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# CERCLA Retroactive Liability in the Aftermath of *Eastern Enterprises v. Apfel*

Karen S. Danahy

# COMMENTS

## CERCLA Retroactive Liability in the Aftermath of *Eastern Enterprises v. Apfel*

KAREN S. DANAHY†

"Retroactive law. [Laws] which take away or impair vested rights acquired under existing laws, create new obligations, impose a new duty, or attach a new disability in respect to the transactions or considerations already past."[1]

### INTRODUCTION

*A coal operator made all of the required contributions to a multiemployer pension plan during its years of operations in the industry. The operator subsequently exited the coal industry when it transferred its coal business to a subsidiary. Almost 30 years after it departed the coal industry, a newly enacted law would render it liable for potentially $100 million in health benefits for retired miners.*[2]

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1. BLACK'S LAW DICTIONARY 1317 (6th ed. 1990).

2. *See* Brief for Petitioner at 1-2, 6, Eastern Enters. v. Apfel, 524 U.S. 498

*A small family business owner sought to construct a new plant to accommodate his growing enterprise. He purchased commercially zoned property, formerly owned by a steel corporation, and built a new concrete producing facility. He proceeded to run a successful operation—unaware of the hazardous wastes that accompanied the deed to the property. Subsequently, the detection of hazardous contaminants would require the owner to pay thousands of dollars in cleanup costs under a law that did not even exist when the property was purchased—or at the time the wastes were disposed.*[3]

Both of these simplistic paradigms demonstrate the retroactive liability effects associated with two different pieces of economic legislation, the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act)[4] and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[5] The first scenario depicts, in part, a recently decided Supreme Court case, *Eastern Enterprises v. Apfel*,[6] which is central to this discussion. Eastern Enterprises (Eastern), a coal operator, claimed that the Coal Act was unconstitutional because of the retroactive liability the law imposed. Eastern argued that the Act violated its substantive due process rights, and comprised an unconstitutional taking of its property.[7] Based upon the extensive line of earlier cases that unsuccessfully challenged the Coal Act's constitutionality, many believed Eastern's challenge would suffer a similar fate. Specifically, an extensive line of prior cases, including the First, Second, Third, Fourth, Sixth, and Seventh Circuits, and more than thirty federal judges, had previously upheld the retroactive legislation of the Coal Act against the same constitutional challenges Eastern argued.[8]

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(1998) (No. 97-42).

3. Interview with Paul A. Schmidt, former CEO, Clarence Materials Corporation, in Buffalo, N.Y. (Nov. 4, 1999).

4. 26 U.S.C. §§ 9701-22 (1994 & Supp. II 1998).

5. 42 U.S.C. §§ 9601-75 (1996).

6. 524 U.S. 498.

7. *See id.* at 499.

8. *See, e.g.*, Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246 (D.C. Cir. 1998); Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir. 1996); *In re* Chateaugay Corp., 53 F.3d 478 (2d Cir.), *cert. denied sub nom.*, LTV Steel Co. v. Shalala, 516 U.S. 913 (1995); Holland v. High-Tech Collieries, Inc., 911 F. Supp. 1021 (N.D. W.Va. 1996); Lindsey Coal Mining Liquidating Trust v. Shalala, 901 F. Supp. 959 (W.D. Pa. 1995), *aff'd sub nom.*, 90 F.3d 688 (3d Cir. 1996); Templeton Coal Co. v. Shalala, 882 F. Supp. 799 (S.D. Ind. 1995), *aff'd sub nom.*, Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996); Unity Real Estate Co. v. Hudson, 889 F. Supp. 818 (W.D. Pa. 1995);

Further, the Supreme Court denied certiorari three times to Fifth Amendment constitutional challenges to the Coal Act,[9] reinforcing the lower courts' determinations that the Act's retroactive legislation is acceptable. Surprisingly, in *Eastern Enterprises*, the Court shifted its direction on this issue and invalidated the Coal Act as it applied to Eastern, finding that the federal statute was unconstitutionally retroactive because it placed a "disproportionate, and severely retroactive burden" on this former coal operator.[10]

The second scenario depicts a CERCLA situation. Indeed, when one takes stock of laws imposing retroactive liability, CERCLA has been described as "the harshest liability scheme around."[11] CERCLA imposes liability without fault for acts that were legal at the time they occurred, a most controversial liability scheme that has been consistently upheld in the courts.[12] It is expected that challengers of CERCLA's harsh retroactive liability will look to the *Eastern Enterprises* decision to undermine the formidable retroactive effects of this statute. Indeed, it appears difficult to reconcile the perseverance of CERCLA's retroactive liability subsequent to the Court's invalidation of the Coal Act's retroactive liability effect on Eastern.

This Comment will discuss the *Eastern Enterprises* decision and explore whether the Court's determination will render new support for challenges to the retroactive legislation promulgated in CERCLA. Part I of this Comment examines the Supreme Court's decision in *Eastern Enterprises v. Apfel*, including the procedural history and the opinions of the case. Part II looks at the Fifth Amendment constitutional challenges Eastern posed to the Coal Act. Despite the plurality's conclusion that the Coal Act violated the Fifth Amendment in this case, only four justices agreed that the

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*In re* Blue Diamond Coal Co., 174 B.R. 722 (E.D. Tenn. 1994), *aff'd,* 79 F.3d 516 (6th Cir. 1996), *cert. denied sub nom.*, Blue Diamond Coal Co. v. Chater, 519 U.S. 1055 (1997); Barrick Gold Exploration, Inc. v. Hudson, 823 F. Supp. 1395 (S.D. Ohio 1993), *aff'd*, 47 F.3d 832 (6th Cir.), *cert. denied*, 516 U.S. 813 (1995).

9. *See In re* Chateaugay Corp., 53 F.3d 478 (2d Cir.), *cert. denied sub nom.*, LTV Steel Co. v. Shalala, 516 U.S. 913 (1995); Templeton Coal Co. v. Shalala, 882 F. Supp. 799 (S.D. Ind. 1995), *aff'd sub nom.*, Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996); *In re* Blue Diamond Coal Co., 174 B.R. 722 (E.D. Tenn. 1994), *aff'd,* 79 F.3d 516 (6th Cir. 1996), *cert. denied sub nom.*, Blue Diamond Coal Co. v. Chater, 519 U.S. 1055 (1997).

10. *Eastern Enters. v. Apfel,* 524 U.S. at 536.

11. Ruth Simon, *Deals That Smell Bad,* FORBES, May 15, 1989, at 49.

12. *See infra* notes 158-61 and accompanying text.

Act constituted a taking in violation of the Takings Clause.[13] A due process analysis was deemed the appropriate mechanism for this constitutional question by five justices.[14] Arguably, the fractured nature of this decision undermines its precedential weight. Part III provides a general discussion of retroactive legislation, including its innate disfavor in society and its existence in various statutes. This Part reviews the history of the judiciary's interpretation of retroactive liability under CERCLA. Part IV draws a comparison between the retroactive liability under the Coal Act and CERCLA to assess the vulnerability of CERCLA based on a similar challenge. Although the imposition of retroactive liability under CERCLA is comparatively more harsh with its strict, joint and several liability scheme, the Coal Act contains notable mitigating components and the industries targeted by each Act are significantly different. Part V looks at the application and impact of the decision rendered in *Eastern Enterprises* to subsequent constitutional challenges. These challenges involve both the Coal Act and CERCLA retroactive legislation in the testing of *Eastern Enterprises'* precedential value. Finally, Part VI delves into CERCLA's journey through the judicial, administrative, and legislative channels of our legal system since its enactment, to demonstrate its evolvement into a more reasonable and fairer law today. This Part also takes note of accomplishments under CERCLA to date.

This Comment concludes that the *Eastern Enterprises* decision provides little force for a similar CERCLA challenge despite CERCLA's inherently more severe retroactive liability scheme.[15] The actual and projected tenacity of

13. The U.S. Constitution's Fifth Amendment Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. *See Eastern Enters. v. Apfel*, 524 U.S. at 503-38 (O'Connor, J., plurality opinion, joined by Rehnquist, C.J., Scalia, J., and Thomas, J.); *see id.* at 539-50 (Kennedy, J., concurring in the judgment and dissenting in part).

14. The Due Process Clause of the U.S. Constitution provides that no person shall be "deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. *See Eastern Enters.v. Apfel*, 524 U.S. at 539-50 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 553-68 (Breyer, J., with whom Stevens, Souter, and Ginsberg, J.J., join, dissenting).

15. Importantly, the "degree" of a statute's retroactive effect has been recognized as "a significant determinant in the constitutionality of a statute." *Eastern Enters. v. Apfel*, 524 U.S. at 549 (citing United States v. Carlton, 512 U.S. 26, 32 (1994)). *See generally* United States v. Darusmont, 449 U.S. 292 (1981);

CERCLA's retroactive liability subsequent to the *Eastern Enterprises* decision is attributable to the Court's fragmented decision necessitating a narrow reading of this case, and the longstanding resistance of our legal and political systems to overturn CERCLA's retroactive liability. Because the *Eastern Enterprises* decision is specific to the claimant, no bright-line rule regarding the constitutionality of laws imposing retroactive liability emerges from this decision. However, despite the persistence of CERCLA's retroactive liability scheme, this Comment will demonstrate that an evolvement of a more fair application of the law's liability has transpired since its enactment through the tripartite dynamics of judicial, administrative, and legislative law. Finding decades ago that changes in accident law can and do occur in response to a need for economic efficiencies, Judge Guido Calabresi acknowledged that there remains ingrained in society the belief that "justice require[s] a one-to-one relationship between the party that injures and the party that is injured."[16] Today in CERCLA law there is still a lack of nexus in many instances between the liable party and the harm realized, but there has been measured progress towards utilizing this link to fairly assign liability.

## I. *EASTERN ENTERPRISES V. APFEL*

### A. *The Coal Act*

In 1992, Congress passed the Coal Act,[17] an extremely contentious piece of legislation intended "to provide for the continuation of a privately financed self-sufficient program for the delivery of health care benefits to the beneficiaries of [these health care benefit] plans."[18] Congress was called upon by the Secretary of Labor's Coal Commission to statutorily impose an obligation on employers in the coal industry to contribute to health care benefits for retired coal

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Dunbar v. Boston & P.R. Corp., 63 N.E. 916, 917 (Mass. 1902)).

16. GUIDO CALABRESI, THE COSTS OF ACCIDENTS 297 (1970).

17. 26 U.S.C. §§ 9701-22 (1994 & Supp. II 1998).

18. *Id.* § 9701. This statement of the Coal Act's policy follows § 9701 (quoting Pub. L. No. 102-486 § 19142(a)(2)). For a more extensive background of this legislation, see Brief of Respondent at 2-13, Eastern Enters. v. Apfel, 524 U.S. 498 (1998) (No. 97-42).

miners and their families.[19] Prior to the Coal Commission's study, it was clear to the United Mine Workers of America and the Bituminous Coal Operators Association that the medical plans in place for retirees in this industry were in serious financial straits.[20] In fact, by 1990, the 1950 and 1974 Benefit Plans had realized a deficit of $110 million.[21] The causes behind these financial difficulties included the increase in the number of retirees in the coal industry, a decline in both the production of coal and number of producers, and a coinciding increase in national health care costs.[22] The industry agreed that remedial action was required, but there was disagreement about where financial responsibility should lie. A formula was settled upon assigning eligible retirees to particular operators, "signatories," based upon the retiree's employment history and the Coal Act was established.[23] The Coal Act's promulgation was seen as a continuation of an extensive historical intervention of the federal government in the coal industry.[24]

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19. *See Eastern Enters. v. Apfel*, 524 U.S. at 510-14.

20. *See id.* at 510-11.

21. *See id.*; *see also id.* at 511 (citing H.R. REP. No. 9 (1990)); COAL COMM'N REP., NO. 43-44, at 1373-74 (1990). The 1950 Benefit Plan covered miners retired before January 1, 1976, and the 1974 Benefit Plan covered post 1975 retirees. The Coal Act effectively merged these two Benefit Plans into a multiemployer plan, the United Mine Workers of America Combined Benefit Fund. *See Eastern Enters. v. Apfel*, 524 U.S. at 514.

22. *See Eastern Enters. v. Apfel*, 524 U.S. at 510.

23. *See* 26 U.S.C. § 9706(a) (1994 & Supp. II 1998); *see also id.* § 9701(c)(1) (defining "signatory operator" as "a person which is or was a signatory to a coal wage agreement"). Courts have endorsed this method of assignment:

> [B]y . . . imposing . . . financing requirements on current and former [signatory] coal operators, the Coal Act embodies four Congressional objectives: (1) to make no attempt to rewrite the collective bargaining agreements to penalize such conduct or to readjust the contractual rights and liabilities of the parties to the [National Bituminous Coal Wage Agreements]; (2) to effectuate a 'pay for your own' policy by 'assigning' companies financial responsibility for their own retirees in the [multiemployer fund]; (3) to implement Congress' decision that financing health care for 'orphaned' retirees should be shared by the employers who voluntarily participated in the [United Mine Workers of America] multiemployer health benefits system; and (4) to close loopholes through which companies . . . have jumped to avoid their obligations to facilitate retiree health care.

Mary Helen Coal Corp. v. Hudson, 976 F. Supp. 366, 369 (E.D. Va. 1997), *rev'd*, 164 F.3d 624 (4th Cir. 1998).

24. *See In re* Blue Diamond Coal Co., 79 F.3d 516, 518-19, 525 (6th Cir. 1996) (discussing the federal government's takeover of the nation's coal mines in 1946 and its establishment of a United Mine Workers of America pension

B. *Procedural History*

Under the Coal Act, the Commissioner of Social Security (Commissioner) assigned health benefit payments for more than 1,000 retired mine workers and their families to Eastern, a Massachusetts business. The Coal Act, § 9706, authorizes the Commissioner to "assign each coal industry retiree who is an eligible beneficiary to a signatory operator which . . . remains in business . . . ."[25] Claiming an improper assignment of these pension responsibilities, Eastern sought a declaratory judgment to assign these beneficiaries to a former subsidiary, Eastern Associated Coal Corporation (EACC).[26] In this lawsuit against the Commissioner, the pension fund, and its trustees, Eastern argued that it transferred its coal mining operations to EACC in 1965, effectively terminating its involvement in this industry.[27] Further, EACC was Eastern's successor in the coal business with responsibility for all of Eastern's corresponding liabilities.[28] Eastern also claimed the Coal Act violated its right to substantive due process and constituted an unconstitutional taking under the Fifth Amendment.[29]

In *Eastern Enterprises v. Shalala*,[30] the District Court ruled against Eastern on these issues, upholding both the Commissioner's assignment of beneficiary responsibility to Eastern and the constitutionality of the Coal Act.[31] The court found that § 9607(a)(3) directs the Social Security Administration to assign beneficiaries to a "signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to . . . the 1978 coal wage agreement."[32] Although successor liability is not specifically addressed in this section of the statute, the court concluded that Congress did not intend to assign past liabilities to successor operators. Further, this was a rational act by Congress be-

benefit and health fund, and federal intervention to settle strikes over benefit issues).

25. 26 U.S.C. § 9706 (1994 & Supp. II 1998).

26. *See* Eastern Enters. v. Shalala, 942 F. Supp. 684 (D. Mass. 1996).

27. *See Eastern Enters. v. Apfel*, 524 U.S. at 516.

28. *See id.*

29. *See id.*

30. 942 F. Supp. at 684.

31. *See id.* at 686-88.

32. 26 U.S.C. § 9706(a)(3) (1994 & Supp. II 1998).

cause the statute allows for a private civil action for pursuing pension benefit fund contributions from others.[33] The court stated that this unambiguous statute "does not appear . . . to be unconstitutional."[34] Eastern pursued these challenges on appeal.[35]

Consistent with the District Court, the First Circuit found that the Social Security Administration's assignment of beneficiaries to Eastern was proper.[36] Additionally, the court maintained the constitutionality of the Coal Act.[37] After determining that "heightened judicial scrutiny" was not required in evaluating this economic legislation, the court concluded that the Coal Act does not violate Eastern's substantive due process rights.[38] The First Circuit held that Congress's means of enacting retroactive liability legislation were rationally related to the legitimate purpose of rectifying multiemployer benefit plan funding problems.[39] Specifically, Congress had concluded from evidence that pre-1974 signatories to the coal wage agreements made an implicit promise to provide lifetime health benefits to employees.[40] Thus, these operators should bear the responsibility for health benefit payments. The court found that it was not irrational to make Eastern responsible because Eastern had "contributed directly to mine workers' legitimate expectations of lifetime health benefits" as a signatory of earlier agreements.[41] In addition, the fact that the Coal Act imposed unanticipated liability on Eastern was not enough to violate Eastern's due process rights.[42] The First Circuit noted that courts have upheld legislation that "impose[s] a new duty or liability based on past acts" finding that the legislation "is not unlawful solely because it upsets otherwise settled expectations."[43]

The First Circuit also rejected Eastern's claims that the

33. *See id.* § 9706(f)(3). This section authorizes a signatory operator to seek indemnification from other parties.

34. *Eastern Enters. v. Shalala*, 942 F. Supp. at 688.

35. *See* Eastern Enters. v. Chater, 110 F.3d 150 (1st Cir. 1997).

36. *See id.* at 155.

37. *See id.* at 159-61.

38. *Id.* at 156.

39. *See id.* at 156-58.

40. *See id.* at 157.

41. *Id.*

42. *See id.*

43. *Id.* (quoting Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 637 (1993)) (citations omitted).

Coal Act violated its equal protection rights and constituted an unconstitutional taking under the Fifth Amendment.[44] The appellant argued that the Takings Clause,[45] which prohibits the confiscation of "private property . . . for public use, without just compensation,"[46] applied to the moneys the Coal Act mandated Eastern should pay into the multiemployer plan. Assessing the statute against the three factors adopted by the Supreme Court in *Connolly v. Pension Benefit Guaranty Corp.*[47] for determination of an unconstitutional taking, the court held that the Coal Act imposed: (1) a proportional economic impact; (2) a reasonable expectation of financial responsibility; and (3) payments of premiums to a private benefit fund and not a government entity.[48] The Coal Act survived under the scrutiny of the *Connolly* factors and did not constitute a violation of the Takings Clause according to the First Circuit. Eastern once again appealed and certiorari was granted.

### C. *Plurality Opinion*

In *Eastern Enterprises v. Apfel*, a divided Supreme Court found Eastern's Takings Clause challenge persuasive. Four justices concluded that the Coal Act effected an unconstitutional taking as it applied to Eastern, finding that the Act "place[d] a severe, disproportionate, and extremely retroactive burden on Eastern."[49] While Justice Kennedy concurred in the plurality's judgment, he reasoned that the Coal Act was unconstitutional because it violated Eastern's due process rights under the Fifth Amendment.[50]

In an effort to formulate the necessary foundation for a constitutional challenge to the Coal Act, the plurality turned to previous challenges to the constitutionality of similar pension plan legislation. Although these earlier

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44. *See id.* at 159-60, 162.

45. U.S. CONST. amend. V.

46. *Id.*

47. 475 U.S. 211 (1986). The Court in *Connolly* identified three factors that have a particular significance in ascertaining the existence of an uncompensable taking by a regulation. These factors are: (1) the economic impact of the regulation on the claimant; (2) the extent that the regulation interferes with the claimant's reasonable investment-backed expectations; and (3) the nature of the governmental action. *See id.* at 224-25.

48. *See Eastern Enters. v. Chater*, 110 F.3d at 160-61.

49. Eastern Enters. v. Apfel, 524 U.S. 498, 538 (1998).

50. *See id.* at 538-51.

challenges had failed, the plurality found support from these "precedents" because these decisions "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."[51]

The plurality acknowledged that this case did not represent a traditional governmental "taking" of property, but held that an "economic regulation such as the Coal Act may nonetheless effect a taking."[52] Although an improper taking typically exists when the government physically invades private property, the plurality found the Takings Clause applied here because "Eastern is 'permanently deprived of those assets necessary to satisfy its statutory obligation . . . to [the Combined Benefit Fund].' "[53] The Court's evaluation of the "justice and fairness" of the Coal Act was based upon a reexamination of the *Connolly* factors employed by the First Circuit to determine whether an unconstitutional taking occurred.

The first *Connolly* factor requires an assessment of the economic impact of the regulation in question on the claimant. Applying this factor to Eastern's situation, the plurality found that the Coal Act forced a considerable economic burden on Eastern.[54] Under the Coal Act, the Commissioner of Social Security assigned health benefit payments for greater than 1,000 retired mine workers and their families to Eastern, a former coal operator.[55] As a result of this assignment, Eastern's cumulative payments to the pension fund were estimated to total $50 to $100 million.[56] Because this case did not involve the classic "taking" of an asset, the Court focused on the proportionality of the economic impact on Eastern.[57] The plurality found that not only was this a substantial liability for Eastern, but it also represented a disproportionate liability compared to Eastern's experience with the multiemployer benefit plan. Eastern had never

51. *Id.* at 528-29.
52. *Id.* at 523.
53. *Id.* (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 222 (1986)).
54. *See id.* at 529.
55. *See id.* at 516-17.
56. *See id.* at 529.
57. *See id.* at 529-37.

participated in negotiations nor agreed to make contributions to the 1974 Benefit Plan the Coal Act regulated.[58] In fact, Eastern's involvement in this industry effectively terminated when it transferred its coal mining operations to a former subsidiary in 1965.[59] The plurality found the amount assessed against Eastern "resembling a calculation made in a vacuum."[60]

Under the second *Connolly* factor, the plurality held that the Coal Act substantially interfered with Eastern's reasonable investment-backed expectations.[61] The Coal Act imposed retroactive liability on Eastern's activities between 1946 and 1965, or more than thirty to fifty years ago.[62] The Court held this extremely retroactive effect "divest[s] Eastern of property long after the company believed its liabilities under [the previous pension fund were] settled."[63] The plurality viewed this as an unfairly imposed burden on Eastern because of the Coal Act's "substantial" and "far reaching" retroactivity.[64] The Court rejected the contention by the Commissioner of Social Security that the coal industry committed to fund lifetime benefits to its retirees, finding that Eastern could not have anticipated the extent of the retroactive liability imposed by the Coal Act.[65] Eastern simply did not make an agreement to provide lifetime health care benefits to its retirees.[66]

Looking at the third *Connolly* factor, the plurality found that the nature of the governmental action in singling out Eastern to bear a substantial burden "unrelated to any commitment [Eastern] made" was fundamentally unfair.[67] The Court not only found that the imposition of the liability imposed by the Coal Act was based on conduct long ago,

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58. *See id.* at 530.

59. *See id.*

60. *Id.* at 530.

61. *See id.* at 532; *see also* Eastern Enters. v. Chater, 110 F.3d 150, 161 (1st Cir. 1997) (explaining "reasonable investment-backed expectations" as the foreseeability of "the specific form of intervention that a legislative solution would take").

62. *See Eastern Enters. v. Apfel*, 524 U.S. at 532.

63. *Id.* at 534.

64. *Id.* "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.*

65. *See id.*

66. *See id.*

67. *Id.* at 537.

thirty to fifty years prior, but also the amount of the financial burden was substantial, an estimated $100 million.[68] This left the plurality to conclude that to force Eastern "to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised" would violate the fundamental fairness embodied in the Takings Clause.[69] Thus, the law as applied to Eastern was held to impose a "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."[70]

D. *Concurring Opinion*

Although the plurality found it unnecessary to address the constitutionality of the Coal Act under Eastern's substantive due process rights, Justice Kennedy believed this was the appropriate analysis for finding Eastern's challenge to the Coal Act unconstitutional.[71] His main rationale for rejecting the plurality's application of the Takings Clause was that the Coal Act does not involve a specific property interest, rather "the law simply imposes an obligation to perform an act, the payment of benefits [on Eastern]."[72] Further, Justice Kennedy found that a governmental action of this nature had never before been considered a taking. Instead, this was a governmental regulation that imposed an "adverse economic effect," and not a taking.[73]

Justice Kennedy found a basis for application of a Due Process analysis from the many precedents that questioned retroactive legislation.[74] He argued that judicial history

68. A $5 million annual premium was assessed which was estimated to total $100 million over time. *See id.* at 516-17.

69. *Id.* at 537.

70. *Id.* at 528-29.

71. *See id.* at 540.

72. *Id.*

73. *Id.* at 543.

74. *See id.* at 547 (explaining that "the Court has given careful consideration to due process challenges to legislation with retroactive effects"); *see also* United States v. Carlton, 512 U.S. 26, 31 (1994); Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 636-41 (1993); General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992); United States v. Sperry Corp., 493 U.S. 52, 64 (1989); United States v. Hemme, 476 U.S. 558, 567-72 (1986); Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729-30 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

supports that "due process requires an inquiry into whether in enacting retroactive law the legislature acted in an arbitrary and irrational way."[75] Economic legislation that does not pass this "test" must be invalidated.[76] Justice Kennedy concluded that this is indeed a "rare [instance] where the Legislature has exceeded the limits imposed by due process" because Congress's enactment of the Coal Act is not rationally related to the legitimate interest asserted by the government.[77] He argued that the Coal Act does not impose a reasonable liability and is "far outside the bounds of retroactivity permissible under our law."[78] Not only was Eastern not responsible for the financial downfall of the multiemployer pension benefit plans, but also Eastern did not create expectations on the part of the retirees for lifetime health care benefits.[79] Borrowing from the plurality's opinion, Justice Kennedy concluded that this "expectation was created by promises made long after Eastern left the coal business."[80]

E. *Dissenting Opinion*

Agreeing with the concurring opinion that the Takings Clause is an inappropriate analysis for Eastern's case, the dissent also turned to the Due Process Clause of the Fifth Amendment to address the constitutionality of the Coal Act.[81] Under a Due Process analysis, the dissent found that the Coal Act was constitutional because its imposition on Eastern was not "fundamentally unfair."[82] Justice Breyer concluded that since the assignment of retired miners to Eastern was based upon the beneficiaries' previous employment with Eastern, the responsibility the Coal Act places on Eastern to provide health care benefits was fundamentally fair and just.[83] Specifically, the Act's "reach-back" liability provision that operates to make Eastern responsible for miners it employed pre-1965 when Eastern

75. *See Eastern Enters. v. Apfel*, 524 U.S. at 547.
76. *See id.*
77. *Id.* at 550.
78. *Id.*
79. *See id.*
80. *Id.*
81. *See id.* at 554.
82. *See id.*
83. *See id.* at 559.

last participated in the coal industry, is not unconstitutional.[84] The dissent reasoned that not only did Eastern benefit from the labor of these mine workers, but also it was Eastern's working conditions that created the health risks to these miners.[85] Additionally, the dissent cited various government and industry actions, which Eastern participated in, that collectively served to create an expectation on behalf of the mine workers that lifetime health benefits would be provided by either the coal industry or Eastern or both.[86] For example, subsequent to the federal government seizing the coal mines to end an industry-wide strike, a health benefit program for the mine workers was established and later financially supported by the government to assure its viability.[87] The dissent found that even though the federal government and coal industry "did not necessarily create contractually binding promises," reasonable expectations for lifetime health care benefits were created.[88] The dissent found further justification for Eastern's liability from the profits Eastern continued to reap from the coal industry until 1980 through its wholly-owned subsidiary, Eastern Associated Coal Corporation.[89] Finally, because "Eastern cannot show a sufficiently reasonable expectation that it would remain free of future health care cost liability for the workers whom it employed," Eastern's "legitimately settled expectations" were not "unfairly upset" and the constitutionality of the liability provision of the Coal Act should be upheld.[90]

## II. FIFTH AMENDMENT CHALLENGES TO THE COAL ACT

Not only did the justices disagree on the constitutionality of the Coal Act, they also disagreed on the Fifth Amendment provision that should be utilized in the consti-

84. *See id.*
85. *See id.* at 554.
86. *See id.* at 561.
87. *See id.* at 564-65. The government's role in promising health benefits to mine workers began in 1946 with Congress's enactment of the Krug-Lewis Agreement establishing health care benefits for mine workers. Subsequently, pre-1965, Congress financially supported the multiemployer benefit plan in effect by providing tax benefits and aiding in hospital construction. *See id.*
88. *Id.* at 565.
89. *See id.*
90. *Id.* at 567-68.

tutional analysis. When the decisional results are tallied, five justices (Kennedy, concurring, and Breyer, joined by Stevens, Souter, and Ginsberg, dissenting) believed that an assessment of the Coal Act's effect upon due process rights was appropriate.[91] They argued that the Takings Clause of the Fifth Amendment does not apply to Eastern's case.[92] Instead, a Due Process analysis was used to inquire into whether the Coal Act was "fundamentally unfair or unjust"[93] as applied to Eastern, and whether the legislature acted in an "arbitrary and irrational way" in promulgating the retroactive Act.[94]

Although the conclusions derived from a Due Process analysis were vastly different, the significance exists in the agreement of its application to this case. The substantive due process argument has not been successful in a retroactivity challenge since the New Deal era,[95] and the Supreme Court has not invalidated economic legislation on substantive due process grounds in more than sixty years.[96] While recognizing the Court's previously expressed concern in applying a due process analysis to "invalidate economic legislation,"[97] the plurality in Eastern nonetheless depended upon precedents that "were grounded in due process."[98] The plurality acknowledged a "correlation" between the Takings Clause analysis used and that of a due process analysis.[99] The dissent identified this commonality as the fundamental unfairness of retroactive liability upon settled expecta-

91. *See id.* at 538, 545, 552.

92. *See id.* Justice Kennedy stated that the Coal Act "must be invalidated as contrary to essential due process principles, without regard to the Takings Clause of the Fifth Amendment." *Id.* at 539.

93. *Id.* at 558.

94. *Id.* at 547 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

95. *See* Donald M. Falk, *Justices Forestall Business Liabilities*, 20 NAT'L L. J. 50 (1998).

96. *See* Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935) (striking down a Louisiana statute on due process grounds); *see also* Eastern Enters. v. Chater, 110 F.3d 150, 158 (1st Cir. 1997) (explaining that *Alton* is no longer good law).

97. *Eastern Enters. v. Apfel*, 524 U.S. at 537 (quoting Ferguson v. Skrupa, 372 U.S. 726 (1963)) (abandoning "the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believ[e] to be unwise").

98. *Id.* at 548.

99. *Id.* at 537-38.

tions,[100] or arguably, the third *Connolly* prong to a takings analysis, "the nature of the governmental action."[101] The plurality, in fact, concluded that "the governmental action implicat[ed] fundamental principles of fairness."[102]

The reluctance of the plurality to interpret this as a fundamental fairness analysis under the Due Process Clause can be attributed to the Court's innate fear of revitalizing the bygone era of *Lochner v. New York*.[103] Subsequent to the Court's decision in *Lochner*, invalidating a state law that limited "the freedom of master and employee to contract" on due process grounds, it was common practice for the Court to strike down state economic regulations based upon the Court's ideals of what constituted proper implementation of a state's policies.[104] *Lochner* was recognized as the epitome of the Court's broad application of the substantive Due Process Clause to invalidate economic legislation. Abandonment of this era did not occur until approximately fifty years later with the Court's decision in *Williamson v. Lee Optical of Oklahoma, Inc.*,[105] when the Court held that the Due Process Clause would no longer be utilized "to strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[106] The Court received heavy criticism for "reading its own philosophy into the Constitution and advocating judicial deference to Congress' economic views."[107] Since then, the modern Court has shied away from use of substantive due process as a means of invalidating economic legislation. As applied today, the substantive due process test evaluates economic legislation to assure there is a "rational relation to a legitimate governmental objective."[108] This means-end fit

100. *See id.* at 556-60.

101. *Id.* at 518 (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986)).

102. *Id.* at 537.

103. 198 U.S. 45 (1905) (invalidating a state law that limited the number of hours a baker could work).

104. *Id.* at 64.

105. 348 U.S. 483 (1955).

106. *Id.* at 488.

107. *Lochner*, 198 U.S. at 74-76 (Holmes, J., dissenting).

108. William A. Montgomery, Jr., *Constitutional Implications of CERCLA: Due Process Challenges to Response Costs and Retroactive Liability*, 31 J. URBAN & CONTEMP. L. 279, 286 (1987) (citing *Williamson*, 348 U.S. at 491).

has developed into a "loose" test.[109] If a "reasonable" economic regulation is promulgated to correct a public "evil," no substantive due process violation will be found.[110] Thus a cautious approach developed in light of the Court's previous longstanding practice of "Lochnerizing."

A due process challenge to economic legislation may have gained some efficacy as a result of the concurrence and dissent in *Eastern Enterprises*, but concededly the basic inquiry into a challenge remains the same. The challenger must overcome a "presumption of constitutionality" by showing "the legislature acted in an arbitrary and irrational way."[111] Even so, as Justice Kennedy recognized in his concurrence, despite finding a substantive due process violation by the government, "[s]tatutes may be invalidated on due process grounds only under the most egregious of circumstances."[112]

Additionally, the Supreme Court has previously held that this type of fragmented decision provides limited precedential value.[113] The Court has found that when a case lacks assent among five justices for a single rationale in explanation of a decision, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds . . . ."[114] Because Justice Kennedy's due process analysis was not joined by at least four justices supporting the judgment, his concurrence cannot be combined with the plurality's holding to establish a "majority rule," despite the common fundamental issues of fairness encompassed in both Justice Kennedy's and the plurality's opinions.[115]

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109. *See id.*; *see also* Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 639 (1993) ("[U]nder 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.").

110. Montgomery, *supra* note 108, at 286.

111. Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1255 (D.C. Cir. 1998) (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

112. Eastern Enters. v. Apfel, 524 U.S. 498, 550 (1998).

113. *See* Marks v. United States, 430 U.S. 188 (1977); Gregg v. Georgia, 428 U.S. 153 (1976).

114. *Gregg*, 428 U.S. at 169 n.15 (1976).

115. *See* United States v. Dico, Inc., 189 F.R.D. 536, 543 (S.D. Iowa 1999); Unity Real Estate Co. v. Hudson, 178 F.3d 649, 658-59 (3d Cir. 1999) (finding that the "splintered" decision in *Eastern Enterprises* "makes it difficult to distill

## III. RETROACTIVE LEGISLATION

*Eastern Enterprises* is not the first challenge to retroactive legislation, nor will it be the last. It is true that retroactively applied laws run afoul of what we as a society hold as fair and just.[116] As Justice Story stated in 1833, "[r]etrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact."[117]

More than a century and a half later, the tenacity of this belief was demonstrated by the Supreme Court decision in *Bowen v. Georgetown University Hospital*[118] invalidating a retroactive federal administrative law. The Court reaffirmed that retroactivity is generally disfavored in the law, ruling that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[119] The Court reasoned that imposition of liability for an act that was legal when completed is potentially unfair.[120] A concurring opinion went so far as to claim that the Administrative Procedure Act bars retroactive rulemaking by administrative agencies.[121]

More recently, in *Landgraf v. USI Film Products*,[122] the Supreme Court held that courts must not "give retroactive

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a guiding principle").

116. *See* General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) (finding that "[r]etroactive legislation . . . presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (holding retroactivity is generally disfavored in the law).

117. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1398 (5th ed. 1891), *quoted in Eastern Enters. v. Apfel*, 524 U.S. at 533. In fact, the "Rule of Law" embodied in our legal system disfavors retroactive lawmaking, as evidenced most clearly in the criminal context by the ban on ex post facto laws.

118. 488 U.S. 204, 208 (1988) (holding that the Medicare Act does not authorize retroactive rulemaking).

119. *Id.* (citing support for this conclusion from the following Supreme Court cases: Greene v. United States, 376 U.S. 149, 160 (1964); Claridge Apts. Co. v. Comm'r, 323 U.S. 141, 164 (1944); Miller v. United States, 294 U.S. 435, 439 (1935); United States v. Magnolia Petroleum Co., 276 U.S. 160, 162-63 (1928)).

120. *See id.* at 208.

121. *See id.* at 216-17. (Scalia, J., concurring); *see also* 5 U.S.C. § 551(4) (1994). Specifically, the language of this section indicates that rules must be of "future effect." *Id.*

122. 511 U.S. 244 (1994).

effect to statutes burdening private rights unless Congress ha[s] made clear its intent" to do so.[123] Punitive damages were held not to apply retroactively in compensating a party for unlawful discrimination under the Civil Rights Act of 1991 since allowing a retroactive effect would "attach an important new legal burden" to the defendant's conduct.[124] This decision was based on "the well-settled presumption against application of . . . statutes that would have genuinely 'retroactive' effect."[125] Subsequent to this case, a presumption against retroactive application of a statute was found a necessary step by the judiciary in assessing laws that lack a clear intent to legislate pre-enactment conduct.[126] The development of a prospective presumption was firmly established.[127]

Despite this historical bias against the retroactive legislation, it purposefully survives in society in a variety of laws.[128] For example, retroactive legislation promulgated in the Black Lung Benefits Act of 1972,[129] the Multiemployer

123. *Id.* at 270 (holding that 1991 amendments to the Civil Rights Act of 1964 do not apply retroactively in a Title VII case).

124. *Id.* at 283.

125. *Id.* at 277; *see also* United States v. Ward, 618 F. Supp. 884, 898 (E.D.N.C. 1985); United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1912 (C.D. Cal. 1984).

126. For an insightful discussion of the impact of the *Landgraf v. USI Film Products* decision and the evolution of the presumption of prospectivity adopted by the courts, see Jan G. Laitos, *Legislative Retroactivity*, 52 WASH. U. J. URB. & CONTEMP. L. 81, 85, 122-32 (1997); *see also id.* n.13, stating:

> The Landgraf opinion expands the definition of retroactivity to include changes in the law which attach 'new legal consequences to events completed before its enactment.' . . . After Landgraf, a law which in the future disrupts certain settled expectations, imposes new obligations, or increases liability for past actions, is retroactive because the law attaches new legal consequences to prior acts.

*Id.* (citations omitted).

127. *See* Gray B. Taylor, *A Review of the Constitutionality of CERCLA in the Wake of* United States v. Olin Corp., 6 S.C. ENVTL. L.J. 61, 67 (1997) (discussing that "*Landgraf* stands for the proposition that a court will presume prospective application of a statute").

128. *See, e.g.*, United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (holding that where "a law intervenes and positively changes the rule which governs, the law must be obeyed . . . if . . . constitutional," but imploring the courts to "struggle hard against a construction which will, by a retrospective operation, affect the rights of parties"). *See generally* Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974); Thorpe v. Housing Auth. of Durham, 393 U.S. 268 (1969).

129. 30 U.S.C. § 901 (1969); *see* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

Pension Plan Amendments Act of 1980,[130] and amendments to the Employee Retirement Income Security Act[131] in 1984, have all survived constitutional challenges.[132]

In *Usery v. Turner Elkhorn Mining Co.*,[133] the Supreme Court held that the imposition of retroactive liability is constitutionally permissible, reasoning that "the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of employees' disabilities to those who have profited from the fruits of their labor."[134] The Court concluded that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations . . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts."[135]

In *Connolly v. Pension Benefit Guaranty Corp.*,[136] despite the Court's recognition that the retroactive withdrawal liability effected by a multiemployer pension plan resulted in a permanent deprivation of private assets by the government, the Court held that the legislation in question did not constitute a Fifth Amendment Takings Clause violation.[137] The Court argued that "[i]n the course of regulating commercial and other human affairs, . . . Congress routinely creates burdens for some that directly benefit others."[138] Particularly significant was the Court's finding that this retroactive liability had precedent over contractual agreements in place by the parties involved that expressly limited pension contributions.[139] Contractual obligations

130. 29 U.S.C §§ 1381-1461 (1980). *See* Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602 (1993); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 226-27 (1986).

131. 29 U.S.C. § 1001 (1984); *see* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984).

132. *See, e.g.*, *Bradley*, 416 U.S. 696 (upholding statute imposing retroactive application of attorney's fees award).

133. 428 U.S. 1 (1976).

134. *Id.* at 18.

135. *Id.* at 16; *see* Holland v. Keenan Trucking, Inc., C.A. No. 2:93-1223 (S.D.W.Va. 1995), *aff'd*, 102 F.3d 736, 740 (4th Cir. 1996) (expanding on the legitimacy of Congress's power to enact corrective legislation by concluding "when, as with the Coal Act, Congress legislates within the core of its commerce power to regulate economic matters, such legislation carries a heavy presumption of validity").

136. 475 U.S. 211 (1986).

137. *See id.* at 222.

138. *Id.* at 223.

139. *See id.* at 223-24.

were overridden by Congress's power to apply corrective economic legislation retroactively.[140]

Additionally, federal tax legislation applied retroactively survived a constitutional challenge in the 1994 case, *United States v. Carlton*.[141] When a Due Process Clause analysis was made regarding the constitutionality of an amendment to an estate tax law,[142] the Court upheld the statute, ruling that it was "neither illegitimate nor arbitrary."[143] The Court reasoned that "Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss."[144] Further, the amendment prevented burdening "innocent" taxpayers, and since Congress promptly promulgated the corrective measure, the amendment "established a modest retroactivity period that extended only slightly longer than one year."[145]

The Supreme Court has in fact endorsed Congress' authority to enact retroactive legislation in instances when it is "confined to short and limited periods required by the practicalities of producing national legislation."[146] In *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*,[147] Congress was concerned with the continuation of multiemployer pension benefits to vested employees and promulgated the Multiemployer Pension Plan Amendments Act of 1980 to impose mandatory payment obligations on employers exiting the plan.[148] In effect, the law imposed payment liabilities on employers who withdrew from multiemployer plans five

140. *See id.* (holding that "[c]ontracts, however express, cannot fetter the constitutional authority of Congress").

141. 512 U.S. 26 (1994).

142. *See* 26 U.S.C. § 2057 (1988).

143. *Carlton*, 512 U.S. at 32. Some scholars have argued that this case effectively dashed any future prospects of a successful Due Process challenge to a retroactive imposition of tax liability. *See, e.g.*, Faith Colson, *Constitutional Law-Due Process-The Supreme Court Sounds the Death Knell for Due Process Challenges to Retroactive Tax Legislation:* United States v. Carlton, 27 RUTGERS L.J. 243 (1995); Laura Ricciardi & Michael B. W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301 (1996).

144. *Carlton*, 512 U.S. at 32. Instead of a general taxation corrective measure, Congress chose to deny deductions in Employee Stock Ownership Plan transactions "to those who had made purely tax-motivated stock transfers." *Id.*

145. *Id.* at 27.

146. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 731 (1984) (citing United States v. Darusmont, 449 U.S. 292, 296-97 (1981)).

147. 467 U.S. 717 (1984).

148. *See id.* at 721-25.

months prior to the law's enactment. The Court found no due process violation of the statute since "[t]he effective date . . . encompassed only that retroactive time period that Congress believed would be necessary to accomplish its purposes."[149]

### A. *CERCLA Legislation*

The most evident area where retroactive legislation runs rampant involves CERCLA or the "Superfund" legislation. Enacted in 1980, the practicalities addressed by this law involved finding an immediate and comprehensive solution for the serious pollution problems created by hazardous waste sites that were abandoned or inactive.[150] Indeed, CERCLA was borne out of a need for corrective measures to address several major environmental disasters that occurred at that time. The public perceived hazardous waste as a national crisis after the Love Canal[151] and Valley of the Drums[152] incidents.[153] Additionally, "CERCLA was a response to the perceived deficiencies and inadequacies of ex-

149. *Id.* at 731.

150. For a general description of the "Superfund" legislation, see CERCLA Overview, http://www.epa.gov/superfund/whatissf/cercla.htm (visited Mar. 26, 1999) (on file with the *Buffalo Law Review*). This law created a tax on the chemical and petroleum industries and provided broad Federal authority to respond directly to releases or threatened releases of hazardous substances that may endanger public health or the environment. Over five years, $1.6 billion was collected and the tax went to a trust fund for cleaning up abandoned or uncontrolled hazardous waste sites.

151. *See* DANIEL MAZMANIAN & DAVID MORELL, BEYOND SUPERFAILURE: AMERICA'S TOXICS POLICY FOR THE 1990's 3, 27 (1992). Occidental Petroleum's Hooker Chemical & Plastics Corporation disposed of more than twenty thousand tons of hazardous waste at its Niagara Falls, New York, site during the 1940s and 1950s, resulting in contaminated groundwater. In 1977 when the Niagara River overflowed, homes in Love Canal were contaminated with over two hundred toxic chemicals and the area was declared a federal emergency disaster location. *See id.*; *see also* Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 66-67 (1992) (explaining that the public pressure generated by Love Canal led to the enactment of federal environmental laws).

152. *See* 1 ALLAN J. TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE 3 (1992) (describing The Valley of the Drums as a ravine in Kentucky where twenty thousand drums containing hazardous wastes were disposed of and caused contaminated groundwater).

153. *See* Richard L. Revesz & Richard B. Stewart, *The Superfund Debate, in* ANALYZING SUPERFUND: ECONOMICS, SCIENCE AND LAW 3, 5 (Richard L. Revesz & Richard B. Stewart eds., 1995).

isting federal environmental protection law, particularly the Resource Conservation and Recovery Act"[154] which operated prospectively.[155] The purpose of CERCLA was to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."[156] In an attempt to conquer this task, Congress's goal was to distribute the cleanup costs among the responsible parties.[157]

The retroactive application of CERCLA liability has been challenged since 1983, and the courts appear settled on its constitutionality.[158] In fact, all but one of approximately thirty federal courts that have addressed the question of CERCLA's retroactive liability have ruled that CERCLA's liability provisions apply to pre-enactment activities.[159] Interestingly, the Supreme Court has never addressed the issue of CERCLA's retroactive effect. Lower courts have predominantly interpreted CERCLA to apply retroactively, recognizing that "Congress intended to have the chemical industry, past, and present, pay for the costs

154. 42 U.S.C. §§ 6901-86 (1994 & Supp. II 1996) (codified as an amendment to the Solid Waste Disposal Act).

155. *See* Nevada v. United States, 925 F. Supp. 691, 703 (D. Nev. 1996) (citing United States v. Shell Oil Co., 605 F. Supp. 1064, 1070-72 (D. Colo. 1985)); United States v. Wade, 546 F. Supp. 785, 792-93 (E.D. Pa. 1982) (finding that CERCLA was "designed to plug gaps" in existing federal pollution laws).

156. S. REP. NO. 69-848, at 2 (1980), *reprinted in* 1 A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980, at 308 (1983).

157. The two primary objectives of CERCLA are: (1) cleaning up hazardous waste sites; and (2) holding the responsible parties liable for the cost of cleanup. *See* S. REP. NO. 848, at 12 (1980) *cited in* Montgomery, *supra* note 108, at 281 & n.10.

158. *See* United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985) (finding that responsible parties are liable for pre-enactment government response costs); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983).

159. *See* Charles de Saillan, *CERCLA Liability for Pre-Enactment Disposal Activities: Nothing Has Changed*, 11 No. 9 NAAG NAT'L ENVTL. ENFORCEMENT J. 3, 4 & n.14 (Oct. 1996) (explaining that the decision in *United States v. Olin Corp.*, 927 F. Supp. 1502 (S.D. Ala. 1996), is the only exception to almost thirty court decisions that have upheld CERCLA's retroactive liability); *see also* United States v. Olin Corp., 927 F. Supp. 1502, 1507 & n.25 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997) (citing an extensive list of cases which have applied CERCLA liability on a retroactive basis).

of cleaning up inactive hazardous waste sites."[160] Additionally, § 9607(a) is recognized as "the sort of provision that must be understood to operate retroactively because a contrary reading would render it ineffective."[161]

This retroactive liability interpretation persists despite the lack of *express* language in the Act requiring retroactive application.[162] Courts reached the conclusion that Congress intended CERCLA to apply retroactively by utilizing a textual analysis of CERCLA's liability provision, and by delving into the legislative history of the Act. Specifically, courts have focused on the past tense language contained in CERCLA's liability provision to conclude that the Act is retrospective.[163] They found that because § 9607(a) is written in the past tense, this "indicat[es] that it applies to past activities," and this makes it "manifestly clear that Congress intended CERCLA to have retroactive effect."[164]

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160. *Northeastern Pharm.*, 579 F. Supp. at 840; *see also* Louisiana-Pacific Corp. v. ASARCO, Inc., 24 F.3d 1565, 1575 (9th Cir. 1994) ("CERCLA is to be broadly interpreted to achieve its remedial goals."); United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990) ("In order to achieve the 'overwhelmingly remedial' goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favor liability . . . .") (quoting Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990)); California v. Celtor Chem. Corp., 901 F. Supp 1481, 1490 (N.D. Cal. 1995) ("[T]he Court has an obligation to construe CERCLA broadly to accomplish its remedial goals."); United States v. Mottolo, 605 F. Supp. 898, 902 (D. N.H. 1985) ("[T]he remedial intent of CERCLA requires a liberal statutory construction designed to avoid frustration of the Act's purpose."); de Saillan, *supra* note 159, at 4.

161. *Olin*, 927 F. Supp. at 1519 (quoting Landgraf v. USI Film Products, 511 U.S. 244, 286 (1994)).

162. *See* Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 695 (D. Nev. 1996) (holding "the clear intent of Congress was to provide for retroactive application of the CERCLA liability provisions"); *Northeastern Pharm.*, 810 F.2d at 733; *Shell Oil*, 605 F. Supp. at 1079 (holding "the whole purpose and scheme of CERCLA is retrospective and remedial"); *Georgeoff*, 562 F. Supp. at 1313-14 (concluding that "the Congressional intent to make industry pay for the clean up costs must be interpreted as an intent to authorize lawsuits which impose liability retroactively upon transporters").

163. *See* 42 U.S.C. § 9607(a)(2)(3)(4) (1994) (stating that liability applies to "[a]ny person who . . . *owned* or *operated* any facility at which such hazardous substances were disposed of, any person who . . . *arranged* for disposal . . . of hazardous substances . . . any person who accepts or *accepted* any hazardous substances . . . shall be liable") (emphasis added).

164. United States v. Stringfellow, 20 Env't Rep. Cas. (BNA) 1912, 1915 (C.D. Cal. 1984) (concluding that CERCLA's § 107 "is constructed in the past tense, indicating that it applies to past activities"); *see also Northeastern Pharm.*, 810 F.2d at 732-33; *Georgeoff*, 562 F. Supp. at 1300; Michelle LeVeque, *Rationales for Applying CERCLA Retroactively After* Landgraf v. USI Film

The legislative history of CERCLA also lent support to a finding of retroactive liability under the Act. When the retroactive liability issue was first addressed by the courts in 1983, the court in *Brown v. Georgeoff*[165] concluded from an examination of CERCLA's legislative history that "[t]he Congressional intent to make industry pay for the cleanup costs must be interpreted as an intent to authorize lawsuits which impose liability retroactively . . . ."[166] A later court agreed that Congress must have intended CERCLA to have retroactive application, reasoning that CERCLA is by nature retrospective because "[m]any of the human acts that have caused the pollution already had taken place before its enactment; physical and chemical processes are at their pernicious work, carrying destructive forces into the future."[167] Further, the acts that resulted in hazardous contamination were the very targets of CERCLA legislation.[168] This view was confirmed by the Eighth Circuit in *United States v. Northeastern Pharmaceutical & Chemical Co.*,[169] where the court upheld the law's retroactive effect finding that "CERCLA's backward-looking focus is confirmed by the legislative history."[170]

However, not all courts agreed that the legislative history of CERCLA supports its retroactive application.[171]

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Products: *Overcoming the Presumption Against Retroactivity*, 59 OHIO ST. L. J. 603, 605-06 (1998); Taylor, *supra* note 127, at 61. *Cf.* Nevada v. United States, 925 F. Supp. 691 (D. Nev. 1996) (holding that "CERCLA's text and structure reveal clear congressional intent to apply the response cost liability section retroactively" but not relying on past verb tenses to reach this conclusion); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985) (finding that retroactive application of CERCLA liability is consistent with legislative intent on different grounds).

165. 562 F. Supp. 1300 (N.D. Ohio 1983).

166. *Id.* at 1313-14 (upholding the imposition of liability for pre-enactment waste disposal on transporters).

167. *Shell Oil Co.*, 605 F. Supp. at 1072.

168. *See* CERCLA preamble, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (explaining that the purpose of CERCLA is "to provide for . . . the cleanup of inactive hazardous waste disposal cites").

169. 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

170. *Id.* at 732, 733 ("Congress intended CERCLA to apply retroactively."); *see also* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989) (upholding CERCLA's retroactive liability based on congressional intent); de Saillan, *supra* note 159, at 8-11.

171. *See, e.g.*, United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997). Justice Hand held in this district court opinion that "Congress did not clearly express its intent that the liability provision of CERCLA be retroactive . . ." and "CERCLA itself has almost no

These courts point to the lack of actual history available for CERCLA.[172] In particular, a conference report, which is a standard mechanism for recording legislative background, does not even exist for CERCLA.[173] It was postulated by some that CERCLA was a hastily constructed compromise by a lame duck Congress on an emergency basis, making the intent behind the Act murky at best.[174]

The only court to ever rule that CERCLA is unconstitutional because of its retroactive liability was the Alabama District Court in 1996.[175] In *United States v. Olin Corp.*,[176] CERCLA's liability provisions were found not to apply retroactively, and the Act was held unconstitutional because it exceeded Congress's commerce clause authority.[177] As a basis for his argument, Judge Hand relied on the 1994 case, *Landgraf v. USI Film Products*,[178] which held that there is a presumption against retroactive application of a statute

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legislative history." *Id.* at 1503, 1513; *see also* Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1311 (N.D. Ohio 1983) (finding "the precise issue of retroactivity . . . was not addressed in Congressional debates").

172. *See Olin*, 927 F. Supp. at 1503, 1513; *see also* Artesian Water Co. v. Government of New Castle County, 851 F.2d 643, 648 (3d Cir. 1988) (finding that "CERCLA is not a paradigm of clarity or precision" and "[i]t has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage").

173. *See* George Clemon Freeman, Jr., *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 BUS. LAW. 215, 223 (1986).

174. *See* LeVeque, *supra* note 164, at 605; *see also* FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.02(2)(a), at 4A-78.176 (1998) (discussing CERCLA's unusual legislative history). *But see* de Saillan, *supra* note 159, at 8-11 (explaining that "although [CERCLA's legislative history] may be fragmented and incomplete," it is substantial and does "provide[] valuable insight to many of CERCLA's provisions").

175. *See* de Saillan, *supra* note 159, at 4 & n.15; *see also* Mary Francis Palisano, *United States v. Olin Corporation: How a Polluter Got Off Clean*, 15 PACE ENVTL. L. REV. 401, 402 (1997).

176. 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

177. *See id.* at 1503. The District court's decision in *Olin* was subsequently not followed by a group of cases. *See, e.g.*, Cooper Indus., Inc. v. Agway, Inc., 987 F. Supp. 92 (N.D.N.Y. 1997) (declining to follow *Olin*); United States v. Glidden Co., 3 F. Supp.2d 823 (N.D. Ohio 1997) (concluding that Congress intended CERCLA to have a retroactive effect); Gould Inc. v. A & M Battery and Tire Serv., 933 F. Supp. 431 (M.D. Pa. 1996) (holding that "we are unpersuaded by the determination of the . . . District Court . . . which declared [Superfund] unconstitutional as it purports to impose retroactive liability"); Nevada v. United States, 925 F. Supp. 691 (D. Nev. 1996); United States v. NL Indus., Inc. 936 F. Supp. 545 (S.D. Ill. 1996) (declining to follow *Olin*).

178. 511 U.S. 244 (1994).

that can only be overcome by clear evidence of congressional intent.[179] Since Judge Hand found this intent lacking in CERCLA, both in the statutory language and in the legislative background, he concluded that the liability sections of CERCLA are not retroactive.[180]

This determination was short-lived as the Eleventh Circuit unanimously reversed the decision on appeal.[181] Responding to the District Court's conclusion that liability costs only apply to waste disposal acts subsequent to CERCLA's enactment date, Judge Kravitch stated that "this ruling not only conflicts with this court's recent description of CERCLA, but also runs contrary to all other decisions on point."[182] This conclusion effectively dashed any new support the *Olin* case may have provided for overturning CERCLA on retroactive liability grounds. This ruling restored this issue to firm ground, and consequently, any new challenges have the burden of overcoming this formidable judicial predisposition.

Concurrent with the judicial interpretation of CERCLA's retroactivity that was taking place, Congress faced the formidable task of addressing CERCLA's retroactive liability in considering CERCLA's reauthorization.[183] Subsequent to the expiration of the Superfund's taxing authority in 1985, Congress passed the 1986 reauthorization bill, Superfund Amendments and Reauthorization Act (SARA).[184] Although SARA significantly altered aspects of CERCLA, the amendments did not restrict the retroactive liability of the original Act.[185] Many saw the inaction of Congress on this matter as the intent to

179. *See Olin*, 927 F. Supp. at 1511-12 (citing *Landgraf*, 511 U.S. at 286).

180. *See id.* at 1519.

181. *See* United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997).

182. *Id.* at 1511-12.

183. *See* Nancy K. Kubasek et al., *Retroactive Liability Under the Superfund: Time to Settle the Issue*, 13 J. LAND USE & ENVTL. L. 197, 206 (1997).

184. Pub. L. No. 99-499, 100 Stat. 1613 (1986).

185. *See* Kubasek et al., *supra* note 183, at 208 & n.67 (citing David J. Hayes & Conrad B. MacKerron, *Superfund II: A New Mandate, A BNA Special Report*, 17 ENV'T REP. 1, 1-2 (1987) (enumerating several revisions SARA made to the original Act, including "strict cleanup standards strongly favoring permanent remedies at waste sites, stronger EPA control . . . mandatory schedule for initiation of cleanup work and studies . . . increased state and public involvement in the cleanup decision-making process . . ." and an increase in funding to $8.5 billion over five years "raised through a new $2.5 billion broad based tax on business income and . . . petroleum . . .")).

maintain the retroactive liability application of CERCLA.[186] Indeed a popular belief was that SARA was a "misnomer," and a more accurate reference to the reauthorization was RACHEL—the "Reauthorization Act Confirms How Everyone's Liable."[187] Since a reenactment of a statute incorporating settled case law has been held by the Supreme Court to "include[] the settled judicial interpretation of the statute,"[188] the courts and the legislature appeared in synchronism on the issue of CERCLA's retroactive application.

## IV. A COMPARISON—THE COAL ACT AND CERCLA

The glaring commonality between the Coal Act and CERCLA is that both Acts do not contain explicit statements regarding their retroactivity. The judiciary has instead interpreted the implicit intent of these laws to find retroactive liability application. Specifically, there was no explicit promise to pay lifetime health care benefits to mine workers and their families prior to the 1974 National Bituminous Coal Wage Agreement between the United Mine Workers of America and the Bituminous Coal Operators' Association.[189] Nevertheless, because the Coal Act effectively merges the 1950 Benefit Plan with the 1974 Benefit Plan, the Coal Act is interpreted as financially protecting lifetime health care benefits for retirees under the later agreement, despite the fact that these benefits were never explicitly promised.[190] This interpretation persists despite a stated congressional intent behind the Coal Act "to make no attempt to rewrite the collective bargaining agreements to penalize . . . conduct or to readjust the contractual rights and liabilities of the parties to the [National Bituminous

186. *See* de Saillan, *supra* note 159, at 11; Kubasek et al., *supra* note 183, at 208-09.

187. Robert H. Abrams, *Superfund and the Evolution of Brownfields*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 265, 271 (1997).

188. de Saillan, *supra* note 159, at 11 (citing Herman & MacLean v. Huddleston, 459 U.S. 375, 384-86 (1983); Lorillard v. Pons, 434 U.S. 575, 581 (1978)).

189. *See* Eastern Enters. v. Apfel, 524 U.S. 498, 553 & n.3 (1998) (citing Davon, Inc. v. Shalala, 75 F.3d 1114, 1124-25) (7th Cir. 1996) ("It is undisputed that the [National Bituminous Coal Wage Agreements] did not contain an explicit promise of lifetime benefits until the 1974 . . . agreement.")).

190. *See id.* Eastern's payment obligations under the Coal Act were seen as assessments made "without any regard to responsibilities that Eastern accepted under any benefit plan the company itself adopted." *Id.* at 531.

Coal Wage Agreements]."[191]

Similarly, CERCLA is consistently interpreted by case law to apply retroactively even though the Act does not explicitly state that it applies to past conduct.[192] As previously discussed, courts have relied upon past tense language utilized in the liability provision, § 9607(a), to infer intent by Congress that the liability must apply retroactively.[193] Looking at this liability provision, § 9607(a) enumerates four categories of "potentially responsible parties" (PRPs) CERCLA covers when "there is a release, or a threatened release [of a hazardous substance] which causes the incurrence of response costs . . . ."[194] The liable parties include:

> the owner or operator of a vessel or a facility [from which a release or *threatened* release of a hazardous substance occurs], any person who at the time of disposal of any hazardous substance *owned* or *operated* any facility at which such hazardous substances were *disposed* of, any person who . . . *arranged* for disposal or treatment, of hazardous substances . . . at any facility . . . *owned or operated* by another party . . . and any person who accepts or *accepted* any hazardous substances for transport to disposal or treatment facilities . . . [he or she] selected . . . .[195]

This section goes on to specify the "recoverable costs and damages" that apply to violations under CERCLA.[196] Blatantly absent from this liability section is any specific time limit on recovery for pre-enactment activities. However, courts have interpreted the past tense language utilized by Congress as indicative of the intent to apply liability to responsible parties on a retroactive basis.[197] This judicial interpretation survives despite the recognition that other CERCLA provisions do not apply retroactively.[198]

CERCLA imposes a strict retroactive liability unlike the conditional retroactive liability promulgated by the Coal Act that allows for more flexibility in application. The eco-

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191. Mary Helen Coal Corp. v. Hudson, 976 F. Supp. 366, 369 (E.D. Va. 1997), *rev'd*, 164 F.3d 624 (4th Cir. 1998).

192. *See* Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300 (D. Ohio 1983); *see also* LeVeque, *supra* note 164, at 605-06.

193. *See supra* notes 154-55 and accompanying text.

194. 42 U.S.C. § 9607(a) (1994).

195. *Id.* (emphasis added).

196. *Id.*

197. *See supra* notes 154-55 and accompanying text.

198. *See* de Saillan, *supra* note 159, at 6 (discussing §§ 402(b) and 109(c)).

nomic retroactive liability of the two laws is distinctly different. The "reach-back" provision under § 9706(a) of the Coal Act imposes a conditional liability.[199] This section states that the application of liability to a coal operator is based upon a hierarchy of assignments to a "signatory operator" (SO) for each eligible retiree beneficiary.[200] The Commissioner of Social Security directs assignment to a SO who remains in business in the following order: (1) first, to a SO who signed the most recent multiemployer pension plan and was the most recent SO to employ the retiree for at least two years, (2) if that SO is not available, the retiree is assigned to the most recent SO to employ the coal industry retiree who was a signatory to the 1978 Coal Wage Agreement, (3) finally, if a SO under either of the first two categories is not available, the retiree is assigned to the SO that employed the worker in the coal industry for "a longer period of time than any other [SO] prior to the effective date of the 1978 Coal Wage Agreement."[201] Effectively, the "reach-back" liability applies only when no other SO is available and applies only to miners employed by the operator.[202] Through this process of liability application, it is clear that whether a SO is liable for premiums to the multiemployer fund depends upon the other employers in the coal industry who might be found liable.[203] Thus, the Coal Act's purpose to "stabilize [multiemployer pension] plan funding and allow for the provision of health care benefits to [coal industry] retirees" is realized, but not at *any* cost to past participants.[204]

Additionally, Congress provided means for "relief" to the coal operators. The Coal Act contains provisions for transfer of moneys from other coal agreement pension funds and the Abandoned Mine Reclamation Fund to mitigate the operators' liability for unassigned retirees.[205] In fact, "the Coal Act authorizes the use of $210 million from the 1950 Pension Plan . . . to defray the cost of furnishing health

199. *See* 26 U.S.C. § 9706(a) (1994).
200. *Id.*
201. *Id.*
202. *See id.*
203. *See id.*; *see also* Eastern Enters. v. Chater, 110 F.3d 150, 158 (1st Cir. 1997) (explaining the hierarchical order of assignment and the statutory shield that exists for companies that are third in the hierarchy).
204. Eastern Enters. v. Apfel, 524 U.S. 498, 514 (1998).
205. *See* 26 U.S.C. § 9705(a)(3)(b) (1994).

benefits . . . ."[206] Admittedly, this provision is limited to "orphan" retirees who are unable to be assigned to an employer in the industry. However, further relief also exists in § 9706(f)(6) of the Coal Act, which preserves the right of a party to seek indemnification from others in a separate civil action.[207] This section effectively "helps to diminish the Act's 'economic impact,'" by mitigating the financial liability imposed by the Act.[208]

This is unlike CERCLA which imposes strict, joint and several liability on the four broad categories of PRPs under § 9607.[209] Basically, "CERCLA applies to essentially any actual or threatened release of a hazardous substance whether at an inactive or active site, regardless of the applicability of other statutes,"[210] and parties who were involved in *any* aspect of handling hazardous materials are subject to liability for disposal of the waste.[211] Adding to the broad imposition of the Act, the retroactive liability provision in CERCLA is virtually unlimited in its applicable time frame. Courts have upheld CERCLA's retroactive liability in situations where the disposal of hazardous waste occurred several decades in the past.[212] Significantly, the dis-

206. *Eastern Enters. v. Chater*, 110 F.3d at 161.

207. *See* 26 U.S.C. § 9706(f)(6).

208. *Eastern Enters. v. Apfel*, 524 U.S. at 567.

209. *See* 42 U.S.C. § 9607(a) (1994); United States v. Hardage, 982 F.2d 1436, 1443 (10th Cir. 1992), *cert. denied sub. nom.* Advance Chem. Co. v. United States, 510 U.S. 913 (1993); O'Neil v. Picillo, 883 F.2d 176, 182 & n.9 (1st Cir. 1989) (finding that CERCLA liability is strict); Idaho v. Hanna Mining Co., 882 F.2d 392, 394 (9th Cir. 1989) (finding CERCLA imposes strict liability); United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988), *cert. denied,* 490 U.S. 1106 (1989) (finding CERCLA's retroactive liability is strict, joint and several).

210. Adam Babich, *Understanding the New Era in Environmental Law*, 41 S.C. L. REV. 733, 750 (1990).

211. *See* 42 U.S.C. § 9607(a) (1994). As previously outlined, these parties include: (1) owners and operators of facilities or vessels; (2) any person who owned or operated any facility for the disposal of hazardous substances; (3) any person who arranged for disposal of hazardous materials at any facility operated or owned by another party; and (4) any person who transports hazardous substances.

212. *See, e.g.*, United States v. Glidden Co., 3 F. Supp.2d 823, 839 (N.D. Ohio 1997) (holding that CERCLA applied retroactively to site where disposal of hazardous waste "occurred at least twenty years prior"); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985) (finding Shell liable for hazardous waste clean-up under CERCLA for disposal activities dating back to 1947); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982) (imposing liability on coal tar refiner who had generated and disposed of chemical wastes for more than 50 years prior to CERCLA's enactment); United States

posal may have been accomplished properly at the time, but one or more of the PRPs may still be found liable many years later. This vast and seemingly open-ended imposition of retroactive liability led one author to accurately depict CERCLA's effect as "a black hole that indiscriminately devours all who come near it."[213]

This "rigid" approach to solving environmental pollution problems through CERCLA prevents leniency in its application. The window of opportunity for challenges is almost non-existent. In some cases, under CERCLA there are virtually no defenses available to a claimant.[214] This is in sharp contrast to the Coal Act, where the First Circuit in *Eastern Enterprises* found that "the fact that the Coal Act contains provisions which moderate the statutory toll is also probative of a constitutionally tolerable economic impact."[215]

Although the purpose of both CERCLA and the Coal Act is to impose economic liability on responsible parties to remedy dire situations, the industries aimed at are vastly different. The size of the environmental problem to be tackled by CERCLA can be ascertained by the multi-million dollar Superfund created by the Act.[216] CERCLA's broad remedial purpose is arguably seen as the only means to combat a problem of this magnitude. The harm inflicted by hazardous waste contamination is to the public at large, which seemingly justifies CERCLA's joint and several retroactive liability scheme. Further, the nature of the activity associated with the coal mining operations may be viewed as more valuable than that associated with manufacturing facilities that generate hazardous wastes. Indeed, the government recognized the essential contribution connected to the coal industry when it stepped in to resolve a nationwide coal miners strike in 1946.[217]

Conversely, the size of the retroactive burden addressed

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v. Vertac Chem. Corp., 489 F. Supp. 870 (E.D. Ark. 1980) (holding herbicide manufacturer liable under CERCLA for hazardous waste disposal activities from the 1940s).

213. Jerry L. Anderson, *The Hazardous Waste Land*, VA. ENVTL. L. J. 1, 6-7 (1993).

214. *See* 42 U.S.C. § 9607(b); *see also* cases cited *supra* note 209.

215. Eastern Enters. v. Chater, 110 F.3d 150, 161 (1st Cir. 1997).

216. *See* Babich, *supra* note 210, at 749.

217. *See* Eastern Enters. v. Apfel, 524 U.S. 498, 505 (1998) (citing Exec. Order No. 9728, 11 Fed. Reg. 5593 (1946)).

by the Coal Act is comparatively smaller, allowing for a direct connection of the liability to the offending parties. The nexus of the burden imposed by the Coal Act to the responsible party is made with much more specificity than is possible under CERCLA's expansiveness. A "clear causal link" based on a "one-to-one relationship" can be meted out under the Coal Act's single liability scheme.[218] Proportional application of the Coal Act may be preserved. This contrasts with CERCLA, where liability is viewed as disproportionate to the problem to be remedied, often times imposing what are interpreted as punitive damages.[219] Indeed, the "retroactive punishment" associated with CERCLA is distinctly different from the "retroactive adjustment of compensatory obligations" associated with the Coal Act.[220]

Under a fundamental fairness analysis, both the Coal Act and CERCLA place liability upon the parties that received a benefit. For example, the Coal Act applies only to the coal operators who actually employed the mine workers and reaped the benefit of their efforts.[221] An exception to this rule is made when the employers are no longer in business to bear the responsibility for health care benefits, leaving "orphan" retirees.[222] In these instances, the Coal Act provides for a proportional assignment to the coal operators remaining in business to cover the retirees' health care needs.[223] Arguably, CERCLA imposes liability upon those who benefited from the use of the natural resources.

Additionally, the legitimate expectation interests of parties under CERCLA and the Coal Act are vastly different. CERCLA focuses on activities that were lawful at one time to correct present harms from past acts.[224] Although the Coal Act is also remedial legislation, this statute is not deeming a past lawful activity now unlawful. Contracts existed between the coal operators and their employees as a result of good faith negotiations for pension benefits.[225] The

218. Freeman, *supra* note 173, at 246 (discussing the Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976), decision and its applicability to CERCLA).

219. *See id.*

220. *Id.* at 246-47

221. *See* 26 U.S.C. § 9706(a) (1994).

222. *See id.* §§ 9703(f), 9704(d).

223. *See id.*

224. *See supra* pp. 530-32 (discussing CERCLA's application to prior lawful acts).

225. *See* Eastern Enters. v. Apfel, 524 U.S. 498, 503-11 (1998) (discussing

employers had legitimate expectations for a certain amount of health benefit and retirement moneys to be paid to employees as a result of signed agreements.[226] These settled expectations were upset by subsequent legislation that altered the employers' responsibilities.[227] Certainly, comparatively diminished expectations existed for the actors under CERCLA. Although no laws existed which mandated tort liability for hazardous waste disposal acts, there was only a limited expectation of non-liability for contaminating areas with known toxins. Pre-CERCLA, manufacturers were mainly concerned with the efficiencies of hazardous waste disposal which ultimately led to the creation of many hazardous waste sites.[228] These acts were not unlawful at the time, but they were accomplished with abandon regarding public health and environmental safety.

## V. THE IMPACT OF *EASTERN ENTERPRISES V. APFEL*

### A. *Coal Act Challenges*

Some claimants have looked to the Supreme Court's decision in *Eastern Enterprises* to find support for constitutional challenges to retrospective laws. A recent case was successful in challenging the Coal Act on this basis. In *Mary Helen Coal Corp. v. Hudson*,[229] a coal operator brought suit against the trustees of the benefit plan claiming that the Coal Act violated its Fifth Amendment constitutional rights.[230] Like Eastern Enterprises, Mary Helen Coal had discontinued its involvement in the coal industry many years prior to the 1974 multiemployer benefit agreement and the enactment of the Coal Act in 1992.[231] Mary Helen Coal argued that it had not "engaged in coal mining nor

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the various wage agreements and multiemployer trust agreements in the coal industry).

226. *See id.*

227. *See id.*

228. *See* CRAIG E. COLTON & PETER N. SKINNER, THE ROAD TO LOVE CANAL: MANAGING INDUSTRIAL WASTE BEFORE E.P.A. 46 (1996) (discussing hazardous waste disposal practices in the 1940s and 1950s).

229. 976 F. Supp. 366 (E.D. Va. 1997), *rev'd*, 164 F.3d 624 (4th Cir. 1998).

230. *See id.* at 367 (claiming a violation of the Takings Clause and the Due Process Clause of the Fifth Amendment).

231. *See id.* at 369-70.

employed coal miners since 1963," and additionally, had not "contributed in [any] way to any legitimate expectation of lifetime benefits for [union] retirees or their dependents."[232] Consequently, the former coal operator alleged that the monetary assessments imposed on it by the Coal Act were "arbitrary, irrational, and contrary to the rationale of the Coal Act" in violation of its Fifth Amendment rights.[233] Mary Helen Coal asserted that these assessments would effectively "render it insolvent."[234] The District Court disagreed with Mary Helen Coal's argument, instead pointing to "the plethora of case law to the contrary" and Mary Helen Coal's alleged involvement in creating a "legitimate expectation of lifetime health benefits" to retired mineworkers and their families as rationale for upholding the Coal Act as it applied to Mary Helen Coal.[235] On appeal, the Fourth Circuit held the decision in abeyance pending the outcome of *Eastern Enterprises*.[236] Subsequently, the court ruled in favor of Mary Helen Coal because its case was "materially indistinguishable from *Eastern*."[237]

The Association of Bituminous Contractors made an unsuccessful challenge to the Coal Act's constitutionality in 1998.[238] Although the Court of Appeals upheld the constitutionality of the Coal Act in *Association of Bituminous Contractors, Inc. v. Apfel*, interestingly, the sole constitutional argument made by the appellant was a due process rights violation.[239] Recognizing that "analysis of legislation under the Takings and Due Process Clauses is correlated to some extent," but not equivalent, the court left the impression that a Takings Clause challenge may have reaped a differ-

232. *Id.* at 370.

233. *Id.* Benefit plan trustees demanded Mary Helen Coal make health benefit payments from 1993 to the present.

234. *Id.* Although no total dollar assessment was provided, the court noted that payments owed by Mary Helen Coal to the combined fund for the period March 12, 1996 through June 30, 1997 were approximately $617,000.

235. *Id.* at 375-76.

236. *See* Mary Helen Coal Corp. v. Hudson, No. 97-2331, 1998 WL 708687, at *1 (4th Cir. 1998).

237. *Id.*

238. *See* Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246 (D.C. Cir. 1998). The Association of Bituminous Contractors is described as a "multi-employer association of contractors that specialize in coal mine construction and related projects," created as a negotiating entity for collective bargaining agreements with the United Mine Workers of America. *Id.* at 1248.

239. *See id.* at 1253, 1258.

ent result for the appellant.[240] Even though the plurality in *Eastern Enterprises* did not address a due process claim by Eastern, the Circuit Court here found this precedent relevant to its decision.[241] The court held that "if the Association's members were in substantially similar factual circumstances to Eastern, we would be compelled to resolve . . . whether the quality and quantity of retroactive liability identified in *Eastern Enterprises* also violates the Due Process Clause."[242] However, the court went on to recognize that the Association's case was factually dissimilar to Eastern's situation.[243] A key distinguishing factor was the Association's current participation in the coal industry, an industry that Eastern had exited in 1965.[244] Because the Association's members were still involved in the coal industry, the court could not find a disproportionate and unfairly retroactive effect imposed on it by the Coal Act.[245] Stated succinctly by the court, "the only binding aspect of *Eastern Enterprises* is its specific result–holding the Coal Act unconstitutional *as applied to Eastern Enterprises*."[246]

### B. *Other Retroactive Laws*

Other subsequent challenges to the constitutionality of retroactive statutes have not fared well. For example, as a cited precedent to a challenge to the Fair Labor Standards Act of 1938,[247] the court found the *Eastern Enterprises* decision inapplicable.[248] The court concluded that the plaintiffs' takings claim was "not properly before [the court]" on jurisdictional grounds.[249] Although the court lacked standing to hear the employees' takings claim, the court distinguished

240. *Id.* at 1253-54. The court pointed out that the appellant appeared to have made a Takings Clause argument by utilizing the three-factor analysis of *Connolly*, but never actually brought a Takings Clause claim against the constitutionality of the Coal Act. As a result, the court was forced to restrict its analysis of this case to a due process challenge. *See id.* at 1254.

241. *See id.* at 1255 & n.6.

242. *Id.* at 1256.

243. *See id.*

244. *See id.*

245. *See id.*

246. *Id.* at 1255 (discussing the government's argument) (emphasis added).

247. 29 U.S.C. § 201 (1989).

248. *See* Adams v. Hinchman, 154 F.3d 420, 426 & n.9 (concluding that the *Eastern Enterprises* decision does not "affect[] the outcome of this case").

249. *Id.* at 425-26.

this case from *Eastern Enterprises* since "[the] plaintiffs here are not threatened with a taking by a 'challenged statute' that 'requires a direct transfer of funds' from them to the government."[250] Further, "the circumstances found to support district court jurisdiction in *Eastern Enterprises* do not exist in this case."[251]

### C. *CERCLA Challenges*

In *United States v. Vertac Chemical Corp.*[252] a CERCLA constitutional challenge was brought by defendants in seeking to escape the government's recovery of $102 million in response costs associated with the cleanup of an abandoned herbicide and chemical manufacturing waste site in Arkansas.[253] The Environmental Protection Agency (EPA) placed the Vertac Chemical site on its National Priority List (NPL) of Superfund sites in 1983, and initiated removal of more than 28,500 drums of dioxins and other toxic wastes in 1987.[254] The defendants were held jointly and severally liable for these response costs, despite their argument that "the actions of the [EPA] were arbitrary, capricious and not in accordance with law."[255] Although not central to the defendants' argument, they requested the court readdress the constitutionality of the retroactive application of CERCLA in light of the *Eastern Enterprises* decision.[256] The court found *Eastern Enterprises* inapplicable, reasoning that the issue of CERCLA's constitutionality had been previously litigated in this case and resolved in favor of upholding CERCLA's constitutionality.[257] Because the defendants were found liable for the hazardous waste contamination at Vertac's site, the court held that "[t]here is no basis to warrant reconsideration of the constitutionality of CERCLA."[258] Giving absolutely no weight to *Eastern Enterprises*, the court instead cited precedents upholding CERCLA's retro-

250. *Id.* (citing *In re* Chateaugay Corp., 53 F.3d 478, 493 (2d Cir. 1995)).
251. *Adams*, 154 F.3d at 426 & n.9.
252. 33 F. Supp.2d 769 (E.D. Ark. 1998).
253. *See id.* at 772. Reimbursement to the government is sought under CERCLA's liability section, 42 U.S.C. § 9607(a)(4)(a) (1996).
254. *See Vertac Chemical Corp.*, 33 F. Supp.2d at 771-72.
255. *Id.* at 771.
256. *See id.* at 784-85.
257. *See id.* at 785.
258. *Id.*

active liability scheme.[259]

## VI. THE EVOLVEMENT OF A "MORE FAIR" CERCLA

Although it is not likely there will any sweeping invalidation of CERCLA's strict retroactive liability scheme in the aftermath of *Eastern Enterprises*, it is worth noting that the tripartite dynamics of judicial, administrative, and legislative law over the nineteen years since its enactment has resulted in a lessening of the harshness of the application of liability under CERCLA today. The pendulum has swung over time, albeit slowly and erratically in certain instances, towards a more fair application of retroactive liability under CERCLA. This development was inevitable as the public's focus on hazardous waste site problems abated, rightly or wrongly, with the perception that a solution was in progress. Indeed, the national environmental crisis addressed by CERCLA had seemingly passed. Additionally, economic reasons acted to "push the pendulum" towards change. For example, diminished property values, negative impacts in investment markets, and transaction costs of CERCLA that often dwarfed cleanup costs[260] all contributed to the necessity for change.

The best way to comprehend this "evolution towards fairness" as it pertains to CERCLA is by reviewing the developments in each of the three component parts of this law-developing framework—statutory law, regulatory law, and common law. A prime example of the interaction of these entities demonstrating this evolvement is seen in the Lender Liability Statutory Protections passed by Congress.[261] These protections are aimed at insulating lenders from liability under the Superfund.

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259. *See id.* (citing United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 732-34 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. Olin, 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506, 1511-15 (11th Cir. 1997)).

260. *See* John J. Lyons, *Deep Pockets and CERCLA: Should Superfund Liability be Abolished?*, 6 STAN. ENVTL. L.J. 271 (1986/1987) (arguing that shifting the cost of environmental cleanup from the government to PRPs creates huge transaction costs to the public's detriment).

261. *See* The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, 42 U.S.C. § 9601(20)(E)-(G) (1996); 42 U.S.C. § 9607(n)(1)-(8) (1998).

A. *Lender Liability Protections*

As originally enacted, lender liability under CERCLA is imposed under § 9607(a), which provides that a party that "own[s] or operate[s]" a facility either presently or "at the time of disposal of any hazardous substance" is potentially responsible for response costs incurred by the government in the cleanup of hazardous wastes resulting from the facility.[262] As with other PRPs under this section, CERCLA holds an owner or operator of a facility strictly liable for the expenses incurred. This section does, however, exempt from liability "secured creditors" which includes a "person, who, without participating in the management of a . . . facility, holds indicia of ownership primarily to protect his security interest in the . . . facility."[263] Known as the "secured creditor exemption," much uncertainty surrounded its interpretation, and the courts were left with the task of determining Congress's intent.

This consternation was brought to bear as conflicting court opinions arose in 1990 involving the "secured creditor exemption" and its application to owners and operators.[264] Most notably in *United States v. Fleet Factors*,[265] the Eleventh Circuit held that despite the lender's "indicia of ownership" in the facility through a deed of trust to protect its security interest, the lender could be found liable if it sufficiently participated in the management of the facility.[266] The court adopted the standard that "a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose."[267] Further, under this ruling it is not necessary for a

262. 42 U.S.C. § 9607(a) (1982 & West Supp. 1998); *see also supra* text accompanying note 209.

263. *Id.* § 9601(20)(A)(iii).

264. *See, e.g.*, United States v. Fleet Factors, 901 F.2d 1550, 1556 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991) (acknowledging that "[t]he construction of the secured creditor exemption [was] an issue of first impression" for federal appellate courts in this case); *In re* Bergsoe Metal Corp., 910 F.2d 668 (9th Cir. 1990).

265. 901 F.2d 1550 (11th Cir. 1990).

266. *Id.* at 1556. *But see In re Bergsoe Metal Corp.*, 910 F.2d at 672 (declining to follow the Eleventh Circuit's interpretation of the "secured creditor exemption" and finding instead that "there must be some actual management of the facility before a secured creditor will fall outside the exemption").

267. *Fleet Factors*, 901 F.2d at 1558.

creditor to be an operator, or be involved in the day-to-day operations of the facility, or even participate in management decisions regarding the facility's hazardous waste.[268] The court reasoned that this standard would encourage creditors to monitor their debtors' hazardous waste policies and treatment systems, and provide incentives to debtors to improve waste problems because of the potential denial of financial support.[269]

As might be expected, the *Fleet Factors* "capacity to influence standard" created huge disincentives for lenders to provide financing to operations that involved hazardous waste and made lenders reluctant to work closely with management, not only in the area of hazardous waste decisions, but also "during work-out negotiations or during forbearance periods."[270] As a result, lenders sought Supreme Court review of *Fleet Factors*, legislative action, or an administrative regulation addressing their concerns.[271] Subsequently, the Supreme Court denied review,[272] and legislative amendments were not forthcoming despite intensive lobbying efforts on behalf of the lending community.

In 1992, the EPA stepped up to the plate to provide a federal regulation to counteract the *Fleet Factors* decision and issued its Lender Liability Rule.[273] Under the EPA's rule, limited involvement by a lender in a debtor's operations did not subject the lender to CERCLA liability unless the lender participated in "hazardous waste decision-making, environmental compliance, or substantially all day-to-day managerial control."[274] The EPA's attempt to include specific parties in the secured creditor exemption, thus protecting them from liability, was met with resistance from the courts several years later. In *Kelly v. U.S. Envi-*

268. *See id.* at 1557-58.

269. *See id.* at 1558.

270. H. Edward Abelson, *Environmental Risks for Lenders, in* COMMERCIAL REAL ESTATE FINANCING: WHAT BORROWERS AND LENDERS NEED TO KNOW 1029, 1046 (Practicing Law Institute ed., 1999).

271. *See* William W. Buzbee, *CERCLA's New Safe Harbors for Banks, Lenders, and Fiduciaries,* 26 ENVTL. L. REP. 10,656, 10,657 (1996).

272. *See Fleet Factors*, 901 F.2d at 1550, *cert. denied*, 498 U.S. 1046 (1991).

273. *See* 40 C.F.R. § 300.1100 (codifying 57 Fed. Reg. 18,344 (1992)). The EPA issued this regulation under the National Oil and Hazardous Substances Pollution Contingency Plan, and specifically addressed defenses available to lenders under CERCLA. *See* WILLIAM L. NORTON, 6A NORTON BANKRUPTCY LAW AND PRACTICE 2D § 149:8 (1999).

274. Buzbee, *supra* note 271, at 10,657.

*ronmental Protection Agency*,[275] the District of Columbia Circuit Court struck down the EPA's Lender Liability Rule, finding that the EPA went beyond its statutory rulemaking authority—specifically, it found that the EPA could not define the scope of CERCLA liability.[276] Determined to continue its efforts to combat the imposition of liability on specific lenders, the EPA subsequently incorporated its invalidated Lender Liability Rule into a non-binding policy statement.[277] Additionally, the EPA indirectly implemented CERCLA liability protection for lenders by means of its enforcement discretion.[278]

Recognizing the importance of protecting non-participatory lenders from liability under CERCLA and understanding the limitations of EPA's statutory ability to prevent liability in this area, Congress reacted by promulgating the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996 (Asset Conservation Law).[279] This law codified much of the EPA's Lender Liability Rule, mandating that a lender with a security interest in property must actually "participat[e] in the management or operational affairs of the facility or vessel" before incurring liability under CERCLA as an owner or operator.[280] Seen by some as the "first significant amendments in a decade to

275. 15 F.3d 1100 (D.C. Cir. 1994), *cert. denied sub nom.*, American Bankers Ass'n v. Kelly, 115 S. Ct. 900 (1995).

276. *See id.* at 1105-08 (concluding that under CERCLA § 107 the EPA's role was limited to litigator and not rulemaker); *see also* NORTON, *supra* note 273, § 149:8 ("The court held that the EPA Rule was valid neither as a substantive regulation, nor as a[n] interpretive regulation, and was, therefore, not to be given deference by the courts."); Philip L. Cormella, *Environmental Issues and Liability Considerations in* ACQUIRING OR SELLING THE PRIVATELY HELD COMPANY 733, 740 (Practicing Law Institute ed., 1999).

277. *See* 60 Fed. Reg. 63,517 (1995). This guideline was issued jointly by the EPA and the U.S. Department of Justice and was aimed at entities that acquire property involuntarily. *See also* Cormella, *supra* note 276, at 740. *But see* Abelson, *supra* note 270, at 1047 (noting that the EPA's and Justice Department's non-binding policy statement had "no force or effect with respect to private party claims").

278. *See* Buzbee, *supra* note 271, at 10,658.

279. 42 U.S.C. § 9601(20)(E)-(G) (1996). Interestingly, the Asset Conservation Law amended CERCLA with little fanfare and almost no legislative history as it was virtually "buried" within the federal budget bill for 1997, the Omnibus Consolidated Appropriations Act of the 104th Congress. *See* Buzbee, *supra* note 271, at 10,656.

280. 42 U.S.C. § 9601(20)(E).

the much-debated [CERCLA],"[281] the Asset Conservation Law ended the consternation which arose from the *Fleet Factors* decision. No longer could the mere "capacity to influence" management decisions bring an end to the applicability of the secured creditor exemption under CERCLA for a lender. Additionally, by its broad definition of "lender," the law applied to a large class of lenders including institutional, private, and "involuntary government holders of contaminated properties."[282] Previously unprotected under CERCLA,[283] the Asset Conservation Law now provided specific liability protections for fiduciaries.[284] Overall, the strict liability application of CERCLA to lenders was effectively lessened under the statutory protections afforded by the Asset Conservation Law.[285] This development has been strengthened by subsequent court decisions conforming to the intent and language of the Asset Conservation Law, finding no lender liability without management participation.[286]

B. *CERCLA Case Law Developments*

Aside from these developments in the area of lender liability, a notable progression of change in CERCLA liability occurred in case law following the decades after the statute's enactment. During the first decade, 1981 through

281. Buzbee, *supra* note 271, at 10,656.

282. *Id.* at 10,663.

283. *See, e.g.*, City of Phoenix v. Garbage Servs. Co., 816 F. Supp. 564, 567 (D. Ariz. 1993).

284. *See* Abelson, *supra* note 270, at 1052. Subject to statutory and common law exceptions, the Asset Conservation Law limits the liability of a fiduciary for a facility owned in a fiduciary capacity to assets held in that fiduciary capacity.

285. *See, e.g.*, Buzbee, *supra* note 271, at 10,663 (concluding that the Asset Conservation Act provides "broad new statutory protection from CERCLA liabilities" to "lenders, fiduciaries, and involuntary government holders of contaminated property").

286. *See, e.g.*, Canadyne-Georgia Corp. v. NationsBank, N.A., 183 F.3d 1269 (11th Cir. 1999); East Bay Mun. Utility Dist. v. United States Dept. of Commerce, 142 F.3d 479 (D.C. Cir. 1998); Kelley v. Tiscornia, 104 F.3d 361 (6th Cir. 1996) (unpublished table disposition); F.P. Woll & Co. v. Fifth & Mitchell St. Corp., No. 96-5973, 1997 U.S. Dist. LEXIS 11685 (E.D. Pa. 1997); Stearns & Foster Bedding Co. v. Franklin Holding Corp., 947 F. Supp. 790 (D. N.J. 1996). *See generally* United States v. Pesses, No. 90-0654, 1998 U.S. Dist. LEXIS 7902 (W.D. Pa. 1998) (exempting a savings and loan from CERCLA liability because it did not participate in management decisions and only held title to the facility for loan security purposes).

1991, Superfund litigation was rampant and the "expansion of the scope of liability . . . continued unabated."[287] In fact, there was an increased willingness to find state, federal, and municipal governments liable under CERCLA, not only for costs associated with hazardous site contamination, but also for their actions involving cleanup efforts.[288] The courts reached harsh results in their adjudication of CERCLA liability, finding support for these decisions in their interpretation of Congress's express language and intent.[289] This led to uniformity and consistency when it came to certain CERCLA liability questions.[290]

Enter decade two—the emphasis on case law evolved from an expansive application of "who will be liable" to a focus on accountability for the cleanup costs incurred. We began to see "attempts to bootstrap [the EPA's and Justice Department's] interpretations of [CERCLA]" in specific areas such as landowner liability, security interest, and corporate / subsidiary liability.[291] For example, in *Westwood Pharmaceuticals v. National Fuel Gas Distribution Corp.*[292] the Second Circuit recognized that a former owner of property who exercised due care in the handling of hazardous waste could assert an "innocent seller defense"[293] against the subsequent buyer of the property. The court reasoned

287. Kyle E. McSlarrow et al., *A Decade of Superfund Litigation: CERCLA Caselaw From 1981-1991,* 21 ENVTL. L. REP. 10,367, 10,367 (1991).

288. *See id.* at 10,368 (citing United States v. Hardage, 985 F.2d 1427 (10th Cir. 1993). *See generally* United States v. Nicolet, Inc., 17 ENVTL. L. REP. 21,085 (E.D. Pa. 1986) (finding that sovereign immunity was not a bar to a counterclaim for recovery costs against the EPA); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D. N.H. 1985).

289. *See supra* notes 158-68 and accompanying text.

290. *See* Lewis M. Barr, *CERCLA Made Simple: An Analysis of the Cases under the Comprehensive Environmental Response, Compensation and Liability Act of 1980,* 45 BUS. LAW. 923, 1000 (1990). Congress's reauthorization of the Superfund in 1990 without *any* changes to the original law further enhanced the courts' ability to find consistent results. *See, e.g.*, McSlarrow et al., *supra* note 287, at 10,367 (predicting a period of stability after the reauthorization of CERCLA because of the foreseeable continuation of CERCLA statutory and administrative programs in effect).

291. Alfred R. Light, *CERCLA Developments During 1990 of Interest to Insurance Counsel, in* POLLUTION LIABILITY MANAGING THE CHALLENGES OF COVERAGE AND DEFENSE IN 1991, Q205 ALI-ABA 39, 41 (1991) (video class transcript live via satellite to 60+ cities on January 17, 1991).

292. 964 F.2d 85 (2d Cir. 1992).

293. *Id.* at 91. This defense was basically an extension of the "innocent purchaser defense," promulgated by Congress in 1986, to the other side of the purchase equation. *See* 42 U.S.C. §§ 9607(b)(3), 9601(35)(A)-(B) (1986).

that such a defense is allowable where a seller discloses the existence of the hazardous substances to the new owner who subsequently experiences an unforeseeable release of the contaminants on the property.[294]

A further demonstration of the judicial "tailoring" of the application of CERCLA liability exists in the area of response costs and PRPs. A growing number of cases began focusing on fault and causation as criteria for determining apportionment of CERCLA liability.[295] For example, in *United States v. Alcan Aluminum Corp.*,[296] the Third Circuit held that the lower court erred in its determination that a PRP was jointly and severally liable for cleanup costs at a Superfund site where its wastes were commingled with others' waste.[297] Here the United States sued twenty defendants for response costs it incurred in the cleanup of hazardous substances released into the Susquehanna River, holding Alcan liable for the difference between the government's cleanup costs and the amounts received from the defendants who had settled.[298] The court found that Alcan should be "permitted [the] opportunity to limit or avoid liability."[299] Specifically, the court ruled that Alcan could attempt to demonstrate that the harm was "divisible" and capable of reasonable apportionment among the PRPs, and, if successful, Alcan "should only be liable for that portion of the harm *fairly* attributable to it."[300] Importantly, the court recognized that a PRP should be provided with the opportunity to show that its wastes did not cause the resulting environmental harm, despite a commingling with other wastes at a Superfund site. Apportionment of liability was no longer reserved for private party resolution through con-

294. *See Westwood Pharm.*, 964 F.2d at 91. The new property owner's construction activities led to the release of the hazardous substances in this instance. *See id.* at 87.

295. *See, e.g.*, Environmental Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503 (7th Cir. 1992); United States v. R.W. Meyer, Inc., 932 F.2d 568 (6th Cir. 1991); Weyerhaeuser Co. v. Koppers Co., 771 F. Supp. 1420 (D. Md. 1991).

296. 964 F.2d 252 (3d Cir. 1992).

297. The Third Circuit vacated and remanded the lower court's determination. *See id.* at 255, 271.

298. *See id.* at 257.

299. *Id.* at 269.

300. *See id.* at 269-70 (emphasis added). The court, however, recognized that Alcan's burden in proving the divisibility of harm to this Superfund site was "substantial" and "factually complex" since it involved findings of "relative toxicity, migratory potential and synergistic capacity." *Id.* at 269.

tribution actions.[301]

Most recently, in *United States v. Bestfoods*,[302] the Supreme Court defined corporate parent liability under CERCLA, reversing a trend of expansive corporate liability that seemingly swallowed traditional corporate law doctrines. Now mere corporate relationship is not enough to find direct liability of a parent corporation under CERCLA—a parent must have actively participated in, and exercised control over, the operations of a polluting subsidiary.[303] The issue to be addressed after *Bestfoods* is whether the agents of the parent corporation managed or conducted operations "related to pollution . . . or decisions about compliance with environmental regulations," rendering the parent subject to CERCLA's reach.[304]

### C. *CERCLA Administrative Law Developments*

Coinciding with the evolvement of CERCLA case law was a similar moderation of liability under EPA regulations and policies pertaining to CERCLA. Except for its early administrative years, which were plagued with scandal and criticism for failure to effectively deal with the hazardous waste problem,[305] the EPA became synonymous with expansive CERCLA enforcement activities. These activities were eventually tempered with EPA guidance policies such as

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301. Under CERCLA's contribution provision, a person who incurs response costs or who is required to reimburse the government for response costs may seek appropriate contribution from other responsible parties. *See* 42 U.S.C. § 9613(f)(1) (1996).

302. 524 U.S. 51 (1998).

303. *See id.* at 55; *see also id.* at 66-67 (defining an operator under CERCLA as one who manages, directs, or conducts operations specifically related to pollution). The Court also held that a corporate parent may be found derivatively liable only if the "corporate veil may be pierced" through an application of common law and corporate law principles. *See id.* at 55. Further, there is "nothing in CERCLA [that] purports to reject this bedrock principle" of corporate law. *Id.* at 62.

304. *Id.* at 66-67.

305. *See generally* JONATHAN LASH ET AL., A SEASON OF SPOILS (1984). This author found that the EPA's actions to cleanup hazardous wastes were steeped in bureaucracy and politics during the Reagan era. For example, a congressional investigation uncovered improprieties by EPA official Rita Lavelle, along with attempts to impede cleanups at hazardous waste cites, which eventually culminated in contempt proceedings against EPA head Anne Gorsuch. *See id.* at 73-81.

"Prospective Purchaser Agreements,"[306] issued in 1989, which prevented CERCLA liability in certain instances. Under this guidance, the EPA would consider providing prospective purchasers of contaminated property with covenants not to sue under CERCLA.[307] The purpose of the Prospective Purchaser Agreements was to combat the creation of "negative" property values that resulted when CERCLA response costs were greater than the value of the property, thereby preventing the abandonment of contaminated sites.[308] In effect, buyers of contaminated property would not inherit unknown liability under CERCLA as "owners."

Acknowledging that the Superfund Program was "broken,"[309] in 1993 EPA Administrator Carol Browner took a substantial step towards tempering the effects of CERCLA by implementing the first of three rounds of Superfund reforms.[310] The first round of the "Superfund Administrative Improvements" involved continuing initiatives "designed to improve the overall efficiency, effectiveness, and *fairness* of the Superfund Program."[311] For example, in pursuit of increasing liability fairness, by the close of round one in 1994, the EPA had removed over 5,500 small volume PRPs from

306. EPA Guidance on Landowner Liability Under § 107(a)(1) of CERCLA, De Minimis Settlements Under § 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property, 54 Fed. Reg. 34,235 (1989).

307. *See id.* Under a Prospective Purchaser Agreement, in exchange for the EPA's agreement not to pursue recovery of future Superfund costs from a purchaser of a Superfund site, the purchaser agrees to perform or pay for a specified portion of future site remedy. *See* SUPERFUND REDEVELOPMENT INITIATIVE, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, GUIDANCE AND POLICY (1999).

308. *See* Howard M. Shanker & Laurent R. Hourcl, *Prospective Purchaser Agreements,* 25 ENVTL. L. REP. 10,035, 10,035 (1995).

309. Hon. Carol M. Browner, Administrator, Environmental Protection Agency, Testimony before the House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment, *in Summary of the March 12, 1997, Hearing by the House Transportation and Infrastructure Committee, Subcommittee on Water Resources and Environment: Superfund Reauthorization,* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY MAR. 12 1997, http://www.epa.gov/superfund/new/congress/summ0312.htm (visited Jan. 7, 2000) (on file with the *Buffalo Law Review*) [hereinafter *March 12, 1997 Hearing*].

310. These reforms grew out of a 1989 "90-Day Study" and a 1991 "30-Day Task Force" conducted by the EPA. *See* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, SUPERFUND REFORMS: ANNUAL REPORT FY 1998 1 (1999) [hereinafter *Annual Report FY 1998*].

311. *Id.* (emphasis added).

CERCLA's liability system.[312] A second round of reforms was introduced in February 1995 containing many of the same principles manifested in the Superfund Reform Act of 1994.[313] The EPA sought to administratively test and implement the innovations from the 1994 Act with pilot projects.[314] The twelve initiatives involved in this round are aimed at, among other things, "enforcement, economic redevelopment, community involvement, . . . [and] environmental justice."[315] Accomplishments of round two encompass "fostering expedited settlements [and] implementing Brownfields initiatives."[316] Finally, a third round of reforms followed in October 1995, which advanced twenty "common sense" initiatives intended to "promote cost-effective cleanup choices, reduce litigation and transaction costs, and ensure that states and communities are informed and involved in cleanup decisions."[317]

An example of a "common sense" effort to reduce litigation and increase fairness in CERCLA's enforcement program exists in the EPA's 1997 "Orphan Share Policy,"[318] which expands an earlier policy allowing a PRP to avoid or minimize its potential orphan share liability.[319] Under the Orphan Share Policy, the EPA "forgives" a portion of a PRP's financial responsibility by allowing the PRP to per-

312. *See* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, SUPERFUND REFORM: SCORECARD OF FIRST ROUND, EPA PUB. NO. 540-R-94-069 (1993) (describing the Round 1 Initiatives and progress made between June 23, 1993, and September 30, 1994) (accessed via the U.S. Environmental Protection Agency Web Site, http//:www.epa.gov/superfund/programs/reforms/docs.htm).

313. *See Annual Report FY 1998*, *supra* note 310, at 39-46.

314. *See id.*

315. *Id.*

316. *Id.* The EPA defines a "brownfield" as "a site, or portion thereof, that has actual or perceived contamination and an active potential for redevelopment or reuse." *See* OUTREACH AND SPECIAL PROJECTS STAFF, COMMUNITY REINVESTMENT ACT (CRA) FACT SHEET, EPA PUB. NO. 500-F-97-100 (1997) (accessed via the Web site of the U.S. Environmental Protection Agency, http:www.epa.gov/superfund/programs/reforms/docs.htm).

317. *See Annual Report FY 1998*, *supra* note 310, at 1.

318. 62 Fed. Reg. 61,113 (1997) (addendum to the EPA's 1984 "Interim CERCLA Settlement Policy").

319. An orphan share is the portion of CERCLA financial responsibility assigned to a PRP who is insolvent or defunct. Under CERCLA's joint and several liability system, at sites where there are parties who have no money to contribute to the cleanup, viable PRPs are required to absorb these orphan shares. *See* Stephanie Pullen Brown et al., *Recent Developments in Environmental Law*, 30 URB. LAW. 945, 979 (1998).

form work, or pay a settlement.[320] The EPA will now consider the inequity involved when substantial orphan shares have to be absorbed by other PRPs.[321] Additionally, in 1998, the EPA published its final "Policy for Municipality and Municipal Solid Waste: CERCLA Settlements at NPL Co-Disposal Sites" (MSW Policy).[322] The MSW Policy aids in resolution of the liability of generators and transporters of municipal waste by setting specific formulas for calculating costs for settlements based on actual quantities of municipal waste they contributed to the site.[323] As a result of this policy, a PRP is enabled to "resolve its liability to the EPA and, thereby, obtain statutory protection from private party contribution actions under CERCLA."[324]

Despite the accomplishments of the EPA's forty-five reform initiatives, and its commitment to improving the Superfund Program, the administration has acknowledged it cannot do it alone.[325] Administrator Browner has called for Congress to enact new Superfund legislation that includes a "liability structure that makes sense."[326]

### D. *CERCLA Legislative Developments*

For decades, Congress has struggled in its efforts to reauthorize and reform CERCLA, a process that has been characterized as a "drawn out, acrimonious political

320. However, the EPA limits the compensation amount to "25 percent of either the response costs or the total past and future oversight costs, whichever is less." UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, SUPERFUND REFORMS: REFORM 3-11 ORPHAN SHARE COMPENSATION (1999) (accessed via the Web site of the U.S. Environmental Protection Agency, http//:www.epa.gov/superfund/programs/reforms/reforms/3-11.htm) [hereinafter *Reform 3-11*].

321. *See* Pullen Brown et al., *supra* note 319, at 979; *see also Reform 3-11*, *supra* note 320.

322. 63 Fed. Reg. 8,197 (1998).

323. Industry groups have unsuccessfully challenged the equity and validity of this policy in court actions, arguing among other things that preferential treatment is given to municipal waste parties under this policy. *See, e.g.*, Chemical Mfrs. Ass'n v. EPA, 26 F. Supp.2d 180 (D.D.C. 1998) (granting the EPA's motion to dismiss and holding that the EPA's MSW Policy was not a "final agency action" subject to judicial review under the Administrative Procedure Act).

324. Pullen Brown et al., *supra* note 319, at 977.

325. *See March 12, 1997 Hearing*, *supra* note 309.

326. *Id.*

brawl."[327] Despite some isolated endeavors to reshape CERCLA liability through specific legislation, attempts at passage of a reform bill have failed. Among the legislation that has been enacted to remedy CERCLA problems is the previously discussed Asset Conservation Law,[328] and the "innocent purchaser defense" promulgated in 1986.[329] The innocent purchaser defense relieves an owner or operator, who acquires a facility after hazardous substances were disposed of at the facility, from liability if certain criteria are met.[330] Among other things, the party must show that the release of hazardous substances was caused solely by an act or omission of a third party, other than "one whose act or omission occurs in connection with a contractual relationship . . . with the defendant," and the owner or operator must have taken "due care" with regard to the hazardous substances.[331]

Since enactment of a comprehensive reform of CERCLA has been elusive, continuation of the Superfund Program has been accomplished via a back door approach of extend-

327. *See, e.g.*, Rena I. Steinzor & David Kolker, *To Pay or Not to Pay: Local Government's Stake in Legislation to Reauthorize Superfund*, 25 URB. LAW. 627, 628-29 (1993) (explaining that the last reauthorization of the Superfund, SARA, "took four-and-a-half years to complete and involved a bruising battle between environmentalists, industry, and the Reagan Administration"); *see also Superfund Reauthorization: Comm. on Env't & Pub. Works Markup of S.8, The Superfund Cleanup Acceleration Act of 1998*, 106th Cong., 1998 WL 159104 [hereinafter *S 8 Reauthorization*] (statement of John H. Chafee, Chairman, Comm. on Env't & Pub. Works explaining that the Superfund reauthorization process began in the 101st Congress).

328. *See supra* notes 279-86 and accompanying text.

329. 42 U.S.C. §§ 9607(b)(3), 9601(35)(A)-(B) (1986).

330. *See id.*

331. *Id.* § 9607(b)(3). "Contractual relationship" is defined to include "instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility." Additionally the defendant must meet one of three conditions:

> (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility. (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation. (iii) The defendant acquired the facility by inheritance or bequest.

*Id.* § 9601(35)(A).

ing program financing.[332] This methodology has, of course, effected no substantive changes to the law. Neither has unsuccessful head-on attacks initiated in the 103d and 104th Congresses calling for a full repeal of CERCLA's retroactive liability.[333] Strong partisan opposition over this issue has led to a more "pragmatic approach," with subsequent bills backing-off this demand for elimination of retroactive liability, and focusing instead on the revision of the key liability sections.[334] For example, the "Superfund Cleanup Acceleration Act of 1997" (S.8)[335], introduced in the Senate exempted from liability for activities pre-January 1, 1997, all co-disposal landfill generators, arrangers, and transporters, or those Congress views as the "little guys" of Superfund litigation.[336] Additionally, CERCLA's joint and several liability scheme would be replaced with a mandatory fair-share allocation system at multi-party sites, and states would be provided with an opportunity for a greater role in federal site remediation.[337] "The Superfund Reform Act" introduced in the House in 1997 (H.R. 3000)[338] to amend CERCLA, similarly restricted retroactive liability. This bill

332. *See* Steinzor & Kolker, *supra* note 327, at 629 (discussing the furtive attachment in 1990 of a five year extension of Superfund Program funding to other legislation); *see also* Allan Freedman, *With Bipartisan Deal Elusive, Superfund Effort Dies*, 54 CONG. Q. WKLY. REP. 2044, 2044 (1996) (noting that despite the expiration of taxes December 31, 1995, a surplus for funding environmental cleanup through the year 2000 exists).

333. *See* Kubasek et al., *supra* note 183, at 222 (discussing Ohio Republican Michael G. Oxley's proposal in the House, H.R. 2500, "Reform of Superfund Act of 1995," and New Hampshire Republican Senator Robert C. Smith's proposal in the Senate, S.1285, "The Accelerated Cleanup and Environmental Restoration Act of 1995"); Taylor, *supra* note 127, at 80, 81.

334. *See* Taylor, *supra* note 127, at 81; Christopher J. Dunsky, *Let's All March Up the Hill and Down Again: Congress Considers Superfund Reform*, 1 MICH. ENVTL. COMPLIANCE UPDATE 9 (1997) (stating that a new Republican bill, S.8, approaches the "political center" because it exempts or limits liability of certain PRPs rather than eliminating pre-1980 enactment liability as earlier CERCLA proposals did). *Cf.* Kubasek et al., *supra* note 183, at 222 (explaining that while the reauthorization debates in Congress "do not focus exclusively on the issue of retroactivity under the Act, . . . the issue of retroactivity is considered one of the divisive 'linchpins' of the program").

335. S.8, 105th Cong. (1997).

336. *See id.* (providing exemptions to liability under "Title II: Liability"); *see also id.* § 501 (detailing "Liability Exceptions and Limitations"); Taylor, *supra* note 127, at 81-82 (citing *Recent Developments in the Congress*, 27 ENVTL. L. REP. 10,128 (1997)).

337. *See* S.8, 105th Cong. (1997); Taylor, *supra* note 127, at 82.

338. H.R. 3000, 105th Cong. § 201(a) (1997).

exempted three major classes of parties from cleanup liability: (1) generators and transporters whose waste did not significantly contribute to the cleanup costs, (2) generators and transporters of only municipal solid waste at an NPL site, and (3) generators and transporters of de minimis amounts of waste at an NPL site.[339] H.R. 3000 also absolved certain owners and operators who acquired a facility by inheritance or bequest from liability, and limited liability for tax-exempt organizations and municipalities.[340] There has been a virtual onslaught of bills targeting Superfund reform and/or authorization over the years.[341] In addition to S.8 and H.R. 3000, CERCLA legislation currently under consideration in the 106th Congress that would effectively lessen the Act's retroactive liability includes:

- H.R. 375, "Superfund Liability Exemption for Local Education Agencies Act,"[342] to amend CERCLA and absolve certain educational agencies from liability.
- H.R. 1300, "Recycle America's Land Act of 1999,"[343] to provide liability relief for innocent landowners and small businesses, and promote brownfields redevelopment.[344]
- H.R. 2247, "Small Business Superfund Fairness Act,"[345] to amend CERCLA to absolve certain small business entities from liability for response costs at NPL sites.
- H.R. 2940, "Common Sense Superfund Liability Relief Act of 1999,"[346] to absolve owners, operators, or lessees of residential property, small businesses, small nonprofit organizations, and prospective purchasers of liability under certain conditions.
- H.R. 2956, "Children's Protection and Community Cleanup Act of 1999,"[347] to reauthorize CERCLA, protect children from hazardous wastes, ensure

339. *See id.* § 201(a); *see also Superfund Reauthorization Issues in the 106th Congress*, Cong. Res. Serv. 5-6 (Dec. 13, 1999) (David K. Aylward, President, Nat'l Strategies, Inc.) [hereinafter *Superfund Reauthorization Issues*].

340. *See* H.R. 3000, 105th Cong. § 201 (1997).

341. A minimum of 15 bills to amend CERCLA were introduced in the 105th Congress alone. *See* Kubasek et al., *supra* note 183, at 227 & n.183.

342. H.R. 375, 106th Cong. (1999).

343. H.R. 1300, 106th Cong. (1999).

344. *See id.* §§ 302, 305.

345. H.R. 2247, 106th Cong. (1999).

346. H.R. 2940, 106th Cong. (1999).

347. H.R. 2956, 106th Cong. (1999).

cleanup of Superfund sites in economically distressed communities, and limit liability for natural resource damages.[348] This bill would also amend CERCLA to absolve prospective purchasers and innocent landowners from liability.[349]

- S. 1090, "Superfund Program Completion Act of 1999,"[350] which includes a "Fair Share Liability Allocations and Protections" provision, exempting certain homeowners, small businesses, and small nonprofit organizations from liability, and "safe harbors" for innocent landholders.[351]
- S. 1105, "Superfund Litigation Reduction and Brownfield Cleanup Act of 1999,"[352] to assist local governments and states in assessing and remediating brownfields sites, and increase fairness and reduce litigation. This bill includes liability exemptions for small business and brownfields liability relief.[353]
- S. 1528, "Superfund Recycling Equity Act of 1999,"[354] to amend CERCLA and absolve certain persons involved in recycling transactions from liability.
- S. 1537, "Superfund Amendments and Reauthorization Act of 1999,"[355] which contains liability exemptions for small business and liability limitations for municipalities, "religious, charitable, scientific, and educational organizations."[356]

All of these bills were referred to congressional committees during 1999. The most promising piece of legislation appears to be H.R. 1300, which has 145 cosponsors and was approved by the House Transportation and Infrastructure Committee on September 30, 1999, as amended. Representative Jack Quinn, a New York Republican who supports this bill, states that "H.R. 1300 acknowledges the importance of brownfield cleanup and use, and addresses the broader concern of the inadequacies of Superfund legisla-

348. *See id.* §§ 401, 501, 702.
349. *See id.* §§ 622, 623.
350. S. 1090, 106th Cong. (1999).
351. *Id.* §§ 104, 301-303.
352. S. 1105, 106th Cong. (1999).
353. *See id.* §§ 101-103, 201.
354. S. 1528, 106th Cong. (1999).
355. S. 1537, 106th Cong. (1999).
356. *See id.* §§ 301, 304.

tion."[357] For these reasons, he purports that of all the pending legislation, "this [bill] appears to have the best chance of passing."[358]

E. *CERCLA Today*

Critics and environmentalists have questioned the success of the Superfund program since its inception in 1980, pointing to the 1,221 sites remaining on the Superfund National Priorities List (NPL).[359] This list of sites, identified by the EPA for remediation, are the hazardous waste sites that "pos[e] the greatest threat to the public's health and the environment."[360] Remedial action for each NPL site requires six to ten years to complete and costs on average $25 million per site.[361] One study found that through fiscal year 1997, greater than $32 billion had been expended to cleanup only thirty seven percent of NPL sites, or 497 sites.[362] Additionally, an estimated forty thousand hazardous waste sites had been reported to various federal agencies to date.[363] The cost of clean up for all Superfund waste sites nationally is estimated to total over $100 billion.[364]

Despite the negative statistics, proponents argue that the Superfund Program has affected stabilization of con-

357. Statement from Congressman Jack Quinn to author (Feb. 28, 2000) (on file with the *Buffalo Law Review*).

358. *Id.*

359. *See Superfund Reauthorization Issues, supra* note 339, at 5-6 (finding only 201 sites have been deleted from the NPL after 19 years). *But see* Thomas S. Udall, *Superfund: The Keynote Address at the 20th Annual Advanced American Law Institute-American Bar Association Course of Study on Hazardous Wastes, Superfund, and Toxic Substances*, 29 ENVTL. L. REP. 10,143 (1999) (discussing the success of the Superfund Program in cleaning up hazardous waste sites).

360. Barry L. Johnson & Christopher T. DeRosa, *The Toxicologic Hazard of Superfund Hazardous Waste Sites, in* 12 REVIEWS ON ENVIRONMENTAL HEALTH 235, 236 (1997).

361. *See* OFFICE OF EMERGENCY AND REMEDIAL RESPONSE, UNITED STATE ENVIRONMENTAL PROTECTION AGENCY, VOL. 1, NO. 2, DESCRIPTIONS OF 11 PROPOSED SITES AND 17 FINAL SITES ADDED TO THE NATIONAL PRIORITIES LIST IN JAN. 1999, 2 (1999); *see also* Palisano, *supra* note 175, at 405 & n.22.

362. *See Superfund Reauthorization Issues*, *supra* note 339. This total amount includes both public and private moneys. *See id.*

363. *See* Johnson & DeRosa, *supra* note 355, at 235.

364. *See* Martin A. McCrory, *The Equitable Solution to Superfund Liability: Creating a Viable Allocation Procedure for Business at Superfund Sites*, 23 VT. L. REV. 59, 59 & n.5 (1998).

taminated waste sites and reduction of public health risks.[365] Additionally, the Act has resulted in a significant reduction in the amount of hazardous waste generated by industry, encouraged recycling and voluntary cleanup of contaminated sites by companies, and "spawned a hugely successful and innovative environmental cleanup industry."[366] Supporters maintain that a repeal of the Act's retroactive liability would reportedly cost the federal government from $800 million to $1.3 billion per year, an amount that would have to be unfairly borne by the taxpayers instead of the parties the Act finds responsible for creating the hazardous waste sites.[367] They further claim that by its nature, CERCLA promotes such cost internalization since it emphasizes past profits as justification for current liability, and its liability scheme has been interpreted by the courts as an avoidance of a direct tax on the general public.[368]

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365. *See* Udall, *supra* note 359, at 3.

> More than 4,800 removal actions have been completed at both NPL and non-NPL sites to remove drums, remove contaminated soil and debris, drain pits and lagoons filled with hazardous liquids and sludges, etc . . . All construction activity has been completed at 509 NPL sites, and operation and maintenance is now underway . . . Construction of the remedy has been partially completed at another 480 sites.

*Id.* Udall also explains that the low number of remedial completions for NPL sites is misleading because nearly 85% of the NPL sites involve groundwater contamination which typically requires decades to achieve purification. *See id.* (citing NAT'L RESEARCH COUNCIL, ALTERNATIVES FOR GROUND WATER CLEANUP 104 (1994)).

366. Udall, *supra* note 359, at 3.

367. *See* Kubasek et al., *supra* note 183, at 229 & n.199 (noting the tax burden under CERCLA's current liability scheme predominantly falls on chemical and petroleum companies); *cf.* Rena I. Steinzor, *The Reauthorization of Superfund: The Public Works Alternative,* 25 ENVTL. L. REP. 10,078 (1995) (arguing that the repeal of Superfund's retroactive liability system and replacement with an expanded public works cleanup program would have necessitated major new taxes and resulted in increased litigation). *But see* John J. Lyons, *Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?* 6 STAN ENVTL. L. J. 271, 271-74 (1986/1987) (arguing that CERCLA should be funded exclusively by a taxation system because CERCLA's imposition of liability on PRPs creates huge transaction and impedes site cleanup); *Exception for Federal Facilities Sought in Call to Eliminate Retroactive Liability*, 25 Env't Rep. (BNA) at 1870 (1995) (discussing Senator Robert C. Smith's and Representative Michael B. Oxley's contention that an elimination of retroactive liability is not likely to cause an increase in taxes because tax breaks as incentives could offset the loss of revenue).

368. *See, e.g.*, Smith Land Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir.), *cert. denied,* 488 U.S. 1029 (1988) (holding a successor corporation liable under CERCLA). The *Smith* court reasoned that:

## CONCLUSION

In the aftermath of the *Eastern Enterprises* decision, it is tempting to extrapolate a result overturning laws such as CERCLA that impose harsh retroactive liability. The reality, however, is that there can be no expectation of a sweeping change in the outcome of Fifth Amendment constitutional challenges to CERCLA's retroactive liability due to the *Eastern Enterprises* decision. *Eastern Enterprises* will govern a challenge to retroactive legislation only if the specific parameters set forth by the Court can be established; clearly, the law under scrutiny must impose a severely retroactive and disproportionate effect upon a claimant to enable a challenge to be successful. Complicating matters is the fact that Eastern's Coal Act challenge was viewed by the plurality as an extreme situation applying to a specific claimant. The amount of support the Supreme Court's holding in *Eastern Enterprises* may lend to a challenge to CERCLA's constitutionality is further diluted by the Court's severely split decision, *i.e.*, a majority of the Court disagreed with the plurality's Takings Clause analysis. Subsequent to the *Eastern Enterprises* decision, there is certainly no defined rule governing a claim that challenges the constitutionality of a law imposing retroactive liability.

Arguably, the same fact pattern present in *Eastern Enterprises* also exists in many CERCLA challenges; a disproportionate, severe and extremely retroactive liability is imposed upon the claimant. The distinguishing factor is the statute involved in each. Because the nature and extent of altered expectation interests must be assessed in each case, the distinctions between the two Acts will effectively serve to diminish any support the *Eastern Enterprises* decision may provide to a CERCLA challenge. Indeed, to date, CERCLA challenges based on *Eastern Enterprises* have not fared well. The courts continue to demonstrate their unwillingness to find CERCLA legislation unlawful. They have found a retrospective intent behind CERCLA despite a scant legislative history and absolutely no express language

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> Expenses can be borne by two sources: the entities which had a specific role in the production . . . of the hazardous condition, or the taxpayers through federal funds. CERCLA leaves no doubt that Congress intended the burden to fall on the latter only when the responsible parties lacked the wherewithal to meet their obligations.

*Id.* at 92.

in the statute promulgating retroactive application. Further, the judiciary has been influenced by societal pressures to solve the overwhelming hazardous waste pollution problem. These pressures result in a comparatively lessened scrutiny by the courts of the harsh retroactive liability imposed by CERCLA.

For these reasons, the courts will most likely continue to apply the *Eastern Enterprises* decision very narrowly, and its effect on future challenges to CERCLA legislation will be minimal. Instead, temperance of CERCLA's stringent liability scheme will continue to be realized through the interactive dynamics of judicial, administrative, and legislative influences. In this manner an imperfect liability scheme has become more tolerable. Yet, there is still a need to rectify the inequities imposed under CERCLA's vast liability net. However far the pendulum will swing towards a 'kinder, gentler' CERCLA liability application, it is highly unlikely this "molding" over time will ever result in the extreme of complete invalidation of the Act's retroactive liability. The positive results cited by some, as well as the overwhelming support for a system that demands that the private sector pay, lend support to continuation of CERCLA's basic retroactive liability scheme.