No. 10-1948

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JACQUELINE J. KEENE (Widow of NORMAN E. KEENE)

Petitioner

v.

CONSOLIDATION COAL COMPANY

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

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SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENT

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SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENT

INTRODUCTION

As fully explained in our response brief, Mrs. Keene's claim for federal black lung benefits was denied because she failed to prove that pneumoconiosis caused her husband's death. While her

appeal was pending, Congress amended the Black Lung Benefits Act to reinstate a statutory presumption that provides claimants with an alternate route to prove their entitlement to benefits. Patient Protection and Affordable Care Act ("PPACA"), Pub. L. No. 111-148, § 1556 (2010). Mrs. Keene argued in her opening brief that the Court should vacate the denial of benefits and remand her claim to permit the administrative law judge to consider whether she had invoked this presumption of entitlement. In response, the Director filed a brief agreeing with Mrs. Keene. Consolidation Coal Company ("Consol"), however, responded that section 1556 of the PPACA is unconstitutional because it deprived Consol of due process of law and constituted an unlawful taking of property. The Court granted the Director's motion to file a supplemental brief in response to Consol's argument that section 1556 is unconstitutional.

STATEMENT OF THE ISSUES

1. Whether Consol has demonstrated that the section 1556 amendment, which balances the benefits and burdens of economic life, is not rationally related to a legitimate legislative purpose and therefore violates the Due Process Clause of the Constitution.

2. Whether Consol has demonstrated that the section 1556 amendment violates the Takings Clause of the Constitution where it has failed to show: (1) what specific economic impact it will bear under the amendment; (2) that it was not on notice that future statutory amendments might be applied to pending claims; or (3) that the character of the governmental action is in the nature of a taking.

HISTORY OF THE 15-YEAR PRESUMPTION

In 1972, Congress amended the Black Lung Benefits Act to include the "15-year presumption." 30 U.S.C. § 921(c)(4) (1970 ed., Supp. IV). The 15-year presumption could be invoked if the miner (1) "was employed for fifteen years or more in one or more underground coal mines" or in surface mines "substantially similar to conditions in an underground mine" and (2) suffered from "a totally disabling respiratory or pulmonary impairment[.]" *Id.* If those criteria were met, the claimant invoked a rebuttable presumption that the miner "is totally disabled by pneumoconiosis [and] that his death was due to pneumoconiosis[.]" *Id.* The presumption could be rebutted by demonstrating that the miner "does not, or did not, have pneumoconiosis" or that "his respiratory

or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." *Id.* Congress adopted this presumption, which was based on the Surgeon General's testimony that the prevalence of pneumoconiosis increased significantly after 15 years of coal dust exposure, to "[r]elax the often insurmountable burden of proving eligibility" that claimants had faced. S. Rep. 92-743, at 1 (1972).

In 1981, Congress limited the 15-year presumption's availability. It amended the section by adding the following sentence: "The provisions of this paragraph shall not apply with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981." 30 U.S.C. § 921(c)(4) (1982). Accordingly, the presumption did not apply to claims filed on or after January 1, 1982, the effective date of the 1981 amendments.

Last year, Congress revived the 15-year presumption for some claims. Section 1556 of the PPACA amended section 411(c)(4) by deleting the restriction added in 1981 and specifying January 1, 2005 as the amendment's effective date:

> (a) REBUTTABLE PRESUMPTIONS.—Section 411(c)(4) of the Black Lung Benefits Act (30 U.S.C. 921(c)(4)) is amended by striking the last sentence.

* * * *

> (c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act.

Pub. L. No. 111-148, § 1556(a), (c) (2010). *See also* 156 Cong. Rec. S2083-84 (daily ed. March 25, 2010) (statement of Sen. Byrd). Because Mrs. Keene filed her claim after January 1, 2005, and the claim remained pending on or after March 23, 2010, the PPACA's date of enactment, the amendment applies to her claim.

SUMMARY OF THE ARGUMENT

Consol does not dispute that Congress explicitly made section 1556 of the PPACA retroactive to January 1, 2005. Instead, Consol argues that section 1556, by virtue of its retroactive nature, deprives it of due process under the Fourteenth Amendment, and violates the Takings Clause of the Fifth Amendment. Both assertions are without merit.

Legislation, including retroactive legislation, carries with it a presumption of constitutionality. In order to establish that section 1556 deprives it of due process, Consol must show that Congress

had no conceivable rational legislative purpose, whether or not Congress articulated it. Consol has failed to meet that burden. The purpose of section 1556 is to provide a less rigorous path to entitlement for miners and their survivors who have proven that the miner endured at least fifteen years of exposure to coal mine dust and suffered from a totally disabling respiratory or pulmonary impairment. In making the amendment retroactive for a limited period, Congress struck a rational balance between compensating deserving claimants and unduly burdening mine operators and their insurance carriers.

Similarly, Consol has failed to establish that section 1556 violates the Takings Clause of the Fifth Amendment. While courts look to the particular factual circumstances surrounding a takings claim, three factors are generally important: (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. Consol's argument fails on all three counts: Consol has not proven how section 1556 will impact it economically, despite its vague complaints to the contrary; offers mere speculation about interference with previously

established insurance premium levels without acknowledging that the black lung program regulations provide notice that liability may be affected by subsequent amendments; and ignores precedent that a public program adjusting the benefits and burdens of economic life to support the public good generally does not violate the Takings Clause.

ARGUMENT

A. Standard of Review

The constitutional issues addressed in this brief present questions of law. The Court reviews legal issues *de novo*. *Roberts & Schaefer Co. v. Director, OWCP*, 400 F.3d 992, 996 (7th Cir. 2005) (citation omitted).

B. Consol has not demonstrated that section 1556 of the PPACA violates the Due Process Clause.

Consol argues that retroactive application of section 1556 of the PPACA deprives it of due process under the Fourteenth Amendment.[1] Specifically, Consol contends that "Congress acted

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[1] The Due Process Clause of the Fourteenth Amendment applies to the states. We assume that Consol intended to rely on the Fifth Amendment's Due Process Clause: "No person shall. . . be deprived (cont'd . . .)

arbitrarily and irrationally by failing to provide any legitimate purpose for retroactively imposing any amendments to the BLBA and further acted arbitrarily and irrationally by failing to explain, discuss, or debate the use of January 1, 2005 date." [*sic*]. (Bf. at 8). Consol's argument is wholly without merit.

Consol concedes, as it must, that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Thus, Consol must overcome "a strong presumption of validity[.]" *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993). This presumption is so strong that calling the challenger's burden "'an uphill climb'. . . may be a bit of an understatement." *Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 806 (7th Cir. 1999). In short, "[s]o long as retroactive

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of life, liberty, or property, without due process of law[.]" U.S. Const. amend V.

application of the change is rationally related to a legitimate legislative purpose, the constraints of due process have been honored." *Kopec v. City of Elmhurst*, 193 F.3d 894, 903 (7th Cir. 1999).

That the Black Lung Benefits Act's retroactive aspects pass constitutional due process muster was resolved by the Supreme Court in its landmark *Turner Elkhorn* decision. There, the Court rejected an argument that the Act as a whole violated due process because it imposed retroactive liability on coal mine operators. The Court later summarized its holding:

> In [*Turner Elkhorn*], we sustained a statute requiring coal mine operators to compensate former employees disabled by pneumoconiosis, even though the operators had never contracted for such liability, and the employees involved had long since terminated their connection with the industry. We said: "[O]ur cases are clear 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." *Id.,* at 15-16, 96 S.Ct., 2892-2893 (citations omitted).

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 223 (1986). The *Turner Elkhorn* Court held that the BLBA was "justified as a rational measure to spread the costs of the employees'

disabilities to those who benefited from the fruits of their labor." *Turner Elkhorn*, 428 U.S. at 18.

The Sixth Circuit followed the same course in sustaining a due process challenge to a later-enacted presumption – section 411(c)(5), 30 U.S.C. § 921(c)(5), enacted in 1978 – which provided a rebuttable presumption of entitlement to the survivors of any miner who had worked in the mines for at least 25 years before June 30, 1971 and died before March 1, 1978. The court noted that "the rational purpose [of the presumption] is compensating survivors of deceased miners for the injury that the miners suffered because of black lung disability." *North America Coal Corp. v. Campbell,* 748 F.2d 1124, 1128 (6th Cir. 1984). The court concluded that "because retroactive application of this statute operates only to make mine operators responsible for compensating the families of employees injured by their conditions of employment we cannot find that it is particularly harsh and oppressive." *Id.*

Consol ignores this precedent and attempts to meet its heavy burden merely by suggesting that Congress had no clear reason for choosing January 1, 2005 as the starting date for claims affected by the amendments. But Consol's quibble over Congress' choice of a

starting date does not prove that Congress did not have a rational legislative purpose. For this reason alone, Consol has failed to meet its burden.

Congress' rationale for applying the 2010 PPACA amendments retroactively is both apparent and logical. In remarks made two days after the passage of the PPACA, amendment sponsor Senator Byrd emphasized that the amendments are intended to help compensate deserving miners and survivors whose claims were pending: "[Section 1556] will also benefit all of the claimants who have recently filed a claim, are awaiting or appealing a decision or order, or who are in the midst of trying to determine whether to seek a modification of a recent order" and will help "ensure that claimants get a fair shake as they try to gain access to those benefits that have been so hard won." 156 Cong. Rec. S2083-84 (daily ed. March 25, 2010) (statement of Sen Byrd). U.S. Representative Nick Rahall, II offered nearly identical bills in recent sessions – *see, e.g.*, Black Lung Benefits Survivors Equity Act of 2009, H.R. 1010, 111th Cong. (2009); Black Lung Benefits Survivors Equity Act of 2007, H.R. 1123, 110th Cong. (2007); Black Lung Benefits Survivors Equity Act of 2005, H.R. 300, 109th Cong.

(2005) – and explained that the bills were intended to remedy "a dual and inequitable standard governing the basis by which a miner or his widow is entitled to benefits under the Act. . . . [because section 411(c)(4)] does not apply to post-1981 Act claimants." 149 Cong. Rec. E875 (daily ed. May 6, 2003); 148 Cong. Rec. E536 (daily ed. April 16, 2002). Thus, the rational purpose for applying amended section 411(c)(4) retroactively is to erase a dual and inequitable standard for both miners and their survivors.

Even had Congress not discussed the purpose of section 1556 of the PPACA, it is enough that a rational basis exists:

> We may find rationality so long as a rational basis exists for the statute's retroactivity, regardless of whether Congress actually considered the basis. This is so because "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."

Davon, Inc. v. Shalala, 75 F.3d 1114, 1124 (7th Cir. 1996) (quoting *Beach Communications, Inc.*, 508 U.S. at 315). Congress intended to ease the path to entitlement for claimants who had proven at least fifteen years of coal mine employment and a totally disabling pulmonary impairment. It is hardly irrational that Congress

decided to accomplish this goal by imposing retroactive liability for a limited period. "Congress 'had absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary.' " *Davon, Inc.*, 75 F.3d at 1124, quoting *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.*, 470 U.S. 451, 477 (1985).

Nor is Congress' choice of the January 1, 2005 starting date necessarily arbitrary. By choosing this date, Congress struck a permissible balance between the coal mine operators' and the benefits claimants' interests. Congress captured a significant portion of the universe of claims pending at the time of the PPACA's enactment and therefore benefited a large number of claimants. Yet Congress reached back to cover only those claims filed since January 1, 2005, and then further limited the class to pending claims, when it could have rationally drawn a much earlier and broader line.

This sort of line drawing "'is the business of Congress and inevitably individuals on the wrong side of the division do not fare well. The result is unfortunate for those adversely affected, but arbitrariness is often unavoidable.'" *O'Kane v. Apfel*, 224 F.3d 686,

692 (7th Cir. 2000) (affirming constitutionality of retroactive amendment to Social Security Act) (quoting *Torres v. Chater*, 125 F.3d 166, 171 (3d Cir. 1997)). The fact that Congress could have designated a different effective date for section 1556 of the PPACA does not make January 1, 2005 unconstitutionally arbitrary. For these reasons, Consol's assertion that retroactive application of amended section 411(c)(4) violates due process should be rejected.

In an attempt to satisfy its heavy burden of demonstrating Congress acted irrationally, Consol offers a smattering of arguments, but none of particular merit. Consol first cites *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), noting the Supreme Court's "'presumption against retroactive legislation'" and quoting *Landgraf* to support its proposition that "[t]here is no evidence that [section 1556] was enacted to 'respond to emergencies, correct mistakes, prevent circumvention of a new statute in the interval immediately preceding its passage, or give comprehensive effect to a new law Congress considered salutary.'" (Br. at 6-7). Of course, *Landgraf*'s relevance is minimal here because, unlike the statute at issue there, Congress itself has determined that section 1556 should apply retroactively and the party challenging the legislation's

constitutionality must make the "uphill climb" to demonstrate that Congress acted irrationally in that choice. As the *Landgraf* Court recognized – tellingly, in the sentence immediately following the passage Consol quotes – "a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268.

Consol further asserts that because Congress did not "discuss[], debate or consider[] the amendment's [financial] effect on the responsible parties," *i.e.* coal mine operators and insurance carriers, the section 1556 amendment is arbitrary and irrational. (Bf. at 10). Congress is not required to provide notice to all affected parties when enacting retroactive legislation. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731-2 (1984); *Davon, Inc.*, 75 F.3d at 1127. And, as noted above, so long as there is a discernable rational basis for the legislation, constitutional due process is satisfied even if Congress did not actually consider that basis or the legislation is not accompanied by legislative history: "Economic regulation will be upheld, even without any express findings or legislative history, if there is 'any reasonably conceivable

state of facts that could provide a rational basis' for the legislation." *Central States*, 181 F.3d at 806 (quoting *Beach Communications*, 508 U.S. at 313).[2]

Taking an unusual tack, Consol also argues that the retroactive nature of section 1556 is irrational "in light of the January 19, 2001 regulatory amendments" to the black lung program regulations. *See generally* 65 Fed. Reg. 79920-80107 (December 20, 2000). In Consol's view, these amendments "expanded the definition of pneumoconiosis, limited the amount of medical evidence that could be submitted and eliminated reliance on case law that was previously utilized in rebutting claims that were entitled to the presumptions." (Bf. at 10-11). Consol further

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[2] Drawing on section 411(c)(4)'s history, particularly its limitation in 1981 to claims filed prior to 1982, Consol alleges that "the only possible 'rational legislative purpose' of Section 1556 would be to ensure that more claimants were awarded benefits." (Br. at 9). It then argues that this type of retroactive change is not about adjusting economic burdens and benefits between the government and coal mine operators. While Consol's point is somewhat vague, one thing is certain: ensuring that miners and their survivors are adequately compensated for coal-mining-related disabilities and deaths is the very purpose of the Black Lung Benefits Act, which the Supreme Court has already characterized as an economic statute. *Turner Elkhorn*, 428 U.S. at 15-6.

complains that the 15-year presumption "shifts the burden from the employee to prove the elements of his claim by a preponderance of the evidence" without restoring the regulations (and the case precedents the revised rules addressed) to the same state as when the 411(c)(4) presumption was previously available to claimants. (Br. at 11). But Consol fails to explain how, exactly, the revised regulations impact the constitutionality of section 1556 or show how Congress acted irrationally. This argument also fundamentally misunderstands the nature of the Act's presumptions: the claimant still bears the burden of proving his claim by a preponderance of the evidence although he may be aided by a presumption in doing so. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). Perhaps Consol is simply complaining that the 15-year presumption may make it more difficult to defeat a claim for benefits than it used to be. That may be true, but it is hardly grounds for finding section 1556 to be unconstitutional.

In its last attempt to establish a due process claim, Consol speciously argues that the retroactive application of section 1556 "is contrary to law under the current regulations that specifically prohibit the use of any 'presumption' as it relates to legal

pneumoconiosis." (Br. at 11). There is no such regulation.[3] But even assuming a regulation of the Secretary conflicts with the 411(c)(4) presumption – which we do not concede – statutes trump regulations (including comments to regulations). *See Caldera v. J.S. Alberici Constr. Co.*, 153 F.3d 1381, 1383 n.** (Fed. Cir. 1998); *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 1267 (6th Cir. 1989). Regulations implementing a statute simply cannot serve to defeat that statute's terms or prove its unconstitutionality.

In sum, Consol has failed to even approach the summit in its uphill climb to prove that Congress acted irrationally and arbitrarily in enacting section 1556 of the PPACA. As the Supreme Court concluded more than a quarter-century ago, "the Due Process

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[3] This argument refers to comments explaining the regulatory definition of pneumoconiosis, where "legal pneumoconiosis" is defined as any chronic lung disease arising out of coal mine employment, including obstructive lung diseases. 20 C.F.R. § 718.201(a)(2) (2009). In promulgating the regulation, the Secretary confirmed that the regulation did not provide a "presumption" of a causal nexus between obstructive lung disease and coal mining; instead, each miner must offer that proof. 65 Fed. Reg. 79938 (Dec. 20, 2000). Assuming the miner suffers a totally disabling respiratory impairment, the 15-year presumption could now suffice to prove that causal nexus, although it would also be subject to the mine operator's rebuttal.

Clause poses no bar to requiring an operator to provide compensation for a former employee's death or disability due to pneumoconiosis arising out of employment in its mines," even if required by retroactive legislation. *Turner Elkhorn*, 428 U.S. at 19-20.

C. Consol has failed to prove that section 1556 of the PPACA is an unconstitutional Taking under the Fifth Amendment.

Consol also argues that section 1556 constitutes an unlawful taking of property in violation of the Fifth Amendment's Takings Clause. This assertion is similarly unsupported.

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend V. This constitutional protection is not restricted to physical invasions, occupations or removals of property; rather, in some cases, overly burdensome government regulation can constitute an unconstitutional taking. *See Houlton Citizens' Association v. Town of Houlton*, 175 F.3d 178, 190 (1st Cir. 1999). But a regulatory action only becomes a compensable taking under the Fifth Amendment if the government interference goes "too far," *Pennsylvania Coal Co. v. Mahon*, 260

U.S. 393, 415 (1922), which it does when "some people alone" are forced "to bear public burdens which, in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "Given the propriety of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986).

The inquiry into whether a regulatory taking has occurred does not lend itself to any set formula, but relies instead on *ad hoc* factual inquiries into the circumstances of each particular case. *Id.* at 224. However, three factors have particular significance in the evaluation of a regulatory takings claim: "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *Id.* at 225 (quoting *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (internal quotations omitted)). The first two factors are primary. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005).

Consol asserts that consideration of these three factors compels the conclusion that retroactive application of the PPACA amendments constitutes an unconstitutional taking of its property. Like its due process challenge, Consol "bears a substantial burden, for not every destruction or injury to property by such action is a constitutional taking." *Eastern Enterprises v. Apfel,* 524 U.S. 498, 500 (1998). Consol has not met its burden under any of these three factors and its challenge must therefore fail.

In an attempt to demonstrate a substantial economic impact, Consol broadly states that the section 1556 amendment "will affect insurance policies related to claims from 2005 to March 23, 2010" and impose significantly greater liability on coal mine operators "than [the pre-amendment system] requiring a claimant to prove the elements of the claim by a preponderance of the evidence."[4] (Br. at

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[4] This Court and the Supreme Court have sometimes broken the "substantial economic impact" inquiry into two steps. The first is whether the statute imposes a "considerable financial burden" and the second is whether the liability imposed is disproportionate to the employer's "experience with the plan." *Central States*, 181 F.3d at 808 (quoting *Eastern Enterprises*, 524 U.S. at 529-30 (1998)). The distinction is not helpful here because Consol has offered no (cont'd . . .)

13). But Consol fails to provide any evidence of its financial situation to support this argument. The absence of this information is fatal to Consol's argument – without it, the Court has no way to determine what economic impact the PPACA amendments will have. *See Connolly*, 475 U.S. at 225-226 (economic impact of federal legislation obligating an employer, who was withdrawing from a multi-employer pension plan, to pay a share of the plan's unfunded vested benefits "directly depends on the relationship between the employer and the plan to which it had made contributions," and must be "out of proportion" to employer's experience with the plan to constitute a taking); *Central States,* 181 F.3d at 808 (7th Cir. 1991) ("The loss at issue must be compared to something in order to assess its impact – the net worth of the company or its total payments under the plan might be a good place to start. [The complainant], however, has not done this").[5]

(. . . cont'd)
evidence or argument that would allow the Court to evaluate either of these inquiries.

[5] Consol points to the debt the Black Lung Disability Trust Fund had incurred by 1981 before Congress limited access to the 411(c)(4) presumption, and extrapolates that revitalization of the (cont'd . . .)

Consol next alleges that section 1556 is likely to disrupt investment-backed expectations, resulting in higher insurance premiums, lower profits, bankrupt mine operators, and consequent job loss that "will only exacerbate an economically difficult time in our country." (Bf. at 14). But unsupported predictions of a gloomy future do not establish a Takings Clause violation. As a simple factual matter, it is still unclear exactly how many claims will be awarded as a result of section 1556, and therefore what the resulting economic impact will be. And Consol has pointed to nothing in section 1556 that upset its own investment-backed expectations.

More importantly, Consol's argument ignores the fact that, since 1974, the black lung benefits program has required that a specific contractual endorsement appear in each policy issued by

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presumption will lead to a similar economic impact. (Br. at 13). This analysis proves nothing about Consol's circumstances. Moreover, many factors led to the Trust Fund's indebtedness, not just the use of one statutory presumption. *See, e.g.*, H.R. Rep. No. 97-406, pt. 1, at 4 (1981) (recommending legislation to address problems with Trust Fund's financing including, *inter alia*, imposing market-rate interest on mine operator reimbursements to the Fund).

an insurance carrier providing liability coverage for black lung benefits under the Act. This endorsement specifically provides that insurers are liable for obligations from any amendments that are enacted while the policy is "in force," *i.e.*, at any time while a claim can be made against the policy. 20 C.F.R. § 726.203(a);[6] *National Independent Coal Operators Association, Inc. v. Old Republic Insurance Co.*, 544 F.Supp. 520, 527-8 (W.D.Va. 1982).

Consol is self-insured under 20 C.F.R. §§ 726.101-.115, and thus is held to the same standards as an insurance carrier. *See generally* 30 U.S.C. § 933; 20 C.F.R. §§ 726.4, 726.110(a)(1). As a self-insured coal mine operator, Consol certainly has been cognizant of this mandatory endorsement and thus has been on notice that it may bear liability arising from amendments to the Act. Accordingly, Consol's implicit suggestion that it – and similarly situated operators and carriers – has been blindsided by the liability

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[6] Section 726.203(a) requires an endorsement that covers all obligations arising under "Part C of title IV of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. section 931-936, and any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force." 20 C.F.R. § 726.203(a).

created by the PPACA amendments must be rejected. *See Connolly*, 475 U.S. at 227, citing *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958) ("Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."). *See also Turner Elkhorn*, 428 U.S. at 15-16 (legislation adjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations). Consol's Takings Clause argument fails for this reason alone.

On the third factor – the nature of the governmental action -- Consol argues, without supporting citations, that "[t]he character of the governmental action is equally compelling as there was no debate or evidence developed before the Legislature related to the need to change the statute prior to the enactment of the amendment." (Bf. at 14). The Supreme Court has explained that legislation that regulates economic life rather than appropriates property or assets for the government generally does not rise to an impermissible taking:

> [Where] the Government does not physically invade or permanently appropriate any of the employer's assets for its own use. . . [and the] interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to

> promote the common good. . . under our cases [the legislation] does not constitute a taking requiring Government compensation.

Connolly, 475 U.S. at 225 (citing, *inter alia*, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), and *Turner Elkhorn*, 428 U.S. at 15, 16). Consol has not demonstrated why the section 1556 amendment should be exempted from this general rule. Nor can it. As the Supreme Court recognized in *Connolly*, once having sustained the Black Lung Benefits Act's retroactive provisions against the due process challenge in *Turner Elkhorn*, "it would be surprising indeed to discover now that . . . Congress had unconstitutionally taken the assets of the employers there involved." 475 U.S. at 223.

One last note: Consol argues that "'retroactive' application of the amendment will only serve to delay and prolong black lung litigation that is already protracted and seemingly endless." (Bf. at 14-15). All parties are free to take advantage of the Act's procedures: hearings governed by the Administrative Procedure Act and appellate review by the Benefits Review Board, this Court and, ultimately, the Supreme Court. Sometimes this litigation is not completed in an ideal time frame. Nonetheless, the possibility of

additional litigation is not grounds for invalidating legislation on constitutional grounds.

CONCLUSION

The Court should hold that the PPACA section 1556 amendment to section 411(c)(4) of the Black Lung Benefits Act is constitutionally valid.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1) This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface (14-point Bookman Old Style) using Microsoft Office Word 2003.

2) On January 7, 2011, paper copies of the Director's brief were served by mail, postage prepaid, and an electronic copy of the brief in portable document format was served through the Court's electronic filing system on the following:

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3) The text of the electronic brief is identical to the text of the paper copies.

4) A virus detection program (VirusScan Enterprise 8.5.0i, updated January 6, 2011) has been run on the file of the electronic brief and no virus was detected.

/s/Jeffrey S. Goldberg
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Attorney
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