

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

THE STATE OF FLORIDA,
et al.,

Case No. CL 95-1466-AD ~~X~~ H

Plaintiffs,

vs.

THE AMERICAN TOBACCO
COMPANY, et al.,

Defendants.

**Order Denying Defendants' Constitutional Challenges
to Section 69.081, Florida's "Sunshine in Litigation Act"**

THIS CAUSE came before the Court on the Special Master's April 18, 1997, Report and Recommendation on the constitutionality of section 69.081, Florida Statutes (1997), "The Sunshine in Litigation Act." Upon consideration of arguments of counsel; the memoranda filed by Defendants, Plaintiffs, and interested intervenor WFTV, INC. d/b/a Palm Beach Newspapers, Inc. ("The Post"); and the Special Master's Report; and being otherwise duly advised, it is hereby ordered and adjudged that the Defendants' Exceptions to the Special Master's Report and Recommendation are overruled and the Report and Recommendation is hereby ratified and affirmed. Furthermore, this Court hereby makes an independent finding that section 69.081, Florida Statutes (1997) is facially constitutional under the federal and state constitutions and was enacted with a legitimate purpose and with appropriate safeguards to ensure due process.

Background

Defendants' constitutional challenge to section 69.081 arises in the context of the State's lawsuit filed against the tobacco industry to recover the costs the State has incurred treating

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smoking-related illnesses. In a September 20, 1996, motion for a protective order, and in various subsequent filings and arguments before the Special Master, Defendants have sought to block release of certain tobacco industry documents that they claim contain valuable trade secrets and confidential information. Section 69.081, *inter alia*, precludes a court from entering such an order to the extent that it would permit Defendants to conceal information concerning a public hazard.

Section 69.081

Section 69.081 does not bar protective orders generally, but rather prohibits entry of those court orders or judgments that have "the purpose or effect of concealing a public hazard or any information concerning a public hazard." § 69.081(3), Fla. Stat. (1997). A "public hazard" is an "instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure or product, that has caused and is likely to cause injury." *Id.* § 69.081(2). The statute empowers the courts to evaluate the particular facts of any given case before releasing such information. It also provides for an evidentiary hearing and an in camera examination of the disputed information or materials. *Id.* § 69.081(7). It protects "[t]rade secrets as defined in s. 688.002 which are not pertinent to public hazards." *Id.* at § 69.081(5).

Defendants' Arguments Against Constitutionality

Defendants argue that section 69.081 violates the U.S. and Florida Constitutions in four ways. They claim it (1) works an unconstitutional taking of their protected property interests in trade secrets; (2) is a legislatively enacted rule of procedure in violation of the separation of powers provision of the Florida Constitution, (3) is preempted by the Federal Cigarette Labeling and Advertising Act ("FCLAA"), and (4) is unconstitutionally vague. Each argument fails.

Section 69.081 Does Not Work an Unconstitutional "Taking"

Properly executed, section 69.081 does not work a "taking" of a protectable property right.

Three factors are relevant to a "takings" analysis:

- (1) "the economic impact of the [state action] on the claimant;"
- (2) "the extent to which the action interferes with the claimant's 'investment-backed expectations,'" and
- (3) "the character of the governmental action."

Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 224-25 (1986).

None of these factors supports a finding that section 69.081 works a "taking" of a protectable property interest. The second factor—"the extent to which the action interferes with the claimant's 'investment-backed expectations'"—is dispositive here. The U.S. Supreme Court has held that a trade secret constitutes a protectable property interest *only* if the government provides a guarantee that the information will be protected from disclosure. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1007-08 (1984).

No such guarantee exists here. In fact, Defendants had *no* expectation, reasonable or otherwise, when they sold their tobacco products to the public, that their trade secrets would be protected in subsequent litigation by the State of Florida or anyone else. Indeed, the privilege against disclosure of trade secrets was not absolute even before the passage of section 68.091. See Freedom Newspapers, Inc. v. Egly, 507 So. 2d 1180 (Fla. 2d DCA 1987); Goodyear Tire & Rubber Co. v. Coney, 359 So. 2d 1200 (Fla. 1st DCA 1978).¹

¹The lack of "investment-backed expectations" in trade secret material not guaranteed to be protected by the government has been *the* factor in other courts' decisions to reject "takings" clause (continued...)

Monsanto also shows that no "taking" will occur by the operation of section 68.091 under factors one and three of the three-part test. Factor one—"the economic impact" on the property owner—does not assist Defendants. As noted above, section 68.081 provides procedural safeguards to ensure that only those portions of a trade secret that would be necessary or useful to the public to protect themselves from a statutorily defined "public hazard" will be revealed. Such information is not protected by the "takings" clause. As emphasized by the Monsanto Court,

the value of a trade secret lies in the competitive advantage it gives its owner over competitors. . . . If, . . . , a public disclosure of data reveals, for example, the harmful side effects of the submitter's product and causes the submitter to suffer a decline in the potential profits from sales of the product, that decline in profits stems from a decrease in value of the [product] to the consumers, rather than from the destruction of an edge the submitter had over its competitors, and cannot constitute the taking of a trade secret.

Monsanto, 467 U.S. 1011 n.15.

Finally, factor three—the character and extent of the taking—also goes against Defendants. Monsanto held that the State's exercise of its police power to protect the health, safety, and welfare of the public does *not* constitute a taking. A commentator observes,

Monsanto is as important for what it refused to hold as for what it did hold. *It did not hold that trade secrets were always property within the takings clause*; on the contrary, the Court qualified its decision by citing a prior case for the proposition that "[t]he right of a manufacturer to maintain secrecy as to his compounds and processes

(c o n t i n u e d)
attacks on statutes very similar to section 69.081. See, e.g., New Jersey St. Chamber of Commerce v. Hughey, 600 F. Supp. 606, 628 (D.N.J.) (mandatory disclosure of trade secrets under New Jersey Worker and Community Right to Know Act were not compensable "takings" under Monsanto because New Jersey had not "committed itself to protecting trade secrets"), *aff'd*, 774 F.2d 587, 598 (3d Cir. 1985); see also Manufacturers Assoc. of Tri-County v. Knepper, 801 F.2d 130, 142 (3d Cir. 1986) (upholding Pennsylvania Worker and Community Right-to-Know Act based upon Hughey for the same reason), *cert. denied*, 484 U.S. 815 (1987).

*must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth."*²

The analysis under the Florida Constitution is the same. The Florida Supreme Court has held that "[t]he owner of private property is not entitled to the highest and best use of his property if that use will create a public harm." Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1382 (Fla. 1981).

Defendants have no protectable property interest in concealing information regarding a public hazard. Their "takings" argument is rejected.

Section 69.081 Does Not Violate Separation of Powers

Defendants' next argument—that section 69.081 is violative of article II, section 3 of the Florida Constitution, the Separation of Powers provision—is equally unavailing. Although Florida Rules of Civil Procedure and Judicial Administration authorize a court to issue protective orders restricting or prohibiting disclosure of trade secrets, See Fla. R. Civ. P. 1.280(c), Fla. R. Jud. Admin. 2.051(c)(9)(A)(ii), these judicial procedures do not—and may not—define what a "trade secret" is. The definition of a "trade secret," and the exclusion of public hazards from that definition in section 69.081, is a matter of substantive law. Since the use of "trade secrets" under judicial rules is coextensive with the statutory definition, there is no conflict between section 69.081 and rules of civil procedure or judicial administration, and no unconstitutional infringement of judicial authority.

Furthermore, like most substantive statutory provisions, section 69.081 includes procedural

²Lloyd Doggett and Michael J. Mucchetti, Public Access to Public Courts: Discouraging Secrecy in the Public Interest, 69 Tex. L. Rev. 643, 674 (1991) quoting Monsanto, 467 U.S. at 1007-08 quoting Corn Prods. Ref. Co. v. Eddy, 249 U.S. 427, 431-32 (1919) (emphasis added).

aspects which serve to implement the Legislature's substantive goals. However, where procedural aspects of section 69.081 are necessary to implement the substantive statutory scheme, the statute does not violate the separation of powers clause of the Florida Constitution. See Smith v. Department of Ins., 507 So. 2d 1080, 1092 (Fla. 1987) (even though provisions of the Tort Reform and Insurance Act dealt with judicial practice and procedure, the provisions were substantive in nature and within the Legislature's authority to enact).

The Florida Supreme Court has rejected the argument that legislative acts which affect judicial rules in the court system are inherently procedural and, therefore, unconstitutional encroachments on judicial power. In Johnson v. State, 336 So. 2d 93 (Fla. 1976), the Supreme Court stated that "[c]learly, the Legislature has the power to enact substantive law, and it is the duty of the courts to enforce such substantive law where constitutional. . . . To the extent that [a law] grants a substantive right . . . , the statute is valid." *Id.* at 95.

Defendants' heavy reliance on Ronque v. Ford Motor Co., 23 Fed. R. Serv. 3d 1299 (M.D. Fla. 1992), is misplaced. A court's determination whether a statute is substantive or procedural for purposes of Erie in federal diversity actions³ is distinct from the inquiry into the legislature's substantive power to enact a statute under the Florida Constitution's separation of powers clause. See Blount v. Sterling Healthcare Group, Inc., 934 F. Supp. 1365, 1374 n.6 (S.D. Fla. 1996); Al-Site Corp. v. VSI Int'l, Inc., 842 F. Supp. 507, 509 (S.D. Fla. 1993); Citron v. Armstrong World Industries, Inc., 721 F. Supp. 1259, 1260-61 (S.D. Fla. 1989). A finding that the statute is procedural

³ A federal court sitting in diversity actions must apply federal law to matters of procedure and follow substantive law with respect to matters of substance. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

under *Erie*, a doctrine concerned with forum shopping and potential conflict with federal procedural rules, does not inform the decision as to whether the Legislature had the rule-making authority to implement State public policy goals in favor of open government under section 69.081. See Kingston Sq. Tenants Assoc. v. Tuskagee Gardens, Ltd., 792 F. Supp. 1566, 1579 (S.D. Fla. 1992) (determination that a statute was "substantive" in the context of a separation-of-powers inquiry had no relevance on the substantive-procedural distinction in *Erie* terms).

Section 69.081 is part of a substantive statutory scheme that furthers the public policy of open government, a policy embodied in article I, section 24 of the Florida Constitution⁴ and embraced by all three branches of State government. It was appropriately enacted by the Legislature to protect the public health and welfare, consistent with article II, section 3 of the Florida Constitution.

Section is Not Preempted by FCLAA

Defendants' third argument that section 69.081 is preempted by the FCLAA also fails, as it too is inconsistent with U.S. Supreme Court precedent.

Under Florida law, records that would otherwise be public under State law are unavailable for public inspection only when there is an absolute conflict between federal and state law relating to confidentiality of records. 18 Office of the Attorney General, Government-in-the-Sunshine Manual: A Reference for Compliance with Florida's Public Records and Open Meetings Laws 130

⁴Article I, section 24 of the Florida Constitution provides in relevant part, "Every person has the right to inspect or copy any public record made or received . . . [and this] section specifically includes the legislative, executive and judicial branches of government." Article I, section 24, creates a constitutional right to public access to court records, independent of the legislative power, which has repeatedly been upheld by the Florida Supreme Court. See Times Publishing Co. v. Ake, 660 So. 2d 255, 257 (Fla. 1995).

(1996). Section 69.081 is not preempted by the FCLAA because Congress expressly has narrowed the scope of The FCLAA to cigarette labeling and advertising and section 69.081 does not establish any advertising or labeling requirements.

Congressional purpose is "the ultimate touchstone" of preemption analysis. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978). Congressional intent may be explicitly stated in statutory language or "implicitly contained its structure and purpose." Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Congress's enactment of a provision expressly defining the preemptive scope of a statute implies that matters outside that scope are not preempted. *Id.* at 517. Moreover, congressional legislation must be construed in light of a presumption against the preemption of state police power regulations. *Id.* at 518.

In Cipollone, the U.S. Supreme Court considered the preemptive scope of the FCLAA and held that Congress intended *only* to preempt state rule-making bodies from mandating particular cautionary statements on cigarette labels or advertising. *Id.* at 518. The FCLAA "is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." *Id.* at 518-19. Section 69.081 does not address cigarette warning labels or advertising and, therefore, poses no conflict between it and The FCLAA.

Defendants nonetheless argue, completely contrary to Cipollone, that The FCLAA occupies the field with regard to protection of cigarette manufacturers' trade secrets, and that section 1335a(b)(2)(C) of The FCLAA supports this. But, the purpose of that section was to institute a statutory requirement that cigarette manufacturers disclose to the federal government ingredients placed in cigarettes during the manufacturing process. *See* Pub. L. No. 98-474, 1984 U.S.C.C.A.N. 3733. The legislative history documents that "Paragraph (b)(2)(C) requires the Secretary to establish

written procedures to ensure the confidentiality of information provided under this legislation *while it is in the possession of the Department of Health and Human Services.*" *Id.* at 3734 (emphasis added). Section 1335a(b)(2)(C) is expressly limited to the establishment of *internal* procedures to control the trade secrets Defendants are compelled to disclose to DHHS under the Act *while in the possession of DHHS*. No evidence exists that Congress intended to control the disclosure of Defendants' trade secrets under any other conditions.⁵

Federal legislation must be construed in light of a presumption against the preemption of police power regulations, and section 69.081 is a valid exercise of the State's police powers. There is absolutely no conflict between the FCLAA and Florida's Sunshine in Litigation Act, and Defendants' preemption argument is repudiated by the FCLAA legislative history, express preemption provisions of the FCLAA, and the U.S. Supreme Court decision in *Cipollone* construing those provisions.

Section 69.081 is Not Unconstitutionally Vague

Finally, contrary to Defendants' arguments, section 69.081 is reasonably clear and provides fair warning that Defendants' unprotectable trade secrets will not be shielded by protective orders in the event of litigation.

Defendants initially fail to show that the statute is impermissibly vague in all its applications.

⁵Defendants rely on the Southern District's decision in *Sonnenreich v. Philip Morris, Inc.*, 929 F. Supp. 416 (S.D. Fla. 1996), to support their argument that the FCLAA precludes the State from requiring disclosure of information concerning public hazards during this litigation. In fact, *Sonnenreich* reaches the *opposite* conclusion. *Sonnenreich*, 929 F. Supp. at 418 ("state law duty to disclose material facts *through channels of communication other than advertising and promotion*" escapes the preemptive reach of the FCLAA).

See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).⁶ And, it is not sufficient for Defendants merely to demonstrate that in marginal or hypothetical cases a statute may be subject to different interpretations. State v. Giamanco, 682 So. 2d 1193, 1194 (Fla. 4th DCA 1996). To be void for vagueness, a statute must be "so vague and indefinite as really to be no rule or standard at all." Jones v. City of Lubbock, 727 F.2d 364, 373 (5th Cir. 1984) (citations omitted).

Defendants nevertheless argue section 69.081 is unconstitutionally vague because the terms "public hazard" and "injury" are undefined. Yet, a statute may use common terms of ordinary meaning. Habie v. Krischer, 642 So. 2d 138, 140 (Fla. 4th DCA 1994). "[T]o make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications." Id. The proper inquiry is whether the statutory language "conveys a sufficiently definite warning . . . when measured by common understanding and practices." Id.; see also Hoffman, 455 U.S. at 498 (stating that a statute is fatally vague when individuals subject to it are exposed to some risk or detriment without fair warning).

Defendants adequately know the standards governing them under section 69.081. Their argument that section 69.081 is constitutionally vague fails.

⁶Under Village of Hoffman Estates, the threshold inquiry into whether a statute is constitutionally vague is whether the law threatens to inhibit the exercise of constitutionally protected rights. 455 U.S. at 499. As demonstrated above, whatever interests Defendants may have in their trade secrets, they have no constitutionally protected property interest in trade secrets concerning a public hazard. Defendants thus cannot complain that the ambiguity of section 69.081 inflicts a constitutional deprivation. The Court's vagueness inquiry thus begins with the second prong of the Village of Hoffman Estates test, as to whether it is vague in all applications.

This Issue Is Live And Ripe For Decision

As the Special Master recognized in his April 19, 1997, Report and Recommendation:

Although the Sunshine in Litigation Act was therefore not directly implicated in the dispute over the thirteen (13) Liggett Settlement documents, . . . [t]he parties' ongoing discovery dispute over thousands of documents to which the Defendants are still claiming trade secret protection necessarily raises the issue of the application of the Sunshine in Litigation Act.

The Special Master observed that Defendants challenged the constitutionality of the section 69.081 on many occasions, at hearings and in court documents, and on many grounds. The Special Master's decision to uphold the Act was timely and necessary to ensure that the public's right to know, a right which has been secured by a long line of decisions by Florida's courts.

Accordingly, the Court overrules the Defendants' Exceptions to the Special Master's April 18, 1997, Report and Recommendation and the Report and Recommendation is hereby ratified and affirmed. Furthermore, this Court finds section 69.081 creates a substantive right in the citizens of Florida pursuant to the State's police powers to protect the public health, safety and welfare, and is facially constitutional under the Florida and U.S. Constitutions. When the Defendants seek confidentiality or trade secret protection for information or documents in this litigation, this Court directs the Special Master to examine disputed materials in camera, in accordance with section 69.081(7), and to conduct an evidentiary hearing to determine whether the materials consist of information concerning a public hazard that must be revealed under that section. Where disclosure is warranted pursuant to the Sunshine in Litigation Act, such disclosure should be limited to that portion of the materials necessary or useful to the public regarding the public hazard. Although the Defendants may challenge the Special Master's application of section 69.081 to the particular documents the Defendants seek to protect, they are precluded from arguing that the Sunshine in

Litigation Act is facially unconstitutional.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this _____ day of July,

1997.

SIGNED AND DATED

JUL 28 1997

Harold J. Cohen

~~Circuit Court Judge~~
Judge Harold J. Cohen

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