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COURT OF APPEALS
STATE OF NEW YORK

AMERICAN ECONOMY INSURANCE COMPANY,

Respondent,

-against-

No. 96

STATE OF NEW YORK,

Appellant.

20 Eagle Street
Albany, New York
September 7, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL G. FEINMAN

Appearances:

STEVEN C. WU, DSG
ATTORNEY GENERAL OF THE STATE OF NEW YORK
Attorney for Appellant
120 Broadway
New York, NY 10271

SETH P. WAXMAN, ESQ.
WILMER CUTLER PICKERING HALE AND DORR LLP
Attorney for Respondent
1875 Pennsylvania Avenue, NW
Washington, DC 20006

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 96, American Economy
3 v. The State of New York.

4 Counsel.

5 MR. WU: Thank you. Steven Wu for the State of
6 New York. I'd like to reserve two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: You may, Mr. Wu.

8 MR. WU: One of the unique protections provided
9 by workers' compensation is the long-term financial
10 commitment that it requires insurance carriers to make to
11 injured workers.

12 JUDGE RIVERA: Counsel, how - - - how do the
13 employers benefit? What - - - what is the savings that
14 they get as a result of the amendment and the closure of
15 the fund?

16 MR. WU: There's an immediate cost savings in the
17 form of getting rid of what has ballooned to be a 300-
18 million-dollar annual assessment against employers. That's
19 sort of the immediate cost savings at issue here. And
20 there's a longer-term cost savings from what are
21 anticipated to be increased efficiencies from having
22 insurance carriers retain these liabilities rather than
23 transfer them to a third party - - -

24 JUDGE RIVERA: Is - - -

25 MR. WU: - - - which is the - - -

1 JUDGE RIVERA: - - - the first one offset by
2 increased premiums?

3 MR. WU: To some extent in the short term it may
4 be offset by increased premiums, but - - - but that gets me
5 to the longer-term benefits of this. And there a couple of
6 benefits here to cost savings. The one is that carriers
7 that retain these liabilities can use their existing
8 apparatus to adjudicate claims, to evaluate them, and
9 basically to administer these workers' compensation claims
10 going forward. Before, there were substantial costs in
11 having a separate party, which is the Fund for Reopened
12 Cases, assume these claims often many years after the date
13 of the injury.

14 JUDGE STEIN: And in fact, there was a lot of
15 litigation over that whole system, right?

16 MR. WU: That - - - that's correct, and that's
17 sort of the second big costs savings here is that the very
18 process of transferring claims to the Reopened Cases Fund
19 was a complex and costly one. It was one that involved a
20 great deal of administrative litigation, as well as
21 litigation to the Third Department - - -

22 JUDGE RIVERA: And - - - and - - -

23 MR. WU: - - - and even to this court.

24 JUDGE RIVERA: So I'm - - - this is where I'm
25 unclear. So who was bearing the cost of that? Aren't all

1 of these costs either through surcharges or a pass through?
2 Who actually was paying for that?

3 MR. WU: The immediate assessments were levied
4 against the insurance carriers, but under 151 of the
5 Workers' Compensation Law, they were then allowed - the
6 carriers were allowed to surcharge the employers and
7 therefore collect some, though necessarily not all, of the
8 assessments that had been levied against them.

9 JUDGE RIVERA: So - - - so what's the windfall to
10 the carriers - - -

11 MR. WU: Well - - -

12 JUDGE RIVERA: - - - that was referenced as a
13 basis for the amendment?

14 MR. WU: There are a couple of answers to that.
15 And I think the clearest answer comes from the immediate
16 impetus for the closure of this fund, which was the rapid
17 escalation of the costs that were imposed on employers
18 here. What that represented was an increased utilization
19 of the fund by insurance carriers that exceeded the
20 assumptions that had been in place when premiums were first
21 imposed. In other words, carriers had collected premium in
22 the years prior to the closure on the assumption that they
23 would retain a larger amount of liability than they, in
24 fact, retained when the time came to pay those claims.

25 And - - - and the flip side to that is that

1 employers were basically required to pay twice. They paid
2 premiums so that the carriers could retain certain
3 liabilities. And then, when several years later the
4 carriers transferred basically triple that amount of
5 liability to the fund, carr- - - employers again had to
6 pay assessments to the fund to manage those liabilities.
7 And that is, in part, the premium windfall that the
8 governor's memorandum was referring to as a basis for
9 saying that the cost of this would be somewhat - - -

10 JUDGE RIVERA: So - - - so when you use a
11 windfall, it's almost as if it's unexpected. What - - -
12 what unexpected about that?

13 MR. WU: What was unexpected was what is always
14 unexpected in these cases, and when there's a change in the
15 way that the workers' comp system operates different from
16 what had historically occurred. And that change here was
17 the dramatic increase in utilization. And just to give you
18 a sense of the numbers, in 2006, the assessments levied
19 against employers was under 100 million dollars, and that
20 had roughly been the figure for several years. Only six
21 years later, by the end of 2012, that figure had ballooned
22 to over 300 million dollars, and as a result of that, the
23 legislature, supported I should say by the insurance
24 industry and by employers, decided to close the fund.

25 JUDGE WILSON: Can I ask you a question about the

1 meaning of a statement in the July 2013 DFS decision that
2 reads: "It's not practical or feasible to quantify the
3 effect the fund closure will have, if any, on the
4 experience of policies that are currently in effect. To
5 the extent that such experience is adversely affected by
6 the RFC closure, the adverse experience will be reviewed as
7 part of - - - part of future rate filings." What is DFS
8 doing, if anything, with regard to RFS - - - RCF closure
9 related expenses and future rate adjustments?

10 MR. WU: Well, I think that is basically a
11 statement that they are going to be seeing what the
12 anticipated effects of this closure are going to be in a
13 broader scale.

14 JUDGE WILSON: And will adjust premiums upward to
15 compensate the insurers for losses out of the RCF fund, or
16 no?

17 MR. WU: Yes. There will. There will be premium
18 increases and there have been premium increases to account
19 for that fact that insurers are now required to retain
20 those liabilities and to pay them basically out of their
21 own pocket.

22 JUDGE WILSON: And does that apply to past
23 liabilities or no?

24 MR. WU: Well, it does in the - - - in a
25 technical actuarial sense, which is that DFS does not

1 approve rate increases going back in time. It only
2 increases rates going forward.

3 JUDGE WILSON: But will the forward rates account
4 for losses that arise from the RCF fund closure prior to
5 2014?

6 MR. WU: They - - - they will not, again, as a
7 technical matter. But - - - but this is not unique to
8 premiums for the purposes of the closure of the fund here.
9 I mean premiums never look backward, even if there are
10 unanticipated statutory changes. And the broader context
11 here is that that is routine in the Workers' Compensation
12 Law. There are always going to be changes to the benefits
13 to employees, to the cost on carriers, and to the burdens
14 on employers.

15 JUDGE RIVERA: So you mean if in the past - - -
16 so you mean if in the past - - - whatever premiums have
17 been set in the past, as it turns out, don't actually cover
18 the expenses, carriers have to pay for that anyway because
19 the premiums were the premiums that were set?

20 MR. WU: That's correct. And - - - and my point
21 here - - -

22 JUDGE RIVERA: So they may have benefitted in the
23 past.

24 MR. WU: Well, and that's my point here is that
25 that is part of the expectation of all the participants in

1 the system that there will be changes, and that premium may
2 or may not account for them. And as you just referenced,
3 sometimes - - -

4 JUDGE FAHEY: One - - - one of the - - - excuse
5 me. One of the things in the approval memorandum that was
6 sent over with the legislation is - - - is the statement
7 that the premiums the insurance carriers charged already
8 covered the liability. Do you concede that that statement
9 in the approval memorandum, I think it was from the
10 governor's office, was in - - - was incorrect?

11 MR. WU: I - - - I do not, and part of the answer
12 - - -

13 JUDGE FAHEY: No?

14 MR. WU: And part of the answer is the answer
15 that I gave to Judge Rivera about how the increased usage
16 of the fund actually made past-collected premiums excessive
17 based on the assumption that carriers would retain a larger
18 set of liability.

19 JUDGE FAHEY: Well, are there other
20 justifications, hypothetical justifications, for the retro-
21 - - - for any possible retroactive impact of the law that
22 we can point to, then, assuming that those premiums were
23 not charged to cover this liability?

24 MR. WU: There are other justifications, and
25 they're not hypothetical. They were explicit in the

1 legislative history. And the two main ones were first, to
2 reduce a burden on employers. And that burden reduction
3 could be achieved most immediately by cutting off the fund
4 to new applications going forward instead of deferring the
5 effect of that disclosure until post-enactment dates of
6 entry.

7 JUDGE RIVERA: The - - - the burden being this
8 300 million as opposed to 100 million.

9 MR. WU: That's correct.

10 JUDGE RIVERA: Is that what you mean?

11 MR. WU: That's correct. And the second was
12 another rationale that was supported both by industry and
13 by employers, which is that the fund had outlived its
14 original purpose. You know, when the fund was created in
15 1933, it was a very - - - it was intended to be a one-time
16 adjustment for a very small number of cases. I think
17 twenty cases were filed in the first year, growing to only
18 a hundred in 1936. By 2012 and 2013, thousands of claims
19 were being adjudicated at the cost of hundreds of millions
20 of dollars. And importantly, the types of claims that were
21 being adjudicated were also substantially different. The
22 fund was created, as its name suggests, for claims that
23 unexpectedly would reopen. But the history here shows that
24 the types of claims being transferred were increasingly
25 shifting to cases where there were foreseeable ongoing

1 medical costs that technically qualified for transfer to
2 the fund because indemnity payments for lost wages had been
3 settled seven years before. And as a result, the fund was
4 no longer dealing with cases where carriers could not
5 predict the cost going forward that had unexpectedly
6 reopened.

7 JUDGE FAHEY: Let - - - let me just go a little
8 briefly to the Article 1 Section 16 argument - - - or
9 Section 18 argument of the New York State Constitution that
10 you made. Did you raise the issue below?

11 MR. WU: This is the argument about whether the
12 Workers' Compensation - - -

13 JUDGE FAHEY: Did the - - -

14 MR. WU: - - - Law is affected by - - -

15 JUDGE FAHEY: Is included in the New York State
16 Constitution. Yeah.

17 MR. WU: Yeah. That - - - we - - - I don't
18 recall if we made that argument specifically below. We are
19 not principally relying on that argument as a basis for
20 saying that the constitutional arguments here fail. I - -
21 - I think, if I could just finish this one thought.

22 CHIEF JUDGE DIFIORE: Go ahead.

23 JUDGE FAHEY: Sure.

24 MR. WU: I think the basic arguments on the
25 constitutional claims are that they're premised on two

1 fundamental mistakes. The first is that there is no
2 legitimate justification at all for the closure of the
3 fund. And - - - and, you know, what I've been arguing so
4 far is there is a legitimate justification here articulated
5 in the legislatively history.

6 And the second is a fundamental
7 mischaracterization by the carriers about the nature of
8 their initial liability. I think a core part of their
9 argument is that when they entered into these contracts,
10 the contracts themselves excluded liability for what
11 they're calling claims in reopened cases. But that is
12 flatly incorrect. What the Reopened Cases Fund did was to
13 provide a mechanism for relieving certain liabilities by
14 carriers as they arose in the future from reopened cases.
15 It was not a redefinition on their initial liability. And
16 we can tell this, in part, because what the fund - - - what
17 triggered the fund's application was an application by the
18 carrier to, as the statute says, transfer their liability
19 to the fund to handle. Because of that the basic starting
20 premise is that - - - that insurance carriers have this
21 liability and the fund's removal only changed their relief
22 going forward.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. WU: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel.

1 MR. WAXMAN: May it please the court, I'm Seth
2 Waxman for the respondents. I think maybe I'll start by
3 addressing the two concluding points that my friend raised,
4 one of which is that we somehow were wrong in our core
5 argument that this legislation, this amendment imposes
6 retroactive liability, has retroactive effect, and
7 secondly, that our argument is that there's no legitimate
8 justification to close the fund.

9 I'll start with the - - - with the first one
10 first and hope that I get around to the second. The 2013
11 amendment makes insurers liable for a category of coverage,
12 that is reopened cases described in Section 25(a) of the
13 Workers' Compensation Law, that were not included in the
14 earlier State-approved contracts, and were not covered by
15 premiums that insurers were permitted to change. I don't
16 think there's any dispute about this, but let me just point
17 the court to the places in the record that establishes
18 that. The contr- - - at page 504 of the record, you'll
19 see a sample State-approved contract, and the contract - -
20 -

21 JUDGE STEIN: Counselor, if we - - - if we accept
22 this argument, when could any changes ever be made to
23 allocating who pays what in workers' compensation cases?

24 MR. WAXMAN: So, Your Honor, there - - - there
25 are two questions - - -

1 JUDGE STEIN: Retroactive.

2 MR. WAXMAN: - - - embedded here. If - - - the
3 first question is is the law retroactive or isn't it? And
4 I understand Your Honor's question to be let's assume that
5 it is.

6 JUDGE STEIN: Right.

7 MR. WAXMAN: Under what circumstances can the
8 legislature enact laws that are retroactive? There are
9 many instances in which - - - and the Supreme Court and
10 this court has been clear - - - that retroactive
11 legislation is not, in and of itself, unconstitutional. It
12 may be constitutional if it meets the specified tests that
13 this court and the U.S. Supreme Court has established for
14 scrutiny under the three provisions of the constitution,
15 I'll say the United States Constitution, two of which exist
16 in the New York State Constitution, that speak - - - that
17 are sensitive to retroactive legislation.

18 So, for example, under the contracts clause, a
19 state may impair the obligations, contractual obligations
20 but only to the extent that the - - - that regulation is
21 quote: "Reasonable and necessary to serve an important
22 public purpose." And as this court's decision in the
23 Health Industries Association v. Hartnett and Moore v.
24 Metropolitan Insurance - - -

25 JUDGE FAHEY: Let - - - let me jump in here on

1 Hartnett because I think it's - - - it goes to the heart of
2 your argument, and one of the things I've struggled with
3 it. It seems that you have a retroactive application of
4 the law that says is going to result in 62 million dollars
5 in unfunded liability, which says to me that you have a
6 contract that says that you are required to cover these
7 particular losses. And I think you would agree with that,
8 that - - -

9 MR. WAXMAN: No, Judge Fahey. I actually don't
10 agree with it. The - - -

11 JUDGE FAHEY: Okay. Let me finish my thought
12 then.

13 MR. WAXMAN: Okay.

14 JUDGE FAHEY: All right. Because the way I read
15 it, it says if - - - if you've got an unfunded liability in
16 your contract, which I'm looking at page 264 from the
17 sample contract says: "Workers' Compensation Law means,"
18 blah, blah, blah, and it seems to specifically lay out your
19 obligation to cover any loss under the Workers'
20 Compensation Law and any amendments to the Workers'
21 Compensation Law. So if there's no liability, you would
22 simply disclaim. If there is liability, then this
23 liability is funded and we're talking about a loss of
24 profit and that's not necessarily the creation of a new
25 liability. Hartnett is a maternity case and that - - -

1 that I see - - - think is a question of the creation of a
2 new liability. And I think that's why I want you to
3 explain this - - - this conflict for me, if you could.

4 MR. WAXMAN: Right. So there isn't a conflict
5 because - - - and again, at page 264 and it's also at page
6 504 of the appendix, the contract, the insurance contract,
7 provides - - - it limits carrier's liability to, quote:
8 "Benefits required of the employer by the Workers'
9 Compensation Law, including any amendments in effect during
10 the policy period." That is the - - - the employer's
11 obligation - - - the insurer's obligation is limited to
12 those liabilities, those statutory responsibilities that
13 employers have under the Workers' Compensation Law during
14 the policy period. There's no dispute in this case that
15 these are one-year contracts that have a start date and a
16 termination date.

17 JUDGE FAHEY: Sure.

18 MR. WAXMAN: And we're talking about applic- - -
19 - and so it is not true that employ- - - - either employers
20 or insurance carriers by contract had any obligation under
21 those contracts.

22 JUDGE WILSON: These document to which you're
23 referring us are not actually the contracts. Are the
24 contracts in the record anywhere?

25 MR. WAXMAN: I believe the State approved the

1 form of the contract - - -

2 JUDGE WILSON: Well, the - - -

3 MR. WAXMAN: - - - and I believe that the - - -
4 the - - -

5 JUDGE WILSON: The disclaimer at the front of
6 these two documents you're pointing to at 503 and 263 of
7 the record say: "This quick reference is not part of the
8 workers' compensation employer's liability policy and does
9 not provide coverage. Refer to the workers' compensation
10 employer's liability policy itself for actual contractual
11 provisions." So it seems to me you're asking us to
12 invalidate state legislation on a constitutional grounds
13 because your contracts have been impaired, and the
14 contracts aren't in the record.

15 MR. WAXMAN: I believe that one of the affidavits
16 in the case - - - and I could be wrong - - - that included
17 these contracts made a representation that these were the
18 material terms of the contracts signed - - - contracts
19 issued during the prior policy periods. And I don't think
20 there's - - - I think there's no disagreement that this is,
21 in fact, what the contracts are. The - - - the point is
22 that under the contracts the insurer undertook - - - the
23 insurer, with the State's approval, bargained for liability
24 - - - indemnification liability for those obligations that
25 the Workers' Compensation Law placed on the employer during

1 the policy period. And during those periods, Section 10 of
2 the Workers' Compensation Law - - -

3 JUDGE FAHEY: Let me just stop you one second.
4 The contrac- - - - forget about the amendments were made.
5 When this contract was in place, there was coverage, your
6 employers who were - - - who you made - - - who you
7 contracted with assumed and you assumed that you - - - you
8 were able to transfer to the 25(a) account. When you lost
9 the ability to do - - - and you did that pursuant to
10 contract, you said, but that isn't included in the contract
11 because the State wasn't a party to the contract. Now it -
12 - - and but nonetheless, the liability was - - - was
13 calculated in the cost of the contract. That's the way I -
14 - - that's the way I understand the facts in this case.

15 MR. WAXMAN: So the - - -

16 JUDGE FAHEY: Go ahead.

17 MR. WAXMAN: If I may?

18 JUDGE FAHEY: Go ahead.

19 MR. WAXMAN: The word "transfer" in the statute
20 is part of the 2013 amendment. The statute Section 10 and
21 Section 25(a), at the time that these earlier contracts
22 were enacted, provided in Section 10 that employers were
23 responsible for disability compensation, quote: "Except as
24 otherwise provided in Section 25(a)."

25 JUDGE STEIN: So - - -

1 MR. WAXMAN: And Section 25(a) stated that any
2 award in a reopened case shall be against the Reopened Case
3 Fund. And therefore, this - - -

4 JUDGE STEIN: Okay. So - - - so what is a
5 reopened case? I mean we've - - - we've heard and - - -
6 and there are affidavits in the record about - - - about
7 the difficulty and the amount of litigation in each and
8 every individual case to determine whether, in fact, that
9 was a - - - entitled to transfer to the fund because it's
10 not just a matter of meeting certain time frames. It's
11 there are all sorts of issues that were being litigated
12 about whether they qualified or not.

13 MR. WAXMAN: With respect, Judge Stein, there
14 were two questions that when a - - -

15 JUDGE STEIN: When a case was - - -

16 MR. WAXMAN: When a case was - - - when a claim
17 was submitted to the Workers' Compensation Board, the board
18 had to answer two questions as an initial matter. One, is
19 this a claim that is made in a closed case? And, two, if
20 the case was closed, is it more than seven years since the
21 accident and three years since the last claim.

22 JUDGE STEIN: You would agree that those - - -
23 those inquiries are not limited to just what the time
24 periods are. There were all kinds of issues about what's a
25 true closure, what's a payment of compensation, you know,

1 and what - - - what qualifies.

2 MR. WAXMAN: I - - - I - - -

3 JUDGE STEIN: I sat on the Third Department. I
4 know the number of cases that - - - that got up to that
5 court, and that doesn't even consider the ones that ended
6 with the board. So - - -

7 MR. WAXMAN: The salient point for purposes of
8 the constitutional analysis is that under - - - if - - - it
9 may or may not have been difficult in individual cases to
10 determine whether something was a reopen - - - a claim in a
11 reopened case under 25(a). But if it did, as this court
12 explained in Mayo - - - De Mayo and as the Third Department
13 has explained in many cases, liability for the indemnity
14 payments passed as a matter of law to the fund.

15 JUDGE STEIN: But the question - - -

16 MR. WAXMAN: They were never the responsibility
17 of the employ- - - -

18 JUDGE STEIN: I think my point is is that there's
19 no way as a matter of contract to have anticipated exactly
20 what those cases would be. I mean so it's - - - it's
21 almost a term that is so ambiguous that it doesn't mean
22 anything.

23 MR. WAXMAN: No. With respect, there - - -
24 everybody was clear. There - - - there may have been
25 factual determinations and factual disputes, but everybody

1 was clear that as a matter of law, if it was a reopened
2 case, there was no liability. The premiums that the State
3 allowed the insurers to charge didn't cover it.

4 JUDGE FAHEY: When you say everybody was clear,
5 point to us in the contract where - - - where that was made
6 clear explicitly.

7 MR. WAXMAN: Yes. Well, the contract says in the
8 page that you cited that the carrier's liability is limited
9 to the benefits required of the employer by the Workers'
10 Compensation Law in effect during the policy period. And
11 during the policy period, Sections - - -

12 JUDGE FAHEY: And so you're saying that exempts
13 this fund then?

14 MR. WAXMAN: Absolute - - -

15 JUDGE FAHEY: That's - - -

16 JUDGE STEIN: Aren't you saying - - -

17 MR. WAXMAN: I think there's no dispute that it
18 exempts this - - -

19 JUDGE STEIN: - - - that you could say to an
20 employer we're not playing this claim because we think that
21 it - - - the fund should take it, and the fund says we're
22 not taking it. Then what?

23 MR. WAXMAN: The problem - - - the problem is - -
24 -

25 JUDGE STEIN: Then what?

1 MR. WAXMAN: - - - we're not arguing that under
2 our contract with the employer the employer has to pay
3 this. The - - - the reason that we've had to reserve 62
4 million - - -

5 JUDGE STEIN: Well, you're saying you don't have
6 to pay it. And I'm - - - I'm asking you what is it that
7 you don't have to pay and - - - and how do you define that?

8 MR. WAXMAN: Are you talking about after the
9 amendment for - - - after the amendment or before?

10 JUDGE STEIN: No. No. I'm talking about the - -
11 - before the amendment. You're saying that there's a
12 contractual right there to transfer these funds - - - these
13 claims, to the funds. And so as a matter of contract
14 between you and your insured, you are not responsible for
15 those, but what are they that you're not responsible for?
16 What if you think you're not responsible, that - - - and
17 the fund thinks you are?

18 MR. WAXMAN: Judge Stein, we are responsible
19 under those old contracts for any liability that the
20 employer had during the relevant policy period under the
21 Workers' Compensation Law. Section 10 of the Workers'
22 Compensation Law provided that the employers had liability
23 to make disability payments except as otherwise provided in
24 Section 25(a), which placed, as a matter of law, on the
25 fund the indemnification obligation for reopened cases. If

1 - - -

2 JUDGE WILSON: And a different - - - a difficult
3 - - - a different way to read the "includes any" amendment
4 language to which you've been pointing us is that there was
5 a constant recognition by the insurers that the law might
6 change anytime and they were assuming that risk.

7 MR. WAXMAN: That - - - that what the State - - -
8 that - - - the insurers were certainly assuming risks that
9 the law might change and their indemnification obligations
10 would change during the policy period. What the State
11 wants to do is read out of the contract the words "in
12 effect during the policy period." The - - - there's no
13 dispute that the premiums that the State allowed us to
14 charge for these periods took no account and could take no
15 account either of indemnification responsibilities that
16 would be covered by the fund under 25F, or the assessments
17 that we paid on an annual basis in order to pay those. If
18 I may just spend one - - -

19 JUDGE RIVERA: Can I ask is there any cost that
20 you bore that didn't get passed onto the employer pre-this
21 amendment?

22 MR. WAXMAN: You mean for - - - in the
23 assessments?

24 JUDGE RIVERA: Related to reopened cases?

25 MR. WAXMAN: In the assessments?

1 JUDGE RIVERA: To anything.

2 MR. WAXMAN: So - - -

3 JUDGE RIVERA: Any attempt for a case to be
4 reopened and to be transferred shifted to the fund.

5 MR. WAXMAN: So any case - - - so any costs,
6 administrative costs, that were involved in adjudicating a
7 factual dispute, for example that Judge Stein raised, were
8 the responsibility of the insurers and they were included
9 in the calcu- - - - the lost cost calculations that the New
10 York CIRB made and the State approved in setting premium
11 rates. Indemnification for reopened - - - claims under
12 reopened cases was not included and there was no
13 compensation because, although as my friend points out the
14 statute in 25(a)(3) says that, you know, there will be an
15 annual assessment made to carriers for any shortfalls in
16 the - - - in the fund for cases pending, it's - - - it also
17 says that the insurers shall assess to the employers the
18 amount of that fund. So we were a passthrough. Now if I
19 just - - -

20 JUDGE FAHEY: Judge - - - Judge, could I just ask
21 - - - I know his time is almost up, but can I ask about the
22 taking clause argument?

23 CHIEF JUDGE DIFIORE: Yes.

24 JUDGE FAHEY: Would that be all right? Just
25 because we haven't gotten to that at all. I figured you

1 might want to get to that. So just to clarify for me, I
2 believe this court has decided that an economic regulation
3 that merely imposes an obligation to pay money cannot be
4 considered a taking. That not be - - - that's St. James.
5 We not - - - that may not be exactly in compliance with
6 Supreme Court jurisprudence, but it seems as if the Supreme
7 Court has left the question open in Eastern Enterprises. I
8 thought it was a plurality decision in Eastern Enterprises,
9 and frankly, I'm not sure how it affects our jurisprudence
10 right now. It may someday, but at this point it doesn't.
11 Do you agree with that?

12 MR. WAXMAN: So our - - - I can't - - - if I - -
13 -

14 JUDGE FAHEY: Do you agree with the principle
15 that our jurisprudence, that New York's jurisprudence, says
16 that an economic regulation, such as a tax that merely
17 imposes an obligation to pay money cannot be considered a -
18 - -

19 MR. WAXMAN: I agree with that as a matter not
20 only of New York Constitutional Law but Federal
21 Constitutional Law. What is at issue here is not just the
22 obligation to pay money but the diminution in value of
23 existing contractual obligations that - - - by virtue of a
24 legislative alteration of the term of a preexisting
25 contract.

1 JUDGE FAHEY: See, in some ways, I see it the
2 same way you do in terms of the - - - I don't see this case
3 so much as an impairment of contract but rather an argument
4 about the diminution and the value of the contract.

5 MR. WAXMAN: So the - - - it's an impairment of
6 contract. I mean the - - - the Supreme Court - - -

7 JUDGE FAHEY: Well, that's the question, isn't it
8 really? Isn't the question really whether or not if we're
9 not changing a clause or adding a clause or modifying a
10 clause in the actual contract but we're - - - we're saying
11 that the contract may not worth as much. Just like if we
12 raised taxes on your property, your property may not be
13 worth as much or we change the zoning on it or any other of
14 a number of arguments. That's a diminution of value as
15 opposed to an impairment of a contract.

16 MR. WAXMAN: Well, in this case, it's both
17 because an impairment of a contract is, you know, in the
18 retroactive sense of the word, anything that creates a new
19 contractual obligation with respect to a contract that's -
20 - -

21 JUDGE FAHEY: Sure.

22 MR. WAXMAN: - - - already in place, as was in
23 Hartnett. On the issue - - - just on the - - - the one
24 factual issue that my friend mentioned that this law was
25 justified because, I don't know, after the 2007 closing of

1 the special disability fund, you know, the - - - the
2 insurers are making unanticipated use of this and sending
3 off to this fund, or we're sending off to this fund, claims
4 that otherwise would have been covered by that other fund.
5 That it's important to focus on what is in the record in
6 this case. The record in this case at page 259 and 260
7 demonstrates that between 2007 and 2013, the number of
8 claims that insurers actually transferred to the fund
9 decreased. It did not increase.

10 There was an increase in the value of those
11 claims and the amount that the fund had to pay out to those
12 claims. But at page 260, the New York CIRB shows that that
13 was because of a - - - a vastly increasing rise in the rate
14 of healthcare costs to the amount of five percent per year.
15 Now, my - - - the - - - my friend says, well, you know,
16 over that period assessments increased by twenty-six - - -
17 it's by 300 million dollars. And that doesn't - - -

18 JUDGE FAHEY: It went from - - - I thought the
19 number was 100-and-something to 310-.

20 MR. WAXMAN: Whatever it was, if - - - if you
21 look, they're getting these figures from their declaration
22 of Mr. Papa, the only declaration they filed in the
23 district court. And those figures in his declaration
24 refute this argument. What they show is that the actual
25 costs to the fund over this period increased seven percent

1 a year, and we know that five percent of that was due to
2 the rising costs in healthcare. While the fund increased
3 assessments by - - -

4 JUDGE RIVERA: But does any of that - - -

5 MR. WAXMAN: - - - twenty-six percent a year.

6 JUDGE RIVERA: Does any of that matter if it was
7 always a passthrough to employers? You said before it was
8 a passthrough and it will continue to be one based on your
9 argument that the DFS is going to raise the premiums to
10 reflect going forward. So isn't the battle royal here only
11 about this - - - this small number that are the past that
12 are not going to get covered because the premiums - - -

13 MR. WAXMAN: This is - - -

14 JUDGE RIVERA: - - - have already been paid out?

15 MR. WAXMAN: The - - - the battle here - - - what
16 you're calling a small number is what the New York CIRB
17 estimated to be between 1.1 and 1.6 billion dollars in
18 unfunded mandates.

19 JUDGE RIVERA: But your client's share is much
20 smaller, no?

21 MR. WAXMAN: Our client's share, because our
22 client's share of the business is much smaller, is 62
23 million dollars.

24 JUDGE FEINMAN: How did you calculate that
25 number?

1 MR. WAXMAN: We - - - we calculated it by the New
2 York CIRB used a methodology that complies with New York
3 State Law that requires employers to raise their loss
4 contingencies to cover their - - - to - - - to raise their
5 reserves to the amount covered. And it's done in
6 accordance with the standards required under, I believe,
7 Section 103 of the relevant New York State statute. Nobody
8 disputes that those numbers are right. In fact, the New
9 York CIRB and the Department of Financial Services have
10 approved them, so there's no question that our unfunded
11 mandate amounts to 62 million dollars, and we have reserve
12 for that.

13 JUDGE FEINMAN: So assuming the accuracy of that
14 number, then how does that relate to the premiums or loss
15 reserves that you have? How - - - how does that - - -

16 MR. WAXMAN: So it doesn't relate to the premiums
17 because as a matter of New York Law, and everybody agrees
18 with this, the premiums that we're allowed to charge apply
19 only to claims that may arise in the policy year in which
20 the premium is assessed. So we cannot go back and, believe
21 me, the Department of Financial Services wouldn't allow
22 this, would not allow us to basically say, well, we're
23 going to have this unfunded liability, we'll make it up on
24 the front end with premium payments. That is - - -

25 JUDGE STEIN: Well, isn't that - - - isn't that

1 the nature of insurance? I mean in some years, you - - -
2 you made probably, you know, a big profit on it and then in
3 other years not so much. So - - -

4 MR. WAXMAN: The question is what our contractual
5 liability or, for purposes of the takings clause or the due
6 process clause, our reasonable expectation was at the sign.
7 We contracted with the State's - - - I think at the State's
8 direction, but certainly with the State's approval - - -
9 for a limitation on our liability, which is we are liable
10 only for benefits that the employer has to pay during the
11 policy period, not for any benefits that may have
12 thereafter increased.

13 JUDGE STEIN: But would you agree that - - -
14 that, you know, your adversary said a special fund was set
15 up for a very limited number of - - - of claims, and over
16 the years, you've managed to expand what the initial intent
17 was to begin with. So - - - so I - - - how does that give
18 you a right - - -

19 MR. WAXMAN: Judge Stein, I agree that in 1933
20 the number of cases that were these stale claims - - -

21 JUDGE STEIN: Well, let me just give you one
22 example. Okay. So when there were a few cases that came
23 down in - - - in 2003, 2007, Jones and - - - and Matter of
24 Bates, that - - - that redefined, you know, when
25 authorization for symptomatic medical treatment was or was

1 not compensation for purposes of determining whether this
2 was a reopen case. And it seems to me that - - - that
3 there was a practice that was engaged in by the insurance
4 companies thereafter which was, you know, to - - - to have
5 these indemnity-only agreements to sort of bypass that and
6 - - - and let the cases continue to flow. So I guess part
7 of what I - - - what I'm seeing is, is that that the
8 insurer's found ways to either increase or at least
9 maintain the flow of cases that was not intended. And so
10 just because you found a way to do that, how does that give
11 you the right to have that expectation that it will
12 continue?

13 MR. WAXMAN: The quest- - - - the relevant
14 question, particularly under the heightened scrutiny that's
15 appropriate that is applied for a contracts clause
16 violation, is what the legislature's intent was, what its
17 purpose was at the time. There is no - - - it - - - even
18 the State, which is raising this argument in this court for
19 the first time, you know, supported by the statistics and
20 the Papa declaration that I've - - - that I've explained
21 says, oh, there was this practice that resulted in these
22 vast increases in claims. Number one, the State isn't even
23 saying this occurred. The State says in its brief that
24 this may have occurred. The - - - what we know for a fact
25 and - - - that I - - - is that it did not occur and that in

1 any event, it is certainly not the legislative purpose.
 2 The legislative purpose was as stated in the government's -
 3 - - governor's approval memorandum that the purpose of this
 4 legislation was preventing a windfall for carriers who
 5 don't need it because the premiums they've charged already
 6 - - -

7 JUDGE STEIN: And - - -

8 MR. WAXMAN: - - - cover this liability.

9 JUDGE STEIN: And save the New York businesses
 10 hundreds of millions of dollars in assessments, right?
 11 Wasn't that also one of the - - - one of the purposes?

12 MR. WAXMAN: The - - - well, no. What it says is
 13 it will save the employers hundreds of millions of dollars
 14 of assessments, which everybody agrees with. The reason
 15 that the insurance industry supported this law
 16 prospectively was that it was going to be vastly cheaper to
 17 simply have insurers adjudicate these claims rather than go
 18 through this long dispute about whose legal responsibility
 19 - - -

20 JUDGE FAHEY: I know we're - - - I know we're
 21 getting kind of long here but you - - -

22 CHIEF JUDGE DIFIORE: Last question.

23 JUDGE FAHEY: Thank you, Judge. You had made
 24 reference to this standard being heightened here in the
 25 taking clause arguments. And my understanding is unless

1 you've established a vested property right, for instance,
2 here the way I understand your argument you'd have to say
3 you had a vested property right in the law remaining the
4 same, that there could be no alteration in the law or the
5 legislative policy. Otherwise, my understanding is you got
6 a rational basis test that has to be met, and it's
7 obviously a much lower standard. You're arguing that
8 there's some heightened standard. In the absence of that
9 vested property right and a particular law, which I've
10 never seen, I don't see how you get there.

11 MR. WAXMAN: So, Judge Fahey, what I was
12 referring to is the test under the contracts clause which
13 the Supreme Court - - -

14 JUDGE FAHEY: Okay. Not the takings clause.

15 MR. WAXMAN: - - - explained in Gray (ph.) and
16 Connolly is intermediate level - - -

17 JUDGE FAHEY: So - - - so let me stop you, so I'm
18 clear. It's not in the takings clause. It's in the
19 contracts clause you're talking about?

20 MR. WAXMAN: Yes. I - - - the takings clause is
21 not rational basis either. Rational basis is the due
22 process test for prospective application. This court has
23 said in the - - - in *Chu v. The Alliance of Insurers* that
24 for retroactive retrospective application, the due process
25 test is a multifactor - - -

1 JUDGE FAHEY: I'm not - - - I'm not sure once
2 again if Chu applies. That - - - that's the trust fund
3 case, I believe. And - - - okay. All right.

4 MR. WAXMAN: And - - -

5 CHIEF JUDGE DIFIORE: Thank you, Mr. Waxman.

6 MR. WAXMAN: Thank you.

7 CHIEF JUDGE DIFIORE: Counsel.

8 MR. WU: Thank you. I - - - I'd like to make
9 just three, hopefully brief, points. The first is that Mr.
10 Waxman argued that the effect of this statute is
11 retroactive because it makes insurance carriers responsible
12 for a new set of claims. But the critical point here is
13 that on the date that this statute was enacted, and really,
14 the nine-month period afterwards, there were no
15 identifiable set of claims that were precluded. The
16 statute applies only to future applications. What this
17 means is that if an insurer had a concrete reopened case
18 for which it could apply for a transfer, it was able to do
19 so for the nine-month period after the statute's enactment.
20 And the only consequence of this statute was to prevent the
21 transfer of cases that arise from reopened claims that
22 would themselves reopen in the future. I mean that is the
23 very definition of a prospective legislation.

24 The second argument that Mr. Waxman made was to
25 say that the underlying liability here for reopened cases

1 was not part of the original contract because the contract
2 basically incorporated the fund's continued existence going
3 forward. And there a couple of problems with this
4 argument. One is one that Judge Stein pointed to which is
5 if it is true that the contracts themselves exclude
6 liability, then it's a little unclear why the carriers care
7 whether the fund remains in existence. They could just
8 tell the employees or the employers we're not going to
9 cover that as a contractual matter, and if the fund also
10 won't cover it, you know, sort of that's your problem. Go
11 back to the - - - go back to the legislature.

12 But - - - but the other point I want to make here
13 is that this is a really sweeping argument to say that the
14 contract freezes in place the law at the time that the
15 contract was entered into because the Workers' Compensation
16 Law is enormously complex. It includes, for instance, you
17 know, substantial both benefits and burdens on a wide class
18 of the participants. And the argument that the contract
19 prevents the legislature from changing those benefits going
20 forward would basically preclude them from making
21 substantial and important reforms. And one example is one
22 that is raised by one of the amici to this case, which is
23 the legislature's decision in 2006 to give 9/11 workers
24 additional time to file workers' compensation claims. That
25 reform was applied to injuries - - - by definition injuries

1 and policy years prior to that statute's enactment. Those
2 sort of costs on the carriers were not part of their
3 initial premium, and yet, there has not be any challenge,
4 nor do I think it would be successful to say the
5 legislature was forbidden from enacting that change.

6 JUDGE RIVERA: So - - - so do we have to - - - we
7 don't have to decide the retroactivity if we determine that
8 the constitutional - - - these other constitutional claims
9 are without merit, correct?

10 MR. WU: That's correct. I mean even if the
11 statute had some retrospective - - -

12 JUDGE RIVERA: If we disagreed with you on this
13 matter.

14 MR. WU: That - - - that's correct. There's no
15 particularly high bar to sustaining retroactive
16 legislation. And the very last point I'd like to make is
17 this. I mean much of what the carriers have been arguing
18 here is about the perceived practical burden of now having
19 to retain these claims. Now this argument about burden was
20 not actually presented to the legislature at any time.
21 Instead, the legislature had the unanimous support of the
22 insurance industry and the employers here.

23 But more to the point, to the extent that there
24 is an ongoing burden that he legislature did not adequately
25 consider, the proper forum for that complaint is the

1 legislature itself. And this is not just an empty slogan
2 to leave these questions to the legislature. The workers'
3 compensation system is so complex that any change in one
4 particular area has unforeseen consequence elsewhere. As
5 Mr. Waxman referenced, part of the reason the fund became a
6 problem after 2007 was that the legislature had closed a
7 separate fund called the Special Disability Fund in 2007
8 that then led to the tripling of obligations at - - -

9 JUDGE RIVERA: But the reality is that moving
10 forward, this is all going to pass through to the
11 employers.

12 MR. WU: The - - - if this fund - - -

13 JUDGE RIVERA: And it doesn't necessarily reduce
14 the number of claims, right?

15 MR. WU: Well, this will reduce the number of
16 claims because it will cut off applications.

17 JUDGE RIVERA: Because you're not going to get
18 new ones, but in terms of the ones that may be out there,
19 they were either going to be reopened cases or they
20 weren't.

21 MR. WU: That's correct. And - - - and the other
22 important balancing act that the legislature did here was
23 that it did not disturb claims that had already been
24 transferred to the fund. The legislature could have
25 decided, I suppose, to say that if a claim had previously

1 been transferred they were going to close the fund entirely
2 and send it all back to the original carriers. They didn't
3 make that judgment.

4 JUDGE FAHEY: Maybe I misunderstood but it - - -
5 you're not saying it would pass through to the employers.
6 It's going to pass through to the carriers on the reopened
7 cases.

8 MR. WU: That - - - that's right. I guess I'd
9 make this distinction.

10 JUDGE FAHEY: Okay.

11 MR. WU: Which is for claims that the fund
12 continues - - -

13 JUDGE RIVERA: Well, no. But if you change the
14 prem- - - - isn't his whole argument that it shows that the
15 premiums never covered this because the premiums moving
16 forward are going to cover this?

17 MR. WU: That's right. If I'm - - - if I'm
18 understanding the question correctly, it is true that to
19 some extent the costs of these reopened claims going
20 forward is going to fall back on the employers because of
21 the increase in premium that DFS has approved. The
22 legislature reasonably believed that the premiums would be
23 lower than the cost of the assessments, in part because of
24 the cost savings we referred to before, including no longer
25 having to rely on this complex administrative process.

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But - - - but I think the fact that the fund remains in operation for previously transferred cases, it self-represents a form of balancing that the legislature engaged in. They understood that at the time the Workers' Compensation Board had agreed to transfer certain cases to the fund, there might have been a legitimate expectation for carriers that they would not see those liabilities again. But it was - - -

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. WU: - - - reasonable to have a different judgment for future applications.

CHIEF JUDGE DIFIORE: Thank you.

MR. WU: Thank you.

(Court is adjourned)