not be charged against such employer.

Pine Ridge and Weirton Steel accepted the offer to self-insure so as not to have to subscribe to the general Workers' Compensation Fund, as well the Second Injury Fund. Eastern Associated accepted the offer to self-insure and not have to subscribe to the general Workers' Compensation Fund, as well as accepted the offer to subscribe to the Second Injury Fund.

(c) Consideration. For the purposes of contract law, "'consideration consists either in some right, interest or benefit accruing to one party or some forbearance, detriment or responsibility given, suffered or undertaken by the other.'" *National Educ. Ass'n*, 890 F. Supp. at 1159 (quoting *Hayes v. Plantations Steel Co.*, 438 A.2d 1091, 1094 (R.I.1982) (internal citations omitted)). In the instant case, one form of consideration that was given, was that all three employers voluntarily undertook the responsibility of directly paying general workers' compensation benefits to their workers.[21] This burden relieved the State of all responsibilities involved with providing healthcare and other benefits to the self-insured employers' employees. Additionally, Pine Ridge and Weirton Steel also elected to provide direct benefits for their second injury employees. This additional undertaking by Pine Ridge and Weirton Steel provided direct financial savings to the

[21]*See* Syl. pt. 10, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975) ("Under W. Va. Code 1931, 23--2--9, as amended, the State Workmen's Compensation Commissioner is authorized to require that self-insured employers insure payment for all necessary medical treatment rendered to their injured employees incident to a compensable claim to the same extent provided all other covered employees by the Workmen's Compensation Act.").

State, because the State had the exclusive financial responsibility for providing permanent and total disability benefits to injured employees who came under the Second Injury Fund.

In sum, "[i]t is because [the employers] voluntarily opted [out of] the System . . . and made decisions about their [businesses] in response [thereto] that the [employers] and the [State] are parties to an implied contract." *National Educ. Ass'n*, 890 F. Supp. at 1161.

2. Impairment. The second step in determining whether there has been a substantial impairment of a contractual relationship, requires "identifying the precise contractual right that has been impaired[.]" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504, 107 S. Ct. 1232, 1251, 94 L. Ed. 2d 472 (1987). "In other words, before [a] [c]ourt can determine whether the impairment is substantial, it must first identify what contractual rights, if any, have been impaired." *Equipment Mfrs. Inst. v. Janklow*, 300 F.3d 842, 851 (8th Cir. 2002).

(a) Pine Ridge and Weirton Steel. Under the contract the State had with Pine Ridge and Weirton Steel, those two employers were self-insured and exempt from having to subscribe to the State's general Workers' Compensation Fund and its Second Injury Fund. As a result of this exemption, the State was obligated to only assess a special self-insured premium tax against them. Under W. Va. Code § 23-2-9(b), that premium tax

consisted of payments for: (1) administrative expenses; (2) costs associated with employers who were in default; (3) expenses of the disabled workers' relief fund; and (4) an advance deposit for the foregoing three costs. Through the retroactive application of Resolution No. 11, the State has sought to hold Pine Ridge and Weirton Steel liable for helping to pay the Second Injury Fund deficit, by expanding the definition of administrative costs to include annual payments that are specifically earmarked to reduce the six billion dollar Second Injury Fund deficit.

The State's retroactive application of Resolution No. 11 impairs the premium tax provision of the contract the State had with Pine Ridge and Weirton Steel. Resolution No. 11 has caused the premium tax for Pine Ridge and Weirton Steel to include payment of a Second Injury Fund debt that accrued during the period 1947 to 1997. During that entire period Pine Ridge and Weirton Steel were self-insured and exempt from any responsibility for or to the States's Second Injury Fund.

Resolution No. 11, in effect, is making Pine Ridge and Weirton Steel, retroactively subscribe to the general Workers' Compensation Fund and Second Injury Fund, for a period of time when they were self-insured and contractually exempt from such subscription. Put another way, under Resolution No. 11 Pine Ridge and Weirton Steel are being forced to retroactively pay premiums for the benefit of second injury employees of nonself-insured employers, while simultaneously and exclusively paying all

benefits for their own employees. Resolution No. 11 does not relieve Pine Ridge and Weirton Steel from their obligations to their own employees, as self-insurers, it imposes an additional obligation on Pine Ridge and Weirton Steel to constructively be the employers for employees of nonself-insured employers. Prior to the implementation of Resolution No. 11, under the terms of the contract Pine Ridge and Weirton Steel had with the State, they were absolutely exempt from the burden now being imposed by Resolution No. 11.

(b) Eastern Associated. Under the contract the State had with Eastern Associated, it was self-insured and exempt from having to pay into the State's general Workers' Compensation Fund. As a self-insured employer, Eastern Associated was assessed a special self-insured premium tax under W. Va. Code § 23-2-9(b). That premium tax consisted of payments for: (1) administrative expenses; (2) costs associated with employers who were in default; (3) expenses of the disabled workers' relief fund; and (4) an advance deposit for the foregoing three costs.

Eastern Associated's contract also included a subscription to the State's Second Injury Fund. As a result of its subscription to the Second Injury Fund, Eastern Associated was obligated to pay a specific premium tax for such coverage pursuant to

W. Va. Code § 23-2-9(e)(3)(A).[22] Additionally, Eastern Associated's direct liability to a previously injured employee, who sustained a second injury that resulted in permanent total disability, was contractually limited to compensation for the second injury only, pursuant to W. Va. Code § 23-2-9(e)(3)(B).[23] Under that statute the State was exclusively responsible for all additional compensation. Further, the statute expressly stated that "[s]uch additional compensation and expenses shall not be charged against such employer." W. Va. Code § 23-2-9(e)(3)(B). *See also* Syl., *Mullens v. State Workmen's Comp. Comm'r*, 159 W. Va. 502, 223 S.E.2d 604 (1976) ("Where an employee of a self-insured employer who pays into the surplus fund sustains a second injury resulting in total permanent disability, the employer is liable for medical expenses occasioned by the second injury up to $3,000 under the second injury statute, and, thereafter, the surplus fund is chargeable for such medical payments." (citation omitted)).

Through Resolution No. 11, the State has sought to hold Eastern Associated liable for helping to pay the Second Injury Fund deficit, by expanding the definition of administrative costs under W. Va. Code § 23-2-9(b), to include annual payments that are specifically earmarked to reduce the Second Injury Fund deficit. The State's retroactive application of Resolution No. 11 impairs both the general self-insured premium tax provision

[22]*See supra* note 19 for the text of W. Va. Code § 23-2-9(e)(3)(A).

[23]*See supra* note 20 for the text of W. Va. Code § 23-2-9(e)(3)(B).

and the self-insured second injury premium tax provision of the contract the State had with Eastern Associated.

Resolution No. 11 seeks to hold Eastern Associated responsible for helping to retire a deficit in the Second Injury Fund that accrued during the period 1947 to 1997. During that entire period Eastern Associated's self-insured administrative costs did not include additional monies earmarked for retiring the Second Injury Fund debt. One reason for this is, as a self-insured that subscribed to the Second Injury Fund, Eastern Associated was being assessed a specific premium tax to cover its participation in the Second Injury Fund. Nonself-insured employers were never assessed a specific premium tax in order to receive coverage under the Second Injury Fund. Resolution No. 11, in effect, is making Eastern Associated retroactively pay premiums for the benefit of second injury employees of nonself-insured employers, while simultaneously paying all benefits for its own employees, including a specific premium tax for its participation in the Second Injury Fund as a self-insurer.

3. Impairment is Substantial. Having shown that a contract existed between the State and Eastern Associated, Pine Ridge and Weirton Steel, and that Resolution No. 11 impaired that contract, I will now demonstrate that the impairment was substantial.

To determine whether an impairment is substantial, courts "consider the

extent to which the [plaintiff's] reasonable expectations have been disrupted." *In re Workers' Comp. Refund*, 46 F.3d 813, 819 (8th Cir. 1995) (citation omitted). This does not mean that "[t]otal destruction of contractual expectations is . . . necessary for a finding of substantial impairment." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L. Ed. 2d 569 (1983) (citation omitted). The jurisprudence of the United States Supreme Court requires a consideration of "whether the industry the complaining party has entered has been regulated in the past." *Id.* at 411, 103 S. Ct. at 704 (citations omitted).[24] It has been further explained that, "[h]eavy regulation of an industry may reduce reasonable expectations. . . . However, regulation does not automatically foreclose the possibility of contract impairment. Courts have found substantial impairment of contracts in heavily regulated areas of commerce." *In re Workers' Comp. Refund*, 46 F.3d at 820 (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250, 98 S. Ct. 2716, 2725, 57 L. Ed. 2d 727 (1978) (employee pensions); *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383, 385 (8th Cir. 1994) (franchise

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[24] The heavily regulated industry doctrine reasons that a private actor who conducts business in an area subject to a pervasive legal scheme cannot expect to avoid the effects of a change in that scheme. The doctrine rests on the notion that in order for a reliance claim to receive Contract Clause protection, that reliance must at least be "reasonable."

Robert A. Graham, Note, *The Constitution, the Legislature, and Unfair Surprise: Toward a Reliance-Based Approach to the Contract Clause*, 92 Mich. L. Rev. 398, 436 (1993).

agreements); *Minnesota Ass'n of Health Care Facilities, Inc. v. Minnesota Dep't of Pub. Welfare*, 742 F.2d 442, 451 (8th Cir.1984) (nursing home rates)). Indeed,

> [t]he substantiality of an impairment is not discounted simply because the affected contract provision is in some way connected to a previously regulated area. Rather, prior regulation of a field mitigates the substantiality of an impairment only to the extent that it opens a contracting party's eyes to the prospect of changes in the existing regulations or to new regulations that may affect the . . . contract.

Toledo Area AFL-CIO Council v. Pizza, 154 F.3d 307, 324 (6th Cir 1998).

There is no question that the State's workers' compensation system is heavily regulated. The workers' compensation system was created by the State legislature and is regulated exclusively by the State. *See Roberts v. Consolidation Coal Co.*, 208 W. Va. 218, 234, 539 S.E.2d 478, 494 (2000) ("'It has been held repeatedly by this Court that the right to workmen's compensation benefits is based wholly on statutes, in no sense based on the common law; that such statutes are sui generis and controlling; that the rights, remedies and procedures thereby provided are exclusive[.]'" (citation omitted)); *Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986) ("The right to workers' compensation benefits is wholly a creature of statute[.]"); *Lester v. State Workmen's Comp. Comm'r*, 161 W. Va. 299, 315, 242 S.E.2d 443, 452 (1978) ("[T]he legislature has the power to modify this state's industrial insurance program as it sees fit so long as no constitutional provision is infringed."); *Bailes v. State Workmen's Comp. Comm'r*, 152

W. Va. 210, 212, 161 S.E.2d 261, 263 (1968) ("The right to workmen's compensation is wholly statutory and is not in any way based on the common law. The statutes are controlling and the rights, remedies and procedure provided by them are exclusive."); Syl. pt. 2, in part, *Dunlap v. State Comp. Dir*., 149 W. Va. 266, 140 S.E.2d 448 (1965) ("The right to workmen's compensation benefits is wholly statutory."). The State's regulatory authority would include the regulation of premiums charged to the self-insured employers in this case. However, prior to the adoption of Resolution No. 11, the State had never sought to regulate payment of the deficit that accrued in the Second Injury Fund from 1947 to 1997.[25] *See Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 323 (6th Cir. 1989) ("If that enterprise has previously been regulated with respect to the particular aspect that is the subject of the challenged legislation, then it may be assumed that further legislation of that specific area does not work as substantial an impairment as a law affecting a hitherto unregulated aspect of the industry."). As a result of fifty years of inaction by the State, the self-insured employers did not have "a fair warning of an impending intervention into their contracts with [the State]." *In re Workers' Comp. Refund*, 46 F.3d at 820. Consequently, the mere fact that the State had previously regulated the premiums paid by the self-insured employers, does not automatically render insignificant the State's decision to force the self-insured employers to share the financial burden of

[25]The State had regulations in place, which were never followed, that were designed to take money from the general Workers' Compensation Fund and place it in the Second Injury Fund. There was never any regulation in place for paying off the unfunded Second Injury Fund debt.

retiring a six billion dollar Second Injury Fund debt. *See In re Workers' Comp. Refund*, 46 F.3d at 820 (finding substantial impairment in the context of the heavily-regulated workers' compensation insurance industry).

The self-insured employers in this case had a reasonable expectation that, because of their self-insured status, they would not be assessed premium charges to reduce a six billion dollar deficit to which they did not contribute, and were contractually exempt from having to pay. *See Toledo Area AFL-CIO Council*, 154 F.3d at 324 ("[S]howing the affected term induced the parties to enter into the contract is *sufficient* to establish a substantial impairment for purposes of the Contracts Clause."); *Baltimore Teachers Union v. Mayor & City Council*, 6 F.3d 1012, 1018 (4th Cir.1993) ("[W]here the contract right or obligation impaired was one that induced the parties to enter into the contract . . . the impairment must be considered 'substantial' for purposes of the Contracts Clause."). Indeed, for fifty years the Second Injury Fund deficit was rightly thought to be the exclusive responsibility of the State. *See Cline v. State Workmen's Comp. Comm'r*, 156 W. Va. 647, 652, 196 S.E.2d 296, 299 (1973) ("[W]e observe that in cases resulting in a life award from the 'second injury' reserve . . ., the real adversary party is not the employer who is chargeable only for permanent partial ratings. It is the Workmen's Compensation Fund which must bear the burden of payment of the total and permanent disability award. Under the statutory scheme . . . it would seem appropriate for the Fund to be represented by its counsel or by the Office of the Attorney General." (citations

omitted)).

The State's imposition of premium taxes upon the self-insured employers, in an amount calculated to contribute to a reduction of the six billion dollar deficit, has caused a substantial increase in the amount of premium taxes the self-insured employers are required to pay. For fiscal year 1998, Weirton Steel was charged $206,000 as its first annual payment for reducing the Second Injury Fund deficit. For the same year Pine Ridge was charged $271,228 as its first annual payment for reducing the Second Injury Fund deficit. Finally, for fiscal year 1998 Eastern Associated was charged $7,265,945 as its first annual payment for reducing the Second Injury Fund deficit.

The annual Second Injury Fund debt reduction premiums being charged to the self-insured employers substantially impairs the contract they have with the State. The additional annual premium charges must be paid even though the employers, as self-insureds, are still exclusively financially obligated to their respective employees for the payment of workers' compensation benefits. "[T]his substantial impairment was not foreseeable[.]" *Equipment Mfrs. Inst. v. Janklow*, 300 F.3d 842, 859 (8th Cir. 2002).

B. Public Purpose

The next point of analysis in a Contract Clause claim requires a consideration of whether the State has a significant and legitimate public purpose behind adoption of Resolution No. 11.[26] The United States Supreme Court discussed the issue in *United States Trust Co.*, 431 U.S. at 25-26, 97 S. Ct. at 1519 as follows:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.

(Footnote omitted). *See also Nieves,* 819 F.2d at 1243 ("If the state is a party to the contract, such deference is inappropriate, and the court may inquire whether a less drastic alteration of contract rights could achieve the same purpose[.]").

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[26]"If there is an emergency, a state may be permitted to impair a contract that it would not normally be allowed to impair. If the honoring of a contract somehow jeopardizes the government, then there is sufficient reason to justify a modification of that contract." Mark Strasser, *Constitutional Limitations and Baehr Possibilities: On Retroactive Legislation, Reasonable Expectations, and Manifest Injustice*, 29 Rutgers L.J. 271, 290 (1998) (footnote omitted). The facts prompting adoption of Resolution No. 11 do not establish an emergency. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 54 S. Ct. 231, 78 L. Ed. 413 (1934) (applying emergency doctrine in holding that a new law did not violate the Contract Clause). *But see Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978) (striking down legislation reducing pension rights as violation of Contract Clause); *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977) (declaring illegal retroactive reduction of guarantees to bond holders).

It is clear that under the decision in *United States Trust* "courts are not to grant carte blanche deference to a legislative assessment of what is reasonable legislation. Reasonableness must filter through a more stringent analysis." *State ex rel. West Virginia Reg'l Jail & Corr. Facility Auth. v. West Virginia Inv. Mgmt. Bd.*, 203 W. Va. 413, 426, 508 S.E.2d 130, 143 (1998) (Davis, C.J., dissenting). *See also Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 511 (5th Cir. 2001) ("The State is a party to the contracts, so we cannot defer in the manner of due process to the State's judgment of the reasonableness of its threatened action." (footnote omitted)); *Parker v. Wakelin*, 123 F.3d 1, 5 (1st Cir. 1997) ("Where the contract allegedly impaired is one created, or entered into, by the state itself, less deference to a legislative determination of reasonableness and necessity is required[.]"); *McGrath v. Rhode Island Ret. Bd.*, 88 F.3d 12, 16 (1st Cir. 1996) ("[W]hen a state is itself a party to a contract, courts must scrutinize the state's asserted purpose with an extra measure of vigilance."). In other words, "[w]hen a State itself enters into a contract, it cannot simply walk away from its financial obligations." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.14, 103 S. Ct. 697, 705 n.14, 74 L. Ed. 2d 569 (1983). Consequently, "the Contract Clause limits otherwise legitimate exercises of state legislative authority, and the existence of an important public interest is not always sufficient to overcome that limitation." *United States Trust*, 431 U.S. at 21, 97 S. Ct. at 1517.

The public purpose behind Resolution No. 11 is to pay off the Second Injury

Fund's six billion dollar deficit and salvage the workers' compensation system without having to impose a special premium tax on the employees of nonself-insured employers or imposition of some other special tax on the general public. Although this purpose may be legitimate, its legitimacy does not rise to the level of satisfying the Contract Clause. "Something more than the showing made to survive rational basis scrutiny is required to justify such an impairment. The hurdle is even higher given the [S]tate's obvious self-interest[.]" *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 326 (6th Cir. 1998).

The United States Supreme Court has observed that a State's "taxing power may have to be exercised if debts are to be repaid." *United States Trust*, 431 U.S. at 24, 97 S. Ct. at 1519. That is, "a State cannot refuse to meet its legitimate financial obligations simply because it would prefer [not to raise taxes] to promote the public good[.]" *Id*. at 29, 97 S. Ct. at 1521. "If a State could reduce its financial obligations whenever it wanted to [by breaching its own contract] for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id*. at 26, 97 S. Ct. at 1519 (footnote omitted).[27] Insofar as the State sought to maintain the viability of the workers' compensation program by invalidating its contract with the self-insured employers, and

[27]"The case law does suggest that there is at least one particular governmental purpose, conserving on expenditures, that will be considered insufficient to justify contract impairment. Where this is the sole basis for governmental impairment of its own contract obligations, liability for breach is likely to be found." Joshua I. Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 Geo. Wash. L. Rev. 633, 699 (1996).

imposing draconian costs upon them, the Contract Clause cannot support its purpose as being legitimate.

C. Adjustment of Rights

Assuming, for the sake of argument, that a constitutionally legitimate public purpose supported Resolution No. 11, the resolution would still violate the Contract Clause because its adjustment of the rights of the contracting parties is "not based upon reasonable conditions [and] is not of a character appropriate to the public purpose justifying [its] adoption." *In re Workers' Comp. Refund*, 46 F.3d at 817. "Framed another way, this inquiry entails an 'overall determination of reasonableness.'" *Nieves*, 819 F.2d at 1249 (quoting *United States Trust*, 431 U.S. at 22 n.19, 97 S. Ct. at 1518 n.19).

Under the terms of the State's contract with Eastern Associated, Pine Ridge and Weirton Steel, the State had the exclusive responsibility for funding the Second Injury Fund. The State, through W. Va. Code § 23-3-1(a), promised to fund the Second Injury Fund through monies it received from nonself-insured employers who subscribed to the State's general Workers' Compensation Fund.[28] This Court has previously acknowledged that self-insured employers, like Eastern Associated, Pine Ridge and Weirton Steel, "elect[ed] to make direct payments of compensation in lieu of subscribing to the Workers'

[28]As previously noted, Eastern Associated contracted to pay a specific premium tax for its subscription to the Second Injury Fund.

Compensation Fund." *Deller v. Naymick*, 176 W. Va. 108, 110 n.5, 342 S.E.2d 73, 75 n.5 (1985). Consequently, "[e]xcept for the *small charges for administrative expenses*, self-insured employers make no payments into the Workmen's Compensation Fund[.]" *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 116, 219 S.E.2d 361, 366 (1975) (emphasis added).

Through Resolution No. 11, the State has, in effect, repudiated its promised method of funding the Second Injury Fund. Under W. Va. Code § 23-3-1(b) "[a] portion of all premiums that [must] be paid into the workers' compensation fund *by subscribers not electing to carry their own risk*" was supposed to be set aside for the Second Injury Fund. *Id.* (emphasis added). For fifty years the State failed to carry out its exclusive responsibility to allocate money for the Second Injury Fund as required by W. Va. Code § 23-3-1(b).

West Virginia Code § 23-3-1(b) constituted a promise by the State that self-insured employers did not have any responsibility to the Second Injury Fund–the State had exclusive responsibility for making payments into and out of the Second Injury Fund. The United States Supreme Court has held that "'[a] promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity.'" *United States Trust*, 431 U.S. at 25 n.23, 97 S. Ct. at 1519 n.23 (quoting *Murray v. Charleston*, 96 U.S. 432, 445, 24 L. Ed. 760, 763 (1878)). Resolution No. 11 is an absurdity that is not based upon

reasonable conditions, nor is it of a character appropriate to the public purpose justifying its adoption. The resolution totally relieves the State of its exclusive responsibility for funding the Second Injury Fund as required by W. Va. Code § 23-3-1(b), and forces self-insured employers to undertake that responsibility while maintaining their financial responsibilities to their own employees. Clearly there is nothing reasonable about these conditions in light of the contract the State had with Eastern Associated, Pine Ridge and Weirton Steel, and the viable alternative of taxing wages of nonself-insured employees.

Even if I "'[a]ccept[] the principle that the [S]tate's duty to maintain the fiscal integrity of the [workers' compensation system] through actuarial soundness is a valid basis for some changes [to pay the deficit], nevertheless, the [S]tate's unilateral [breach of its contract with the self-insured employers] cannot pass constitutional muster and must fall.'" *Association of Pennsylvania State Coll. & Univ. Faculties v. State Syst. of Higher Educ*., 505 Pa. 369, 377, 479 A.2d 962, 966 (1984) (citation omitted). The State cannot impose "a drastic impairment when an evident and more moderate course would serve its purposes equally well." *United States Trust*, 431 U.S. at 31, 97 S. Ct. at 1522. "While the need to keep the workmen's compensation fund on a sound financial basis may justify prospective legislation designed for that purpose, it cannot justify this type of retrospective legislation." *Nieves*, 819 F.2d at 1252.

III. DUE PROCESS

By imposing a premium upon self-insured employers to recover funds to reduce a long standing debt of the Workers' Compensation Division, the State has enacted severe retroactive legislation and has thereby violated the Due Process Clause of the Fifth Amendment to the United States Constitution. In reaching this conclusion, I am persuaded by Justice Kennedy's separate opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 539, 118 S. Ct. 2131, 2154, 141 L. Ed. 2d 451 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

In Eastern, the United States Supreme Court was presented with a challenge similar to the one presented in this case. Eastern Enterprises challenged the Coal Industry Retiree Health Benefit Act of 1992 (hereinafter "the Coal Act"). The Coal Act had "establish[ed] a mechanism for funding health care benefits for retirees from the coal industry and their dependents." *Eastern* 524 U.S. 498, 504, 118 S. Ct. 2131, 2137. To accomplish its goals, the Coal Act obtained funding by imposing "annual premiums assessed against . . . coal operators that had signed any [National Bituminus Wage Agreement][29] or any other agreement requiring contributions to the 1950 or 1974 Benefit

[29]The National Bituminus Coal Wage Agreement (hereinafter "NBCWA") of 1947 "established the United Mine Workers of America Welfare and Retirement Fund. . . . The Fund was to use the proceeds of a royalty on coal production to provide pension and medical benefits to miners and their families." *Eastern*, 524 U.S. at 505-06, 118 S. Ct. at 2138.

Plans."[30] 524 U.S. at 514, 118 S. Ct. at 2142. Under the Coal Act, premiums could be assessed against these signatory companies so long as they derived revenue from "'any business activity, whether or not in the coal industry.'" *Id.* (citations omitted). Moreover, "[w]here a signatory [was] no longer involved in any business activity, premiums [were] levied against 'related person[s],' including successors in interest and businesses or corporations under common control." *Id.* (citations omitted). Eastern Enterprises had transferred its coal-related operations to a subsidiary by the end of 1965. *Id.* at 516, 118 S. Ct. at 2143. Though Eastern Enterprises retained a stock interest in the subsidiary for some time, it ultimately sold its interest in 1987. *Id.* Nevertheless, pursuant to the Coal Act, Eastern Enterprises was assigned the obligation for premiums "respecting over 1,000

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[30]In 1950, another NBCWA was executed. It "created a new multiemployer trust, the United Mine Workers of America Welfare and Retirement Fund of 1950 (1950 W&R Fund)." *Eastern*, 524 U.S. at 506, 118 S. Ct. at 2138. Following enactment of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), the United Mine Workers of America (UMWA) and the Bituminus Coal Operators Association (BOCA) entered into a new agreement in an effort to comply with ERISA. *Id.* at 509, 118 S. Ct. at 2139. The new agreement, known as the 1974 NBCWA, "created four trusts, funded by royalties on coal production and premiums based on hours worked by miners, to replace the 1950 W&R Fund." *Id.*

> Two of the new trusts, the UMWA 1950 Benefit Plan and Trust (1950 Benefit Plan) and the UMWA 1974 Benefit Plan and Trust (1974 Benefit Plan), provided nonpension benefits, including medical benefits. Miners who retired before January 1, 1976, and their dependents were covered by the 1950 Benefit Plan, while active miners and those who retired after 1975 were covered by the 1974 Benefit Plan.

Id.

retired miners who had worked for [it] before 1966." *Id.* at 517, 118 S. Ct. at 2143. Eastern Enterprises's obligation was based upon its "status as the pre-1978 signatory operator for whom [the subject retiree] miners had worked for the longest period of time. . . . Eastern's premium for a 12-month period exceeded $5 million." *Id.* (citations omitted). A plurality of the *Eastern* Court decided that the Coal Act violated the Takings Clause. Justice Kennedy, however, while agreeing that the Coal Act was unconstitutional, opined that Coal Act had violated the Due Process Clause of the Constitution of the United States.

> Justice Kennedy explained that,
>
> > due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity. Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.

Eastern, 524 U.S. at 549, 118 S. Ct. at 2159. Indeed, "for centuries our law has harbored a singular distrust of retroactive statutes." *Id*. at 547, 118 S. Ct. at 2158 (citing plurality opinion at 532-33, 118 S. Ct. at 2151).

Conducting a due process analysis of a severe retroactive law "requires an inquiry into whether in enacting the retroactive law the legislature acted in an arbitrary and

irrational way." *Id*. at 549, 118 S. Ct. at 2159. In other words, we must ask whether "the remedy created by the [regulation] bears [a] legitimate relation to the interest which the Government asserts in support of the [law]. . . . In our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute." *Id.* (Citations omitted).

The instant case is similar to *Eastern* in that the State, by virtue of Resolution No. 11, is imposing a severe retroactive regulation that fashions a remedy "bear[ing] no legitimate relation to the interest which the Government asserts in support" of that legislation." *Id.* Resolution No. 11 charges self-insured employers a substantial amount to reduce a six billion dollar debt that was created, not by these self insured employers, but by the State itself. For a fifty-year period the State has failed to maintain a Second Injury Fund, even though it had the exclusive responsibility to do so. *See* W. Va. Code § 23-3-1(a).[31] Beginning in 1998, the State, under the authority of Resolution No. 11, has charged self-insured employers millions of dollars to reduce this debt even though the employers are exempt from any responsibility to fund the Second Injury Fund. *See* W. Va. Code § 23-3-1(b).[32] A0s I explained earlier in this dissenting opinion, Pine Ridge and Weirton Steel have never subscribed to the Second Injury Fund. They have fulfilled their

[31]*See supra* note 14 for the text of W. Va. Code § 23-3-1(a).

[32]*See supra* note 16 for the text of W. Va. Code § 23-3-1(b).

obligation to their second injury employees by direct payment of claims. Nevertheless, the State, via Resolution No. 11, is retroactively subscribing Pine Ridge and Weirton Steel to the Second Injury Fund for a period of time when they were self-insured. Thus, they are being forced to retroactively pay premiums for the benefit of second injury employees of nonself-insured employers. While Eastern Associated did subscribe to the Second Injury Fund, Eastern Associated was assessed a special premium tax to cover its participation in that fund. *See* W. Va. Code § 23-2-9(e)(3)(A).[33] Thus, Resolution No. 11 is causing Eastern Associated to retroactively pay additional premiums for the benefit of second injury employees of nonself-insured employers. The amount of the retroactive premiums is substantial. For Fiscal Year 1998, self-insured employers as a whole were assessed more than forty-five million to reduce the deficit. The premiums imposed upon Weirton Steel were $206,000 for Fiscal Year 1998. Pine Ridge was assessed $271,228 for the year, and Eastern Associated was assessed $7,265,945. Finally, I contend that Resolution No. 11 bears no legitimate relation to the interest which the Government has asserted. Self-insured employers did not create the six billion dollar deficit the State is seeking to reduce. That deficit was created by the State's failure to fund the Second Injury Fund as it was legislatively mandated to do. To now charge self-insured employers, who have fulfilled their obligation to their second injury employees, to relieve a debt created by the unlawful actions of the State is simply wrong.

[33]*See supra* note 19 for the text of W. Va. Code § 23-2-9(e)(3)(A).

An economic regulation may be found to violate the Due Process clause only under the most egregious circumstances:

> Finding a due process violation in this case is consistent with the principle that "under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means." . . . Statutes may be invalidated on due process grounds only under the most egregious of circumstances. This case represents one of the rare instances in which even such a permissive standard has been violated.

Eastern, 524 U.S. at 550, 118 S. Ct. at 2159. As with the Coal Act, Resolution No. 11 represents a rare instance where an economic regulation violates due process because of its severe retroactive impact and because its enactment was arbitrary and irrational.

IV. TAKINGS CLAUSE

The Fifth Amendment to the United States Constitution proscribes the taking of private property for public use without just compensation. It has been explained that, "[t]he aim of the 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.'" *Eastern*, 524 U.S. at 522, 118 S. Ct. at 2146 (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554 (1960)). "The Fifth Amendment applies to the states through the Fourteenth Amendment." *United States Fid. & Guar. Co. v. McKeithen*, 226 F.3d 412, 416 n.7 (5th Cir. 2000) (citation omitted). By increasing the premium tax charged to self-insured employers by an amount intended to reduce a six

billion dollar debt to which the self-insured employers did not contribute, the State has perpetrated an unconstitutional taking of the self-insured employers' property.

In the *Eastern* case discussed in the preceding section, one of the grounds asserted by Eastern Enterprises in challenging the premiums it was charged for retiree health care benefits was that the premiums violated the Takings Clause. The Court acknowledged that, while not a taking in the classic sense, "economic regulation . . . may nonetheless effect a taking." 524 U.S. at 523, 118 S. Ct. at 2146. The High Court went on to explain that:

> [o]f course, a party challenging governmental action as an unconstitutional taking bears a substantial burden. See *United States v. Sperry Corp*., 493 U.S. 52, 60[, 110 S. Ct. 387, 393-394, 107 L. Ed. 2d 290] (1989). Government regulation often "curtails some potential for the use or economic exploitation of private property," *Andrus v. Allard*, 444 U.S. 51, 65[, 100 S. Ct. 318, 326, 62 L. Ed. 2d 210] (1979), and "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense," *Armstrong, supra*, at 48[, 80 S. Ct. at 1568.] In light of that understanding, the process for evaluating a regulation's constitutionality involves an examination of the "justice and fairness" of the governmental action. See *Andrus*, 444 U.S., at 65[, 100 S. Ct., at 327]. That inquiry, by its nature, does not lend itself to any set formula, see ibid., and the determination whether "'justice and fairness' require that economic injuries caused by public action [must] be compensated by the government, rather than remain disproportionately concentrated on a few persons," is essentially ad hoc and fact intensive, *Kaiser Aetna v. United States*, 444 U.S. 164, 175[, 100 S. Ct. 383, 390, 62 L. Ed. 2d 332 (1979)] (internal quotation marks omitted).

Eastern, 524 U.S. at 523, 118 S. Ct. at 2146. The Court then stated that it had identified the following three factors that are of "particular significance" to a Takings Clause analysis of an economic regulation: (1) "[T]he economic impact of the regulation;" (2) "its interference with reasonable investment backed expectations;" and (3) "the character of the governmental action." *Id* at 523-24, 118 S. Ct. at 2146 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S. Ct. 383, 390, 62 L. Ed. 2d 332 (1979)). Applying the three-part test, the Court concluded that the premiums assessed against Eastern Enterprises did, in fact, amount to an unconstitutional taking of Eastern Enterprises' property.

Following the lead of the *Eastern* plurality, the United States Court of Appeals for the Fifth Circuit has applied the three-part test in the context of a Workers' Compensation case involving the funding formula for calculating premiums to be paid into the Louisiana Workers' Compensation Second Injury Fund by insurers. *United States Fid. & Guar. v. McKeithen*, 226 F.3d 412. In *McKeithen*, numerous insurers challenged Act 188 (hereinafter "the Act"), which contained a funding formula that calculated premiums based upon "the insurer's volume of business written in earlier years," and was made retroactive to insurance policies written before passage of the legislation imposing the funding formula. *Id.* at 415. The Act was also "made expressly applicable to workers' compensation insurers who, prior to the Act's passage, had withdrawn from the Louisiana market or had substantially reduced their underwriting in the state." *Id.* Applying the

three-part test announced in *Eastern*, the Fifth Circuit concluded that the Takings Clause had been violated. Following the *Eastern* and *McKeithen* cases, I will analyze the premium tax charged to the self-insured employers in the case *sub judice* under the three factor test set out in *Eastern*.

A. Economic Impact of the Regulation

With respect to the first factor, the economic impact of the regulation, the Supreme Court in *Eastern* concluded that there was no doubt the Coal Act had "forced a considerable financial burden upon Eastern." *Id.* at 529, 118 S. Ct. at 2149. In reaching this conclusion, the Court noted that Eastern's cumulative payments under the Coal Act would be between fifty to one-hundred million dollars, and that it was "clearly deprived of the amounts it must pay." *Id.* The Court also noted that "an employer's statutory liability for multiemployer plan benefits should reflect some 'proportion[ality] to its experience with the plan.'" *Id.* at 530, 118 S. Ct. at 2149 (citation omitted). The Court explained that "[t]he company's obligations under the [Coal] Act depend solely on its roster of employees some 30 to 50 years before the statute's enactment, without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted." *Id.* at 531, 118 S. Ct. at 2150.

The *McKeithen* Court, in discussing this factor, observed that consideration should be given "not only [to] the financial burden [imposed by the Act], but also the

proportionality between that burden and the insurers' experience with the [Second Injury Fund]." 226 F.3d at 416. In finding that the Act imposed a considerable and novel financial burden on insurers, who had paid a net amount of zero for claims made on the Second Injury Fund prior to enactment of the new funding scheme, the Court observed that the Act was estimated to cost the various insurers five million dollars in its first year of enactment and forty-five million dollars in the future. *Id.* at 416-17. Moreover, the insurers who had discontinued or substantially reduced their volume of business in Louisiana had no practical way of recouping the premium. *Id.* at 417. Finally, the Court commented:

> The newly-created liability reflects no proportionality to the plaintiffs' experience with the SIF [Second Injury Fund]. For over twenty years before Act 188, plaintiffs were an intermediary for the SIF. They collected assessments from employers and received SIF reimbursement for payment of second injury benefits. They received no net benefits and incurred no net costs. Defendants do not argue that the policy and purpose of the SIF have changed since its inception in 1974. But under Act 188, plaintiffs must make significant net contributions to the fund. Act 188 thus imposes costs on parties that never profited from the SIF.

Id.

In the instant case, the State has imposed a substantial financial burden on self-insured employers that bears no relationship to their experience with the Second Injury Fund. For Fiscal Year 1998 alone, self-insured employers as a whole were assessed

more than forty-five million dollars under Resolution No. 11 to reduce the deficit. The premiums imposed upon the appellants individually for that single year were similarly substantial. Weirton Steel was assessed $206,000, Pine Ridge was assessed $271,228, and Eastern Associated was assessed $7,265,945. These premiums were assessed against these self-insured employers notwithstanding the fact that they had already fulfilled their obligations to their second-injury employees that arose during the period during which the deficit was created.[34] Clearly, then, the sizable premiums imposed under Resolution No. 11 for Fiscal Year 1998 have no relation to these self-insured employers' experience with the Second Injury Fund.

B. Interference with Reasonable Investment Backed Expectations

In addressing the second element of the test, whether the regulation interferes with reasonable investment-backed expectations, the *Eastern* Court expressed concern over the retroactivity of the Coal Act. With respect to a regulation's imposition of a retroactive liability, the Court explained

> Congress . . . may impose retroactive liability to some degree, particularly where it is "confined to short and limited periods required by the practicalities of producing national legislation." [*Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 731, 104 S. Ct. 2709, 2719, 81 L. Ed. 2d 601

[34]Pine Ridge and Weirton Steel fulfilled their obligations by directly paying the Second Injury claims of their employees. Eastern Associated fulfilled its obligation by paying the special premiums tax associated with its subscription to the Workers' Compensation Fund. *See* W. Va. Code § 23-2-9(d)(3)(B).

> (1984)] (internal quotation marks omitted). Our decisions, however, have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

Eastern at 528-29, 118 S. Ct. at 2149. Regarding Eastern Enterprises claims, the Court remarked that

> the Coal Act operates retroactively, divesting Eastern of property long after the company believed its liabilities under the 1950 W&R Fund to have been settled. And the extent of Eastern's retroactive liability is substantial and particularly far reaching. . . . The distance into the past that the Act reaches back to impose a liability on Eastern and the magnitude of that liability raise substantial questions of fairness.

Id. at 534, 118 S. Ct. at 2152 (internal citations omitted). The *Eastern* Court ultimately concluded that nothing included in the plans in which Eastern Enterprises had participated prior to its exit from the coal industry, and nothing in the pattern of the Federal Government's involvement in the coal industry, could have led Eastern Enterprises to conclude that it would have a future responsibility for providing lifetime health benefits to its retirees and their families. *Id.* at 535-36, 118 S. Ct. at 2152.

In the *McKeithen* case, the Fifth Circuit similarly observed that "[r]etroactivity is generally disfavored in the law . . . . Retroactive legislation, as opposed to the prospective kind, can present more severe problems of unfairness because it can upset legitimate expectations and settled transactions." 226 F.3d at 418 (citations

omitted). The retroactive application of the Act at issue in *McKeithen* "reached back at least twenty years to upset the plaintiffs' reliance on the cost-neutrality of the [prior] funding scheme." *Id.* The defendants in *McKeithen* argued that the companies' economic expectations were "unreasonable because the insurance industry is heavily regulated and because the plaintiffs knew of the [Second Injury Fund's] need for annual funding and knew that benefits-based assessments are prescribed in many other states." *Id.* at 418. The Court rejected all of these arguments, ultimately concluding that there was "no pattern of conduct on the state's part that could have given the plaintiffs sufficient notice [of the new funding scheme]." *Id.* at 419.

Here Resolution No. 11 reaches back fifty years, the duration of the time the State created a six billion dollar deficit by failing to fulfill its legislatively mandated duty to fund the Second Injury Fund. *See* W. Va. Code § 23-3-1(a). As self-insured employers not subscribing to the Second Injury Fund, Pine Ridge and Weirton Steel were legislatively exempt from any responsibility to fund the Second Injury Fund. *See* W. Va. Code § 23-3-1(b). While Eastern Associated did subscribe to the Second Injury Fund, it was assessed a special premium tax to cover that participation. *See* W. Va. Code § 23-2-9(e)(3)(B). Because these employers fulfilled their obligation to their own employees, either by directly paying second injury claims, or by paying the properly assessed special premium tax for participation in the Workers' Compensation Second Injury Fund, Resolution No. 11 is causing them to retroactively pay additional premiums for the benefit

of second injury employees of nonself-insured employers. Moreover, these self-insured employers had the reasonable expectation that the state would fulfill its legal duty to fund the Second Injury Fund. They had no way of anticipating that the State would charge them hundreds of thousands, or even millions, of dollars per year to reduce a six billion dollar debt created by the State's unlawful failure to fund the Second Injury Fund. This is true in spite of the fact that the State's workers' compensation system is heavily regulated. Prior to the adoption of Resolution No. 11, the State had never sought to regulate payment of the deficit that accrued in the Second Injury Fund from 1947 to 1997. Due to this fifty years of inaction by the State, the self-insured employers could not have had "sufficient notice" of a new funding scheme." *See McKeithen*, 226 F.3d at 419.

C. Character of the Governmental Action

With regard to the final element, the character of the governmental action, the *Eastern* Court stated

> the nature of the governmental action in this case is quite unusual. That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable; complex problems of that sort typically call for a legislative solution. When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits

were promised.

Id. at 537, 118 S. Ct. at 2153.

The Fifth Circuit similarly found the nature of the government action at issue in *McKeithen* to be unusual. In this regard, the Court remarked

> [w]ithout identifying a compelling problem, such as the financial insecurity of the SIF, the state enacted a solution that "singles out certain [parties] to bear a burden that is substantial in amount, based on the [parties'] conduct far in the past, and unrelated to any commitment that the [parties] made or to any injury they caused . . . ."

226 F.3d at 419 (citation omitted).

Here the State has singled out self-insured employers to bear a significant burden that they had no role in creating. Rather, the debt sought to be relieved by Resolution No. 11 was created by the State's unlawful conduct perpetuated over fifty years of failing to fund the Second Injury Fund as it was statutorily required to do. The employers here were either exempted from paying into the Second Injury Fund, or were charged a premium tax for their years of participation in the Fund during those years they participated. Consequently, I conclude that the State's action in assessing a retroactive premium against these self-insured employers "implicates fundamental principles of fairness underlying the Takings Clause." *Eastern*, 424 U.S. at 537, 118 S. Ct. at 2153.

V. CONCLUSION

"The evil that men do lives after them; The good is oft interred with their bones." William Shakespeare, *Julius Caesar* act 3, sc. 2. The majority opinion in this case represents an evil that will, if left unchanged, live to corrupt the already deeply troubled West Virginia Workers' Compensation Program and threaten the corresponding rights and liabilities of this State's employers for generations to come. Simply stated, I cannot condone such a result and its ensuing devastating effect on the economy of West Virginia. For the reasons explained above, it is plain that Resolution No. 11 violates the Contract, Due Process, and Takings Clauses of the United States Constitution. Accordingly, I dissent. I am authorized to state that Justice Maynard joins me in this dissenting opinion.