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FIFRA AND THE "TAKING" OF TRADE SECRETS

Joseph F. Gannon*

I. INTRODUCTION

The pesticide industry is big business in this country. Thousands of companies are engaged in some level or another of the production and marketing of pesticides.¹ Over 1.4 billion pounds of pesticides are produced each year with some 1,400 active ingredients formulated into approximately 40,000 end-use products.² Total sales of pesticides can amount to billions of dollars a year.³ With so many participants and with so much at stake, competition is stiff. The value of information which would allow one company to get a competitive leg-up on another is quite high. To the extent they can, companies naturally prefer to maintain as trade secrets any data which they develop.⁴

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¹ S. REP. No. 334, 95th Cong., 1st Sess. 27, 28, 34 (1977).

² *Id.* at 34.

³ 43 Fed. Reg. 17,781 (1978) (supplementary information to final regulations limiting effluent discharges by manufacturers of certain chemicals). Sales of pesticide chemicals in 1975, for example, were over \$2.16 billions at manufacturers' value. *Id.*

⁴ See, Memorandum of Plaintiffs' in Support of Motion for Preliminary Injunction at 14-16, *Amchem Products Co. v. Costle*, Civ. No. 76-2913 (S.D.N.Y., filed July 9, 1979). [hereinafter cited as *Amchem Memo.*] One of the most commonly accepted definitions of trade secrets is that found in the RESTATEMENT OF TORTS, § 757, Comment b (1939):

Definition of trade secret. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract or the salary of certain employees,

Since the passage of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) in 1947,⁵ the federal government, through its power under the Commerce Clause of the United States Constitution,⁶ has required pesticide manufacturers wishing to market a pesticide to submit data demonstrating the pesticide's safety and efficacy to a regulatory agency for its approval, before the agency "registers" the product and allows it to be marketed.⁷ FIFRA contained no provision for the protection of trade secrets until 1972.⁸ However, the Environmental Protection Agency (EPA), the present administrator of FIFRA, and its predecessor

or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Patents may be issued to cover a newly-discovered chemical, a newly-discovered use for a known chemical, or a new method for producing a chemical. Normally, producers of pesticides make prompt application for patents in order to protect their discoveries from loss through publication or independent discovery by another. During the seventeen year period of patent protection the producer has the exclusive right to manufacture and market the product but may license others to do so. Once the protection period expires, however, anyone may duplicate the invention and market it without permission of the inventor. S. REP. NO. 334, 95th Cong., 1st Sess. 36, 37 (1977). Data generated during the production and testing of a pesticide is not patentable, however. See 35 U.S.C. §§ 1-376 (patent laws). Anyone who obtained such data not protected as trade secrets would be free to use that data. Producers try to maintain the data as trade secrets because it allows them to prevent use or disclosure of the data by those to whom the secret has been confided or by those who have obtained the secret by improper means, such as theft or wire-tapping. Trade secret protection does not prevent the use of data which is independently generated or otherwise legitimately obtained and so is a lesser form of protection than the exclusive rights for seventeen years granted by patents. However, trade secret protection may last indefinitely so long as the information is kept secret. See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (holding that state trade secret laws do not conflict with federal patent laws); RESTATEMENT OF TORTS, § 757 (1939).

⁵ Act of June 25, 1947, ch. 125, 61 Stat. 163 (current version at 7 U.S.C.A. §§ 136-136y (West Supp. 1979)).

⁶ "The Congress shall have Power . . . (t)o regulate commerce with foreign nations and among the several states, and with the Indian Tribes. . . ." U.S. CONST. art. 1, § 8.

⁷ 7 U.S.C.A. § 136a. (West Supp. 1979) See text at notes 18-69, *infra*, for a fuller discussion of FIFRA. Normally a patent for a pesticide issues well before the producer has developed data establishing the pesticide's safety and efficacy for registration purposes. See note 2, *supra*. There may be only 12 or so years of patent protection remaining when a product is initially registered under FIFRA. S. REP. NO. 334, 95th Cong., 1st Sess. 34 (1977). Thus, the importance of maintaining the secrecy of data which would support registration of the product by another is underlined.

⁸ See text at notes 31-48, *infra*.

agency, the United States Department of Agriculture, generally held data submitted as confidential.⁹

Because of concern over the effects upon the pesticide industry of having such data kept confidential, and partially in response to the growing concern for public access to the data upon which government decisions are based, Congress enacted in 1972 the first of three amendments to FIFRA¹⁰ which have gradually diminished the protection given to trade secret data. The most recent amendments (in 1978)¹¹ authorized EPA to rely, within certain limitations, upon the data submitted by one company to register another company's product and also to disclose to the public certain data relating to the safety and efficacy of a registered pesticide.¹²

Pesticide companies have claimed that EPA's handling of the data in this manner violates their property right to prevent unauthorized use or disclosure of the data and destroys the value of the data as trade secrets. They contend that this amounts to a "taking" of private property for public use without just compensation in violation of the Fifth Amendment of the United States Constitution.¹³

This article will address the "taking" issue with respect to trade secret data¹⁴ submitted to the government under FIFRA. It will be assumed that pesticide producers do, in fact, have a property right to prevent unauthorized use or disclosure of their data.¹⁵ The focus will be upon the implications of the Supreme

⁹ See note 32, *infra*.

¹⁰ Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 975 (1972) [hereinafter referred to in text as 1972 FIFRA]. See *Chevron Chemical Co. v. Costle*, 443 F.Supp. 1024, 1033-1040 (N.D. Cal. 1978), for a discussion of the legislative history of the 1972 amendments.

¹¹ Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 843 [hereinafter referred to in text as 1978 FIFRA or FIFRA].

¹² 7 U.S.C.A. § 136a(c)(1)(D) (West Supp. 1979) (authorizing EPA to rely on data), see note 52, *infra*; 7 U.S.C.A. § 136h(b)-(d) (West Supp. 1979) (authorizing disclosure), see note 57, *infra*.

¹³ "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. v.

¹⁴ The term "data" hereinafter will mean data submitted by pesticide companies to meet the safety and efficacy requirements of FIFRA.

¹⁵ This is not as innocent an assumption as it appears. It is, in fact, a critical issue. There is quite a dispute as to whether trade secrets are property. The authors of the *Restatement of Torts*, for instance, in reviewing the common law stated:

The suggestion that one has a right to exclude others from the use of his trade secret because he has a right of property in the idea has been frequently advanced and rejected. The theory that has prevailed is that the protection is afforded only by a gen-

Court's recent analysis of "taking" jurisprudence in *Penn Central Transportation Co. v. City of New York*,¹⁶ and the claims made by pesticide companies in *Amchem Products Co. v. Costle*,¹⁷ a suit pending in the Southern District of New York representative of those brought by chemical companies to challenge EPA's handling of the data.

The article will begin with an outline of the statutory changes of FIFRA which have precipitated the pesticide companies' concerns. The second section will briefly outline the arguments presented in the *Amchem* litigation and will discuss the power of Congress under the Commerce Clause, further discussing the traditional distinctions between compensable and non-compensable governmental actions. The third section will be an analysis of the "taking" jurisprudence concepts presented in *Penn Central*. In the fourth section, an application of these concepts to the particular issues in *Amchem* will be presented.

II. THE STATUTORY BACKGROUND

FIFRA was originally enacted in 1947¹⁸ and applied only to pesticides shipped in interstate commerce. From that time until 1970, it was administered by the United States Department of

eral duty of good faith and that the liability rests upon breach of this duty; that is, breach of contract, abuse of confidence, or impropriety in the method of ascertaining the secret."

RESTATEMENT OF TORTS, § 757 Comment a (1939). See also Justice Holmes' often-quoted opinion on trade secrets in *E.I. DuPont DeNemours Powder Co. v. Masland*, 244 U.S. 100 (1917).

Others have found no difficulty in finding that trade secrets are property:

[T]he property view underlies protection of trade secret decisions, and is, in fact, the keystone upon which the protection body of case law rests. The existence of a protectable property interest is the basis for equity jurisdiction, and for remedies such as declaration of a constructive trust and injunctive relief.

R.M. MILGRIM, *TRADE SECRETS* § 1.09 (1977). See also *W.L. Wearly v. FTC*, 462 F.Supp. 589 (D.N.J. 1978). Cf. *Dow Chemical Co. v. Costle*, 464 F.Supp. 395 (E.D. Mich. 1978); *Mobay Chemical Co. v. Costle*, 12 ENVIR. REP. (BNA) 1572 (W.L. Mo. 1978) (three judge panel), appeal dismissed for want of jurisdiction, 439 U.S. 320 (1979), (both cases held that the 1972 FIFRA created no property right which could not be altered by subsequent amendment). A finding of no property right at all would necessarily obviate any Fifth Amendment claims.

¹⁶ 438 U.S. 104 (1978).

¹⁷ Civ. No. 76-2913 (S.D.N.Y., filed July 9, 1978). On August 15, 1979, a preliminary injunction was granted which prohibited the EPA from relying on or disclosing plaintiffs' trade secret data.

¹⁸ Federal Insecticide, Fungicide, and Rodenticide Act, ch. 125, 61 Stat. 163 (1947) (current version at 7 U.S.C.A. §§ 136-136y (West Supp. 1979)).

Agriculture and was considered little more than a labelling law.¹⁹ In 1970, administration was transferred to the Environmental Protection Agency.²⁰ Since 1947, the law has required that pesticides be registered with the administering agency. The basic purpose of the registration procedure is to ensure that marketed pesticides are safe, effective and environmentally sound.²¹ Data demonstrating the safety and efficacy of the pesticide can be required.²² If the use of a pesticide could result in a residue in or on a food crop, a tolerance for such use also has to be established pursuant to the Food, Drug and Cosmetic Act.²³

In 1972, amendments transformed FIFRA by giving the EPA much broader regulatory power over the pesticide industry.²⁴ While continuing the registration procedure, the amendments made further requirements for data submission²⁵ and also required reregistration of pesticides previously registered under FIFRA in order to ensure that the more stringent data requirements were met for older products as well as for newer ones.²⁶ In addition, the scope of the law was extended to encompass pesticides marketed in intrastate commerce.²⁷ The 1972 amendments also reflected the growing congressional concern, fostered by passage of the Freedom of Information Act in 1966,²⁸ of allowing public access to the data upon which governmental decisions were based.²⁹ Congress therefore included a general mandate provision which provided that, unless otherwise protected within FIFRA, data received by EPA, as well as other scientific information

¹⁹ See H.R. REP. No. 511, 92d Cong., 1st Sess. 4 (1971).

²⁰ Reorg. Plan No. 3 of 1970, 3 C.F.R. 1072 (1966-1970 compilation), reprinted in 5 U.S.C. app, at 609 (1970) and in 84 Stat. 2086 (1970).

²¹ See H.R. REP. No. 511, 92d Cong., 1st Sess. 4 (1972); S. REP. No. 334, 95th Cong., 1st Sess. 5 (1977).

²² 7 U.S.C.A. § 136a(c)(1)(D) (West Supp. 1979). See note 52, *infra*.

²³ See Section 408 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. § 346a (West 1972 & Supp. 1979). The Administrator of the EPA may also exempt a pesticide from the requirement of a tolerance. *Id.* Data submitted to comply with this Act is also used to support registration of the pesticide.

²⁴ See H.R. REP. No. 511, 92d Cong., 1st Sess. 1 (1971).

²⁵ See *Dow Chemical Co. v. Train*, 423 F.Supp. 1359, 1362 (E.D. Mich. 1976) (discussion of the 1972 amendments).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Pub. L. No. 89-554, 80 Stat. 383 (1966) (codified at 5 U.S.C. § 552 (1976 & Supp. II 1979)). See also, 40 Fed. Reg. 21,987-22,002 (1975); 40 Fed. Reg. 28,814-15 (1975) (EPA's proposed regulations under FOIA).

²⁹ See *Chevron Chemical Co. v. Costle*, 443 F.Supp. 1024, 1025 (N.D. Cal. 1978).

deemed by the agency to be relevant, should be made available to the public within thirty days after EPA registers a pesticide.³⁰

Prior to 1972, there was no mention of trade secrets within FIFRA. Formulas for products and data submitted in certain circumstances, such as in administrative hearings to review the proposed denial of an application, were expressly required to be kept confidential.³¹ Otherwise, agency regulations and practices governed what could and could not be done with data.³² Along with the general mandate provision, the 1972 amendments also included specific protection for trade secrets³³ which has remained unchanged through the most recent FIFRA amendments. The trade secrets provision of FIFRA requires EPA not to "make public information which in [its] judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential. . . ." ³⁴ If EPA proposes to make public information which the submitting company (also known as the "producer" or "submitter") believes to be a trade secret, EPA is required to give thirty days written notice to the producer of the agency's judgment that the data are not trade secrets.³⁵

In support of applications for pesticide registration, companies are required to submit, among other things, a complete copy of the label of the product,³⁶ the product formula, and a statement

³⁰ 7 U.S.C.A. § 136a(c)(2)(A) (West Supp. 1979).

³¹ See, e.g., 7 U.S.C. 135b(c) (1964) (superseded 1972). The Trade Secrets Act, 18 U.S.C. § 1905 (1976), punishes the disclosure of trade secret and other confidential information by any officer or employee of the United States "in any manner or to any extent not authorized by law." Since disclosure of safety and efficacy data is mandated under FIFRA, this statute does not apply.

³² See, e.g., 7 C.F.R. § 1.3(b)(1) (1949) (providing that data submitted to support pesticide applications not be made available to persons outside the agency). See also 7 C.F.R. § 1.4(b)(15) (1962) (providing that data concerning products and formulations provided by industry in connection with registration are administratively confidential); 7 C.F.R. § 370.13(d) (1968) (providing that trade secrets, scientific and technical data on products, process or methods, and data in research studies are confidential).

³³ Federal Environmental Pesticide Control Act, Pub. L. No. 92-516, 86 Stat. 975 (1972). See note 57, *infra*, for the current codification of this provision.

³⁴ 7 U.S.C.A. § 136h(b) (West Supp. 1979). However, the section also provides that: "when necessary to carry out the provisions of this [Act] information relating to formulas of products acquired by authorization of this [Act] may be revealed to any Federal agency consulted and may be revealed at a public hearing or in findings of fact issued by the Administrator." *Id.*

³⁵ 7 U.S.C.A. § 136h(c) (West Supp. 1979).

³⁶ The label must bear an "ingredient statement" on a prominent place on the container which sets forth:

of all the claims made for the product.³⁷ If requested by EPA, applicants are also required to submit a "full description of the tests made and the results thereof upon which the claims are based. . . ."³⁸ It is data submitted for this purpose that has caused such consternation in the pesticide industry. If EPA finds that the pesticide lives up to its claims and will not cause unreasonably adverse effects on the environment, the pesticide is registered and thus may be marketed.³⁹ Because the information supporting registration would be valuable to companies that wished to use it to register a similar pesticide or to use it for other purposes,⁴⁰ much of the information submitted by the producing companies is maintained by them as trade secrets.⁴¹ In submitting data to support registrations, companies are required to mark and submit separately those portions of the data which they wish to keep secret.⁴²

The 1972 FIFRA amendments also authorized EPA to rely on data and information submitted by one applicant to determine whether a subsequent applicant had made the necessary showings of safety and efficacy.⁴³ EPA's authorization to so use the data was limited by two restrictions. The agency was not to use any data protected by the newly enacted trade secret provision and it was able to rely on unprotected data only if the applicant for registration had offered to pay reasonable compensation to the company which had originally submitted the data.⁴⁴ This so called mandatory licensing provision thus allowed a company to

(1) the name and percentage of each active ingredient, and the total percentage of all inert ingredients, in the pesticide; and

(2) if the pesticide contains arsenic in any form, a statement of the percentages of total and water soluble arsenic, calculated as elementary arsenic.

7 U.S.C. § 136(n) (West Supp. 1979).

³⁷ 7 U.S.C.A. § 136a(c)(1) (West Supp. 1979).

³⁸ *Id.* The tests are used by EPA to help determine whether the product is safe, effective and environmentally sound. See 40 C.F.R. pt. 162 (1979). Safety and efficacy data are routinely submitted as the burden is on the applicant to prove that the product is environmentally safe and lives up to all claims made for it. *Id.* at 162.6(B). See 40 C.F.R. 162.8, 162.45 (1979) (requirements for data submission).

³⁹ 7 U.S.C.A. § 136a(c)(2)(D)(5) (West Supp. 1979). No pesticide may be marketed without registration. 7 U.S.C.A. § 136a(a) (West Supp. 1979).

⁴⁰ See text at notes 72-74, *infra*.

⁴¹ See *Chevron Chemical Co. v. Costle*, 443 F.Supp. 1024, 1026 (N.D. Cal. 1978).

⁴² 7 U.S.C.A. § 136h(a) (West Supp. 1979).

⁴³ Federal Environmental Pesticide Control Act, Pub. L. No. 92-516, 86 Stat. 975 (1972) (current version at 7 U.S.C.A. § 136a(c)(1)(D) (West Supp. 1979)).

⁴⁴ *Id.*

register its product on the basis of non-trade secret data previously submitted by a competing company to register its own similar product. A registration on this basis is referred to as a "me-too" registration within the industry.⁴⁵ Prior to this time, EPA routinely considered data submitted by previous applicants in granting later applications by competitors for products with an identical formula.⁴⁶ While a number of courts have noted this practice,⁴⁷ there is a question as to whether the practice was administratively proper.⁴⁸ Nevertheless, the new provision sanctioned the practice and allowed a subsequent applicant a right to use previously submitted data upon offering reasonable compensation.

Because of uncertainty as to whether the compensation requirement related to all data submitted under FIFRA or only to that submitted after the 1972 amendments, Congress again amended FIFRA in 1975.⁴⁹ The new law provided that the two limitations imposed by the mandatory licensing provision applied only to data submitted on or after January 1, 1970.⁵⁰ Thus, data submitted prior to January 1, 1970, could be relied on by subsequent applicants without compensation regardless of trade secret status. Data submitted after that date could be relied on as set out under the 1972 FIFRA amendments.

⁴⁵ See *Mobay Chemical Corp. v. Costle*, 447 F.Supp. 811, 834 (W.D. Mo. 1978).

⁴⁶ The practice was so widely known that the National Agricultural Chemical Association (NACA) took a position against it before Congress:

Under the present law registration information submitted to the Administrator has not routinely been made available for public inspection. Such information has, however, as a matter of practice but without statutory authority, been considered by the Administrator to support the registration of the same or a similar product by another registrant.

"Statement Relative to Exclusive Use of Data Provision of H.R. 10729," contained in REPORT OF SENATE AGRICULTURE AND FORESTRY COMM., S. REP. No. 838, 92d Cong., 2d Sess. pt. 2 at 18-19 reprinted in [1972] U.S. CODE CONG. & AD NEWS 3993, 4040.

⁴⁷ See, e.g., *Amchem Products, Inc. v. GAP Corp.*, 391 F.Supp. 124, 128 (N.D. Ga. 1975); *Mobay Chemical Corp. v. Costle*, 12 ENVIR. REP. (BNA) 1572, 1580 n. 22 (W.D. Mo. 1978) (three judge panel), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979).

⁴⁸ See, e.g., *Mobay Chemical Co. v. Costle*, 439 U.S. 320 (1979). In that case the Supreme Court, considering FIFRA as amended in 1975, noted that the statute neither authorized nor forbade this agency practice. *Id.*

⁴⁹ Pub. L. No. 94-140, 89 Stat. 755 (1975). See *Mobay Chemical Corp. v. Costle*, 12 ENVIR. REP. (BNA) 1572, 1573-74, 1578-79 (W.D. Mo. 1978) (three judge panel) (discussion of effects of 1972 and 1975 amendments and Congressional motives in making 1975 amendments).

⁵⁰ Pub. L. No. 94-140, 89 Stat. 755 (1975) (current version at 7 U.S.C.A. § 136a(c)(1)(D) (West Supp. 1979)).

In the 1978 amendments to FIFRA,⁵¹ Congress again amended the mandatory licensing provision by providing that "a citation to data that appear in the public literature or that previously had been submitted to [EPA] and that [EPA] may consider in accordance with [specified] provisions"⁵² would satisfy the test data requirement. The "specified" provisions required that EPA not consider data submitted on or after January 1, 1970 for a period of fifteen years after the submission unless the company seeking registration makes a specific offer of compensation to the data producer for part of the cost of producing the data.⁵³ Under the

⁵¹ Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819.

⁵² 7 U.S.C.A. § 136a(c)(1)(D) (West Supp. 1979). This section provides:

Each applicant for registration of a pesticide shall file with the Administrator a statement which includes— . . . (D) except as otherwise provided in subsection (c)(2)(D) of this section, if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, or alternatively a citation to data that appear in the public literature or that previously had been submitted to the Administrator and that the Administrator may consider in accordance with the following provisions:

(i) with respect to pesticides containing active ingredients that are initially registered under this [Act] after September 30, 1978, data submitted to support the application for the original registration of the pesticide, or an application for an amendment adding any new use to the registration and that pertains solely to such new use, shall not, without the written permission of the original data submitter, be considered by the Administrator to support an application by another person during a period of ten years following the date the Administrator first registers the pesticide: *Provided*, That such permission shall not be required in the case of defensive data;

(ii) except as otherwise provided in subparagraph (D)(i) of this paragraph, with respect to data submitted after December 31, 1969, by an applicant or registrant to support an application for registration, experimental use permit, or amendment adding a new use to an existing registration, to support or maintain in effect an existing registration, or for registration, the Administrator may, without the permission of the original data submitter, consider any such item of data in support of an application by any other person (hereinafter in this subparagraph referred to as the "applicant") within the fifteen-year period following the date the data were originally submitted only if the applicant has made an offer to compensate the original data submitter and submitted such offer to the Administrator accompanied by evidence of delivery to the original data submitter of the offer. The terms and amount of compensation may be fixed by agreement between the original data submitter and the applicant, or, failing such agreement, binding arbitration under this subparagraph. If, at the end of ninety days after the date of delivery to the original data submitter of the offer to compensate, the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service.

The section continues with details of the arbitration procedure.

⁵³ 7 U.S.C.A. § 136a(c)(1)(D) (West Supp. 1979). See note 52, *supra*.

so called "exclusive use" provision, data submitted to support the registration of a product registered after September 30, 1978 may not, however, be considered by EPA for a period of ten years after it registers the product.⁵⁴ The original data producer may waive both the compensation and ten year "exclusive use" provisions.⁵⁵ Data submitted before January 1, 1970 may be considered by EPA without compensation to, or the permission of, the original producer.⁵⁶

In 1978, Congress also introduced a provision (known as the "disclosure provision")⁵⁷ which allows disclosure to the public of

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See 7 U.S.C.A. 136a(c)(1)(D)(iii) (West Supp. 1979).

⁵⁷ 7 U.S.C.A. § 136h(b)-§ 136h(d)(1) (West Supp. 1979).

(b) Disclosure.—Notwithstanding any other provision of this [Act], and subject to the limitations in subsections (d) and (e) of this section the Administrator shall not make public information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential, except that, when necessary to carry out the provisions of this [Act], information relating to formulas of products acquired by authorization of this [Act] may be revealed to any Federal agency consulted and may be revealed at a public hearing or in findings of fact issued by the Administrator.

(c) Disputes.—If the Administrator proposes to release for inspection information which the applicant or registrant believes to be protected from disclosure under subsection (b) of this section, he shall notify the applicant or registrant, in writing, by certified mail. The Administrator shall not thereafter make available for inspection such data until thirty days after receipt of the notice by the applicant or registrant. During this period, the applicant or registrant may institute an action in an appropriate district court for a declaratory judgment as to whether such information is subject to protection under subsection (b) of this section.

(d) Limitations.—

(1) All information concerning the objectives, methodology, results, or significance of any test or experiment performed on or with a registered or previously registered pesticide or its separate ingredients, impurities, or degradation products, and any information concerning the effects of such pesticide on any organism or the behavior of such pesticide in the environment, including, but not limited to, data on safety to fish and wildlife, humans and other mammals, plants, animals, and soil, and studies on persistence, translocation and fate in the environment, and metabolism, shall be available for disclosure to the public: *Provided*, That the use of such data for any registration purpose shall be governed by section 136a of this section: *Provided further*, That this paragraph does not authorize the disclosure of any information that—

(A) discloses manufacturing or quality control processes,

(B) discloses the details of any methods for testing, detecting, or measuring the quantity of any deliberately added inert ingredient of a pesticide, or

(C) discloses the identity or percentage quantity of any deliberately added inert ingredient of a pesticide

unless the Administrator has first determined that disclosure is necessary to protect against an unreasonable risk of injury to health or the environment.

data relating to the safety and efficacy of a pesticide.⁵⁸ However, any data which would reveal manufacturing or quality control processes, details of methods of discovering deliberately added inert ingredients, or the identity or percentage of deliberately added inert ingredients (unless EPA determines disclosure of such information is necessary for health or environmental reasons) are not authorized for disclosure under this provision.⁵⁹ In addition, any data disclosed are subject to any applicable compensation or exclusive use limitations when used for registration purposes.⁶⁰

The mandatory licensing and disclosure provisions apply whether or not the producer has designated and maintained the data as trade secrets and whether or not EPA would have considered the data in question to be trade secrets under the trade secrets provision.⁶¹

In the legislative history of both the 1972 and 1975 amendments there is considerable debate over the lack of competition within the pesticide industry and the trade-offs between the conflicting objectives of environmental protection and the economic advantages afforded by using pesticides.⁶² In amending FIFRA in 1978, Congress was immediately concerned with the virtual halt in the registration of pesticides which resulted from litigation challenging the various provisions of the 1975 amendments.⁶³ Congress hoped to undo the logjam by further clarifying definitions and restrictions and by streamlining the registration proce-

⁵⁸ Efficacy tests concern the performance of the product and are usually based on comparisons of results achieved under controlled conditions. Safety tests relate to the toxicity of the product and deal with the effects on laboratory animals, chemical analyses to determine the presence of harmful residues, and environmental impact. Safety test methodology is generally standardized throughout the industry, but the design and methodology of efficacy tests may constitute trade secrets. See *Chevron Chemical Co. v. Costle*, 443 F.Supp. 1025, 1026 (N.D. Cal. 1978). In addition, EPA publishes guidelines describing the data requirements in greater detail and prescribing acceptable standards and protocols of data development. See, e.g., 40 C.F.R. §§ 162, 163, 180 (1979).

⁵⁹ 7 U.S.C.A. § 136h(d)(1) (West Supp. 1979). See note 57, *supra*.

⁶⁰ *Id.*

⁶¹ See notes 52 and 57 *supra*.

⁶² See *Chevron Chemical Co. v. Costle*, 443 F.Supp. 1025, 1033-40 (N.D. Cal. 1978) (appendix discussing legislative history of 1972 amendments); Schulburg, *The Proposed FIFRA Amendments of 1977: Untangling the Knot of Pesticide Registration*, 2 HARV. ENV'T'L. L. REV. 342 (1977) (discussion of the background of the 1975 amendments and concerns leading to 1978 amendments).

⁶³ H.R. REP. NO. 663, 95th Cong., 1st Sess. 18 (1977); S. REP. NO. 334, 95th Cong., 1st Sess. 3 (1977). See note 85, *infra*, for the names of two of the cases challenging the 1975 amendments.

dures⁶⁴ while still promoting the original concerns of the 1972 and 1975 amendments. Thus, the encouragement of competition within the pesticides industry and the prevention of undue competitive advantage derived as a result of government regulations;⁶⁵ the spreading of the costs of developing safety and efficacy data among the pesticide producers;⁶⁶ and the elimination, as far as practicable, of duplicative testing⁶⁷ were all factors in Congress' decisions in 1978. There was also discussion of the desirability of conforming FIFRA to the Toxic Substances Control Act (TSCA)⁶⁸ which, from the time of its enactment in 1976, has allowed disclosure of safety and efficacy data. Clear definition of the public's right of access to test data was a further consideration.⁶⁹

In sum, it appears that in the 1970's Congress was trying, at least in part, to carry out its objectives concerning the potential environmental and health hazards posed by pesticides, the right of the public to have access to information, and the lack of competition within the pesticide industry by causing a steady decline in the absolute protection granted to data submitted to support pesticide registrations. In 1972, non-trade secret data were available for use by EPA upon payment of compensation. In 1975, the requirement for compensation and the protection of trade secrets were removed for data submitted prior to January 1, 1970. In 1978, safety and efficacy data were made available to the public. While the exclusive use provision and the compensation requirements of the 1978 FIFRA amendments diminish some of the im-

⁶⁴ One of the streamlining procedures was to allow "generic" registration of pesticides in certain circumstances. The generic registration would be based on the basic chemicals in the product and would obviate the need for repeated submissions of data as to such basic chemicals. Another procedure would allow conditional registration of pesticides during the period in which data needed for complete registration was furnished in certain specified situations. See H.R. REP. No. 663, 95th Cong., 1st Sess. 19 (1977).

⁶⁵ See, e.g., Extension of the Federal Insecticide, Fungicide, and Rodenticide Act, S. REP. No. 334, 95th Cong., 1st Sess. 30, 31 (1977).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C.A. §§ 2601-2629 (West Supp. 1979)). TSCA allows public disclosure of "health and safety" data concerning chemical substances and mixtures distributed in commerce. Manufacturing processes and some formula information are excepted. 15 U.S.C. § 2613(b) (1976). Pesticides subject to regulation under FIFRA are excluded from regulation under TSCA. 15 U.S.C. § 2602(2)(B)(ii) (1976).

⁶⁹ 123 CONG. REC. S13,091 (daily ed. July 29, 1977) (remarks of Sen. Leahy); *Id.* at S13,095 (remarks of Sen. Lugar).

fact of unrestricted use and disclosure, the 1978 law made a significant inroad upon a producer's ability to maintain absolute protection of his data.

III. GENERAL BACKGROUND TO THE AMCHEM LITIGATION

A. *The Issues in Amchem*

As noted above,⁷⁰ the mandatory licensing and disclosure provisions of FIFRA apply whether or not the producer has designated and maintained the data as trade secrets. Many companies in the pesticide industry are concerned about the effects of these provisions in allowing competitors to benefit from their data: the companies fear that competitors will be able to enter the marketplace at lower start-up costs since they do not have to produce data to support registrations.⁷¹ The companies also fear that rivals who gain access to the safety and efficacy data will be able to derive other benefits from them which will reduce the producer's competitive advantage.⁷² Specifically, the data are also valuable for meeting state or foreign registration requirements, defining and supporting advertising and warranty claims, defending against product liability actions, providing leads for product development and improvement, and for discovering cost efficient manufacturing and research methodology and other spin-off technology as well.⁷³ In any case, the companies are concerned with the loss of the competitive advantage that would result from the mandatory licensing and disclosure of their trade secret data.⁷⁴

In *Amchem Products Co. v. Costle*,⁷⁵ approximately seventy-five chemical companies claim that these provisions of FIFRA violate the Fifth Amendment of the United States Constitution in two respects. First, as to data submitted prior to the effective date of the 1978 amendments, the provisions are claimed to constitute a deprivation of property without due process of law in that they effect a "retroactive taking" of the data.⁷⁶ Second, as to

⁷⁰ See text at note 61, *supra*.

⁷¹ See Amchem Memo, *supra* note 4, at 9-14.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Civ. No. 76-2913 (S.D.N.Y., filed July 9, 1979).

⁷⁶ Amchem Memo, *supra* note 4, at 56-65. Much of the argument on this issue concerns application of the holding in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) to the situation in the instant litigation. In that case, coal mine operators were retroactively held

all data, regardless of date of submission, the provisions are claimed to constitute a "taking" of private property for public purpose without just compensation.⁷⁷

The plaintiffs in *Amchem* maintain that the property right to prevent unauthorized use and disclosure of trade secret data inheres in the nature of trade secrecy⁷⁸ and that this right has vested by virtue of "federal laws and regulations, and agency practice and procedure (as well as state and common law principles)."⁷⁹ It is this ability to prevent unauthorized use or disclosure which gives the trade secret commercial value.

The basic argument of the chemical companies is that the FIFRA provisions effect a transfer of the value and right to use the data to others, particularly competitors, and that this "appropriation" of the data cannot be sustained as a valid regulation under the Commerce Clause power.⁸⁰ Assuming Congress has the power to order such transfer when it determines that the public interest will be served, it may make such transfer of property only upon payment of just compensation.⁸¹ The law goes beyond an even-handed and nondiscriminatory promotion of competition because it takes information the plaintiffs have developed at great expense and distributes it to competitors who need pay little or nothing.⁸² The provisions are "takings" both because, in character, they are appropriations and also because they destroy the commercial value of the trade secrets involved with the resulting diminution in value being near total.⁸³ The fact that the data producing companies are still allowed to use the data is beside the point:

The cases are unequivocal that when the effect of the government's action is to appropriate private property for the use and benefit of

liable for compensation to former employees who had contracted Black Lung Disease. The plaintiffs in *Amchem* claim that the case sets higher standards for the constitutionality of retroactive legislation than for prospective legislation and that these standards are not met in the present case. Reply Memo of Plaintiffs in Support of Motion for Preliminary Injunction at 59-62, *Amchem Products Co. v. Costle*, Civ. No. 76-2913 (S.D.N.Y., filed July 9, 1979) [hereinafter cited as *Amchem Reply Memo*]. This issue is beyond the scope of this article.

⁷⁷ *Amchem Memo*, *supra* note 4, at 40-56.

⁷⁸ *Id.* at 37-40.

⁷⁹ *Amchem Reply Memo*, *supra* note 76, at 54.

⁸⁰ *Amchem Memo*, *supra* note 4, at 42-52.

⁸¹ *Amchem Reply Memo*, *supra* note 76, at 40.

⁸² *Id.* at 42.

⁸³ *Amchem Memo*, *supra* note 4, at 48.

members of the public, it is *absolutely irrelevant* that the government beneficently allows the original owner to retain some use of the property, or to share equally with the public in using the property.⁸⁴

EPA,⁸⁵ in reply, attacks the "taking" question first by arguing that the plaintiffs in *Amchem* had no right to prevent use or disclosure of the registration data prior to 1972⁸⁶ and that the 1972 amendments granted no rights which could not be impaired by subsequent FIFRA amendments.⁸⁷ The agency contends that police power regulations requiring disclosure of trade secrets have been enacted and upheld many times and that Congress was acting within its constitutional powers in requiring the mandatory licensing and disclosure of trade secret data.⁸⁸ Finally, EPA argues that despite the claim of the chemical companies "that the [mandatory licensing] and disclosure provisions of the 1978 FIFRA amendments destroy the value of the data, plaintiffs retain full use of all test data submitted under FIFRA."⁸⁹

In essence, the plaintiffs are challenging Congress' power under the Commerce Clause⁹⁰ to affect their alleged property rights in trade secret data by amending FIFRA. If, in amending FIFRA in 1978, Congress was either exceeding its Commerce Clause power or using it improperly, the amendments would be void.⁹¹ For a complete understanding of the issues it is therefore helpful to know something about Congress' power under the Commerce Clause to affect property rights without compensation. The next two subsections present brief overviews of Congress' power under the Commerce Clause and some of the tests used by the Supreme Court to determine whether governmental action requires compensation.

⁸⁴ *Amchem Reply Memo*, *supra* note 76 at 50-51 (emphasis in original).

⁸⁵ EPA raised arguments in cases involving challenges to the 1975 FIFRA mandatory licensing provision similar to those raised in *Amchem* in *Dow Chemical Co. v. Costle*, 464 F. Supp. 395 (E.D. Mich. 1978) and in *Mobay Chemical Corp. v. Costle*, 447 F.Supp. 811 (W.D. Mo. 1978). Both cases held that the 1972 FIFRA created no property rights in trade secret data which could not be altered by subsequent amendment.

⁸⁶ Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 17-36, *Amchem Products Co. v. Costle*, Civ. 76-2913 (S.D.N.Y., filed July 9, 1979) [hereinafter cited as EPA Memo].

⁸⁷ *Id.* at 39-47.

⁸⁸ *Id.*

⁸⁹ *Id.* at 65-68.

⁹⁰ See note 6, *supra*.

⁹¹ See text at notes 92-105, *infra*.

B. Congressional Power Under the Commerce Clause

The power of Congress under the Commerce Clause⁹² is analogous to the "police power" of the states⁹³ and is subject directly to the same limitations of the Constitution applied to the states through the Fourteenth Amendment.⁹⁴ It is undisputed that if one of the effects of a federal statute is to deprive a person of property without due process of law or without just compensation, such a statute is invalid as contrary to the Fifth Amendment.⁹⁵ But, within these Fifth Amendment limitations, there is room for congressional regulatory action:

If the nature and conditions of a restriction upon the use or disposition of property is such that a State could, under the police power, impose it consistently with the Fourteenth Amendment without making compensation, then the United States may for a permitted purpose impose a like restriction consistently with the Fifth Amendment without making compensation. . . .⁹⁶

The requirements of the Fifth Amendment are generally satisfied where the means of regulation of commerce are appropriate to a permissible end.⁹⁷ The burden is on the one challenging a statute to demonstrate the lack of facts to support its validity, as congressional exercise of the commerce power is presumed to be constitutionally proper.⁹⁸ The scope of the regulation, whether it affects the industry generally or only individual concerns, may also be a factor.⁹⁹ Regulations affecting an industry as a whole, even though they reduce property value or increase business risks, are not generally construed as "takings."¹⁰⁰ In addition, it has

⁹² See note 6, *supra*.

⁹³ See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938): "[I]t is no objection to the exertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *Id.* at 147. For ease of reference, the terms "police power" and "Commerce Clause power" will be used interchangeably in this paper.

⁹⁴ See *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146 (1919).

⁹⁵ See *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). See also *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935).

⁹⁶ *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 156-157 (1919). See also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (this is perhaps the earliest statement of the Commerce Clause power).

⁹⁷ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 148-49 (1938).

⁹⁸ See *Uesery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

⁹⁹ See *S. La. Area Rate Cases v. Fed. Pow. Comm'n*, 428 F.2d 407, 428 (5th Cir. 1970), *cert. den.* 400 U.S. 950 (1970), *on reh.* 444 F.2d 125 (5th Cir. 1971).

¹⁰⁰ *Id.*

been said that those who deal in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end.¹⁰¹ Even when legislation burdens one more than others, a "taking" claim must rest on the particular facts of the case, as the Supreme Court has long recognized that "legislation designed to promote the general welfare commonly burdens some more than others."¹⁰²

The plaintiffs in *Amchem* concede Congress' power to regulate the pesticide industry under the Commerce Clause in order to promote the public health and welfare.¹⁰³ In addition, the regulation of competition is one of the oldest and most well-developed powers of Congress under the Commerce Clause.¹⁰⁴ The courts traditionally have accorded wide latitude to Congress in its efforts to enhance competition in furtherance of the public good.¹⁰⁵ Thus, the issue in *Amchem* is not whether Congress may regulate the production of pesticides. Rather, the issue is whether, in so doing, Congress has contravened the Fifth Amendment.

C. *Compensable and Non-Compensable Actions: Police Power v. Eminent Domain*

Traditionally, the police power has been viewed as the inherent

¹⁰¹ *F.H.A. v. Darlington, Inc.*, 358 U.S. 84, 91 (1958) (upholding law prohibiting those who held certain federal mortgages for multifamily units from renting to transients).

¹⁰² *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978).

¹⁰³ *Amchem Memo*, *supra* note 4, at 42. Nor do the plaintiffs object to the policy of public review. The companies do, however, object to the fact that Congress has, in carrying out its policies, allowed competitors to gain access to their data. The plaintiffs have offered to permit review of the data by responsible scientists under assurance of confidentiality. *Id.* at 43.

¹⁰⁴ *See Northern Securities Co. v. United States*, 193 U.S. 197, (1904).

Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine. Undoubtedly, there are those who think that the general business interests and prosperity of the country will be best promoted if the rule of competition is not applied. But there are others who believe that such a rule is more necessary in these days of enormous wealth than it ever was in any former period of our history. Be all this as it may, Congress has, in effect, recognized the rule of free competition by declaring illegal every combination or conspiracy in restraint of interstate and international commerce. As in the judgment of Congress the public convenience and the general welfare will be best subserved when the natural laws of competition are left undisturbed by those engaged in interstate commerce, and as Congress has embodied that rule in a statute, that must be, for all, the end of the matter, if this is to remain a government of laws, and not of men.

Id. at 337-38.

¹⁰⁵ *Id.*

power of the sovereign to promulgate regulations designed to promote the public health, morals, safety, convenience or general prosperity.¹⁰⁶ The power of eminent domain was seen as the unlimited power of the sovereign to take private property for public use upon the payment of just compensation.¹⁰⁷ The powers were viewed as operating within separate ambits.¹⁰⁸ Government "regulation" which prevented a property owner from using his property in a way deemed injurious to public health, safety or welfare was a non-compensable exercise of the police power even though the owner's property value was impaired by reason of the regulation.¹⁰⁹ If, however, government action, although in furtherance of public welfare, resulted in physical invasion of the property, such that the property became, in effect, devoted to public use, it was viewed as a compensable "taking" under the government's power of eminent domain.¹¹⁰

At times, however, the police power was seen as merging with the power of eminent domain. Justice Holmes' statement in *Pennsylvania Coal Co. v. Mahon*,¹¹¹ where a law forbidding the mining of coal in certain instances was found to constitute a "taking", is the classic expression of this viewpoint:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.¹¹²

This question of degree, where regulation ends and "taking" begins, has been an important factor in a number of "taking" cases.¹¹³ The Supreme Court has recently phrased the question in terms of whether governmental action so frustrates "distinct in-

¹⁰⁶ See *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561 (1906).

¹⁰⁷ See *Kohl v. United States*, 91 U.S. 367 (1875).

¹⁰⁸ See Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402, 404 (1977) [hereinafter cited as Costonis].

¹⁰⁹ See *Mugler v. Kansas*, 123 U.S. 623 (1887).

¹¹⁰ See *Northern Transp. Co. v. City of Chicago*, 99 U.S. 635 (1878).

¹¹¹ 260 U.S. 393 (1922). See text at notes 164-170, *infra*.

¹¹² 260 U.S. at 415-16.

¹¹³ See, e.g., *Armstrong v. United States*, 364 U.S. 40 (1960) (government's destruction of a materialman's lien in certain property held a "taking"); *Hudson Water Co. v. McCarter*, 209 U.S. 349 (1908) (if height restriction makes property wholly useless "the right to property prevails over the public interest" and compensation is required).

vestment-backed expectations" as to amount to a "taking."¹¹⁴

In zoning cases, and recently with respect to historic preservation laws,¹¹⁵ the Supreme Court has looked to the economic value of the uses of the property remaining to the property owner after the governmental regulation, rather than to any quantum of impact on his expectations, to decide whether a "taking" has occurred.¹¹⁶ If the Court finds that the property owner has retained "reasonable beneficial use" of the property, the governmental regulation is not a "taking" even though the property owner might suffer severe economic loss.¹¹⁷

In certain other instances, the Court has focused its attention on the fact that the government's action can be characterized as an appropriation of the claimant's property.¹¹⁸ In these cases, the Court is concerned with whether the government's action effectively excludes the claimant from using his property¹¹⁹ or results from the government's acting for some strictly governmental purpose.¹²⁰ If either of these factors is found, the government's action may be construed as a "taking."¹²¹

One issue for the district court to decide in *Amchem* is which test to use in addressing the "taking" claim. Because a particular governmental action might be recognized as a "taking" under one test but not under another, there is a theoretical tension between the tests. Whether the district court uses a "reasonable beneficial use" test, a "distinct investment-backed expectations" test or an "appropriation" test is thus of critical importance in *Amchem*. As the Supreme Court has stated that "taking" claims must be resolved on the particular facts in issue,¹²² the test the district court employs is likely to be also a product of these facts.

¹¹⁴ Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

¹¹⁵ Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

¹¹⁶ See *Costonis*, *supra* note 108, at 407.

¹¹⁷ See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

¹¹⁸ See, e.g., *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Cress*, 243 U.S. 316 (1916).

¹¹⁹ See *Sanguinetti v. United States*, 264 U.S. 146, 148-49 (1923).

¹²⁰ See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 135 (1978)

¹²¹ See text at notes 143-156, *infra*.

¹²² *United States v. Central Eureka Min. Co.*, 357 U.S. 155, 168 (1958).

IV. THE ANALYSIS OF "TAKING" JURISPRUDENCE IN *Penn Central Trans. Co. v. City of New York*

Much of the law concerning "takings" developed in response in cases concerning property rights in land. In *Amchem*, both the chemical companies and EPA rely on land cases in arguing the "taking" issue. In addition, in *Mobay Chemical Corp. v. Costle*, where it was held that the 1975 FIFRA mandatory licensing provision did not effect a "taking" of Mobay's trade secret data, the district court used principles derived from land "taking" cases in reaching its decision.¹²³ The Supreme Court itself has used such principles in deciding cases involving intangible properties such as a materialman's lien or contracts.¹²⁴ For these reasons, there should be no impediment to using principles derived from land "taking" cases in analyzing the trade secrets "taking" claim in *Amchem*.

As it is representative of the Supreme Court's analysis of land "taking" claims, the recent decision in *Penn Central Trans. Co. v. City of New York*¹²⁵ deserves close attention. In that case, Penn Central challenged the constitutionality of New York City's Landmark Preservation Law, which was enacted to protect historic landmarks from precipitous decisions that might destroy or fundamentally alter their character. The law prevented the railroad company and its lessee from adding a fifty-five-story office tower atop its Grand Central Terminal in midtown Manhattan. Penn Central claimed, *inter alia*, that the application of the

¹²³ The issues in this case were initially split between a district court and a three judge panel. The district court decided the issues relating to whether plaintiffs' data warranted trade secret protection. 447 F. Supp. 811 (W.D. Mo. 1978). The court held that data which met the Restatement of Torts definition of trade secrets must be protected as such. *Id.* at 834-5. The three judge panel heard the constitutional challenges. 12 ENVIR. REP. (BNA) 1572 (W.D. Mo. 1978). The three judge panel held that the 1975 FIFRA mandatory licensing provision did not effect a "taking" of Mobay's trade secret data. This decision was appealed directly to the Supreme Court. 439 U.S. 320 (1979). The Supreme Court found no jurisdiction as the plaintiffs' dispute was not with the statute but with agency practice. The Court dismissed the appeal but did not vacate the judgment of the three judge panel. *Id.*

For a discussion of the 1975 FIFRA mandatory licensing provision, see text at notes 49-50, *supra*.

¹²⁴ See, e.g., *Armstrong v. United States*, 364 U.S. 40 (1960) (materialman's lien); *Omnia Commercial Co., Inc., v. United States*, 261 U.S. 502 (1923) (contract rights).

¹²⁵ 438 U.S. 104 (1978). For an excellent presentation of the issues in this case and the development of "taking" jurisprudence generally, see Scott, *Alas in Wonderland: The Impact of Penn Central v. New York Upon Historic Preservation Law and Policy*, 7 B.C. ENV. AFF. L. REV. 317 (1978).

Landmark Law had "taken" its property, specifically the right to develop the air space above the terminal, without just compensation, in violation of the Fourteenth Amendment.

The Court first established that the New York City law was not rendered invalid because it failed to provide compensation whenever a landowner had been restricted in the exploitation of property interests to a greater extent than was provided for in applicable zoning laws.¹²⁶ It next considered whether the interference with Penn Central's property right was of such magnitude that "there must be an exercise of eminent domain and compensation to sustain [it],"¹²⁷ and focused its inquiry on the impact of regulation on the Grand Central Terminal site. The Court stressed that the law did not interfere with Penn Central's present use of the terminal in any way. Rather, the designation as a landmark not only permitted but contemplated that Penn Central "may continue to use the property precisely as it has been used for the past 65 years. . . ."¹²⁸ Further, while Penn Central had been prohibited from constructing the tower over the terminal, it had not been prohibited from other construction which might not alter the character of the building. Finally, noting that the Landmark Law allowed Penn Central to transfer air rights to other properties it owned in the area, the Court stated: "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on [Penn Central] and, for that reason, are to be taken into account in considering the impact of regulation."¹²⁹ Finding that "[t]he restrictions imposed are substantially related to the promotion of the general welfare and . . . permit reasonable beneficial use of the Landmark site,"¹³⁰ the Court upheld the Landmark Law in a 6-3 decision, thus sustaining use of the police power to promote historic preservation.

In the course of the *Penn Central* decision, the Court reviewed "the factors that have shaped the jurisprudence of the Fifth Amendment injunction 'nor shall private property be taken for

¹²⁶ 438 U.S. at 128-136.

¹²⁷ *Id.* at 136, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

¹²⁸ *Id.*

¹²⁹ *Id.* at 137.

¹³⁰ *Id.* at 138.

public use, without just compensation.'"¹³¹ Writing for the majority, Justice Brennan stated:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking [*sic*], this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .¹³²

Three concepts critical to the Court's analysis of "taking" claims are set forth in this statement. First, the concept of the "parcel as a whole" establishes the boundaries of the Court's inquiry into property rights affected by governmental action. Second, the concept of the "character of the action" indicates that the *kind* of government action is a relevant factor. Third, the concept of "nature and extent of the interference" indicates that the *degree* of regulation is also a factor. How these concepts (herein referred to by the phrases in quotation marks above) are employed by the Court is best seen by examination of cases in which these factors were particularly significant.

A. *The "Parcel as a Whole"*

In one of its most extensive definitions of property, the Supreme Court recognized that the Fifth Amendment protection of property "is addressed to every sort of interest the citizen may possess."¹³³ It is against the totality of these interests, "the parcel as a whole," that the effects of the Government's actions are measured.¹³⁴ It is important, then, to ascertain how the Court defines this "parcel as a whole." The case of *Goldblatt v. Town of Hempstead*¹³⁵ offers a good example of how the Court approaches this issue.

In *Goldblatt*, a town ordinance prohibited excavation operations below the level of the water table. The law also imposed an affirmative duty to refill any excavations below that level. Gold-

¹³¹ *Id.* at 123.

¹³² *Id.* at 130-31.

¹³³ *U.S. v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (holding that compensation to be paid for government's temporary occupancy of building under long-term lease to plaintiff must be based upon market rental value of building on lease by long-term tenant to temporary occupier).

¹³⁴ See text at note 132, *supra*.

¹³⁵ 369 U.S. 590 (1962).

blatt, owner of a lot which had been used for excavation of sand and gravel for over forty years, claimed that the ordinance prevented him from continuing his business and that this prohibition without compensation was a "taking" of his property without due process of law. At the time of the litigation, twenty of Goldblatt's thirty-eight acres were covered with a lake, resulting from the excavation operations, with an average depth of twenty-five feet. Although it noted that "[t]here is no set formula to determine where regulation ends and taking begins,"¹³⁶ the Supreme Court declined to decide whether the regulation went so far as to amount to a "taking". "Indulging in the usual presumption of constitutionality,"¹³⁷ the Court found no evidence in the record which even "remotely suggest[ed] that prohibition of further mining will reduce the value of the lot in question."¹³⁸ The Court upheld the ordinance despite the assumed validity of the "supposition" that, as Goldblatt had claimed, the eighteen acres surrounding the lake could not be mined because there would be no area left for processing operations.¹³⁹ Thus, even though Goldblatt claimed, and the Court supposed, that he would be entirely prevented from carrying on his business, the Court was unable to conclude that Goldblatt had met the burden of proving that the value of his property would be unreasonably diminished by the prohibition.

By casting the burden of proof on Goldblatt, the Court, in effect, assumed that other reasonable uses of the land existed. The Court's citation of a case where the diminution in property value because of an ordinance prohibiting certain uses of the property was from \$800,000 to \$60,000 as an example of the principle that comparisons of value of the property before and after regulations are "relevant" but "not conclusive" of the regulation's validity is an indication of the difficulty a claimant faces in overcoming the assumption.¹⁴⁰ Indeed, the Court in *Goldblatt* cited one of its earlier opinions in another police power case for the proposition that the exercise of the police power would be upheld if any state of

¹³⁶ *Id.* at 594.

¹³⁷ *Id.*

¹³⁸ *Id.* (footnote omitted).

¹³⁹ *Id.* at 596. The court also recognized that "one could imagine that preventing further deepening of a pond already 25 feet deep would have a *de minimis* effect on public safety." *Id.* at 595.

¹⁴⁰ *Id.* at 594, citing *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

facts either known or reasonably assumed support it.¹⁴¹

It is perhaps possible that Goldblatt could have won the case had he proven that no beneficial use of the property as a whole existed after the regulation. However, in *Penn Central* the Court expressly declared its unwillingness to be bound by definitions of property interests such that the prohibition of that interest necessarily would deprive the owner of all beneficial uses of the property. In discussing *Goldblatt* and other cases concerning prohibitions of land use, the Court in a footnote stated:

These cases dispose of any contention that . . . full use of air rights is so bound up with the investment-backed expectations of appellants that Governmental deprivation of these rights invariably—i.e., irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a “taking.”¹⁴²

Goldblatt and *Penn Central* exemplify the Court's approach to defining the property interest at stake in the usual “taking” claim. In both cases, the property right affected by the legislation was severable from other uses of the property and could have been valued separately, as mining rights and air rights have often been the subject of leasing or sale arrangements. In defining the “parcel as a whole,” the Court ignored any question of severability and looked instead to all possible reasonable uses of the land in question. Thus *Goldblatt* and *Penn Central* demonstrate that, for “taking” purposes, the economic interest against which the impact of governmental action will be measured is made up of the sum of the property owner's interests and not simply selected interests—no matter how valuable in themselves.

B. The “Character of the Action”

In discussing the character of the action as a factor in “taking” analysis, the *Penn Central* opinion stated that “[a] ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by Government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”¹⁴³ Later, the Court also noted that “government actions that may be characterized as acquisitions of resources to permit

¹⁴¹ *Id.* at 596, citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938).

¹⁴² *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130 n.27 (1978).

¹⁴³ *Id.* at 124.

or facilitate uniquely public functions have often been held to constitute 'takings.'"¹⁴⁴

In both statements the Court made specific reference to the case of *United States v. Causby*¹⁴⁵ as illustrative of its meaning. There, in a suit for compensation brought by the owner of a chicken farm, frequent low-level flights of government aircraft were deemed an appropriation of the land directly underneath the flight path. Although the Court noted that navigable airspace was a "public highway," the Court found that the damages suffered by the claimant were the result of a direct invasion of his land.¹⁴⁶ The noise and glare of the airplanes destroyed the use of the property as a commercial chicken farm, and the government was held liable for "taking" an easement of the air rights.¹⁴⁷ In a footnote, the Court stated: "This is not a case where the United States has merely destroyed property. It is using a part of it for the flight of its planes."¹⁴⁸ The Court was careful to narrowly define those instances where even government "use" of airspace would require compensation: "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."¹⁴⁹ Although the Court found that the government "appropriation" by "direct invasion" of the claimant's land resulted in a "taking" of a severable property right, the finding rested on the fact that the government was, in effect, using the land to the exclusion of the property owner's use and enjoyment.

Thus, the "character" of the act, of itself, will not necessarily determine the existence of a "taking." The Court's treatment of *Causby* in *Penn Central* suggests that the role the government plays in the action can be critical to the determination of whether or not a "taking" occurs when governmental action is viewed as

¹⁴⁴ *Id.* at 128.

¹⁴⁵ 328 U.S. 256 (1946).

¹⁴⁶ *Id.* at 264-265.

¹⁴⁷ Since the record was not clear as to whether the easement taken was permanent or temporary, the Supreme Court remanded to the Court of Claims for a determination of this issue and the amount to be awarded. *Id.* at 268. The Court had earlier distinguished the damages suffered by a property owner under a flight path from those suffered by owners of property adjoining a railroad who are affected by the noise, vibration and smoke incidental to the operation of the trains. *Id.* at 262, citing *Richard v. Washington Terminal Co.*, 233 U.S. 546 (1914).

¹⁴⁸ *Id.* at 262 n.7.

¹⁴⁹ *Id.* at 266.

an appropriation of a person's property. In addressing Penn Central's broad objections to the validity of the Landmark Law, the Court rejected the railroad's attempt to analogize the Landmark Law to cases such as *Causby*, where, according to the Court, government acted in an "enterprise capacity" to appropriate part of a person's property "for some strictly governmental purpose."¹⁵⁰ The Court stated that the Landmark Law neither exploited Penn Central's parcel for city purposes nor facilitated nor arose from any entrepreneurial operations of the city. The law was "no more an appropriation of property by Government for its own uses" than were zoning laws prohibiting two or more adult theatres in a specified area for aesthetic reasons or regulations preventing excavation for safety reasons.¹⁵¹

Implicit in the Court's decision in *Penn Central* and in its treatment of *Causby* is the distinction between the governmental roles of "adjuster" of the "benefits and burdens of economic life to promote the common good"¹⁵² and "entrepreneur," where government appropriates property for some strictly governmental purpose.¹⁵³ Governmental action characterized as resulting from the "adjuster" role is less likely to require compensation than action characterized as resulting from the role of "entrepreneur." Since almost all legitimate governmental actions can be viewed as promoting the public good, this distinction is not clear cut. It has been suggested that the distinction lies in whether or not government competes with or profits from the regulated activity.¹⁵⁴ Ab-

¹⁵⁰ Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 135 (1978).

¹⁵¹ *Id.* The Court's implicit definition of the "parcel as a whole" in *Causby* should be noted. The Court did look beyond the immediately affected air rights to determine whether the impact of the governmental actions amounted to a "taking". Once it had found substantial interference with the land use resulting from governmental use of the airspace in an enterprise capacity, however, the Court did not consider other reasonable uses of the property. Instead, it was content to award compensation based on the diminution of value of claimant's land because of the government's easement. As the Court has often stated that diminution in value alone does not constitute a "taking", *Id.* at 131, the difference here must be the added factor of the governmental action in an enterprise capacity. Because of the character of this action, *Causby* is distinguished from those cases, such as *Goldblatt* and *Penn Central*, where the government's action did not constitute an acquisition of property for its own use. Thus, where the character of governmental action is an appropriation of property for its own exclusive use, other reasonably beneficial uses of the property are not considered in defining the "parcel as a whole".

¹⁵² *Id.* at 124. See text at note 143, *supra*.

¹⁵³ *Id.* at 135. See text at note 150, *supra*.

¹⁵⁴ TRIBE, AMERICAN CONSTITUTIONAL LAW, ch. 9 § 2 (Supp. 1979). "[I]n some contexts it makes sense to point out that the government is not making a profit from the regulated

sent actual competition or profit, it would seem that the government's action must result in exclusion of the property owner from use and enjoyment of the property in order to constitute a "taking".

The Court in *Penn Central* also made two statements which indicate the range of governmental action that will be permitted when the action is characterized as resulting from government's role as "adjuster." First, after a discussion of a number of "taking" cases where governmental action had prohibited certain uses of property, the Court stated that these cases illustrated the fallacy of *Penn Central*'s contention that a "taking" must be found to have occurred "whenever the land-use restriction may be characterized as imposing a 'servitude' on the claimant's parcel."¹⁵⁵ Second, after discussion of still other "taking" cases involving prohibited uses of property which the Court observed "were perfectly lawful in themselves," the Court stated:

These cases are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.¹⁵⁶

In sum, the fact that government's regulation under the police power can be characterized as the imposition of a servitude, as an adjustment of the benefits and burdens of economic life, or even as an appropriation does not in itself make the regulation unconstitutional. This is true even when the action is not taken to prevent a noxious use but rather to implement a policy bringing widespread public benefit. In order for there to be a "taking" by appropriation, there must be either governmental action in an enterprise capacity or governmental action to the exclusion of the original property owner, or both. In those cases where these factors are found, the Court will not apply the "reasonable beneficial use" test. Thus, the "appropriation" test¹⁵⁷ focuses on the "character" of the action whereas the "reasonable beneficial use"¹⁵⁸

activity". *Id.* at n.12.

¹⁵⁵ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130 n.27 (1978).

¹⁵⁶ *Id.* at 134 n.30.

¹⁵⁷ See text at notes 118-121, *supra*.

¹⁵⁸ See text at notes 115-117, *supra*.

test focuses on the fact that the claimant is able to use the property for purposes other than those obviated by the governmental action. Each test operates in its own sphere and the use of one over the other will depend upon the particular facts of the case. In certain fact situations, however, the Court may ignore both tests and, instead, focus upon the degree of impact of the governmental action upon the plaintiff's property interests.¹⁵⁹

C. *The "Nature and Extent of the Interference"*

The standard rule relating the extent of the impact of governmental action with the existence of a "taking" is that diminution in property value, standing alone, cannot establish a "taking."¹⁶⁰ Even if the regulation in question prohibits the most potentially profitable use of the property¹⁶¹ or prohibits a beneficial use to which the property had been previously devoted and thus causes substantial individualized harm,¹⁶² the regulation is not necessarily invalid. However, in some circumstances, the Court has recognized that a statute which "substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'."¹⁶³

The leading case for this proposition is *Pennsylvania Coal Co. v. Mahon*.¹⁶⁴ There, the regulation in question prohibited the mining of coal in such a way as to cause subsidence of public structures, roads or other facilities. The law was passed after Pennsylvania Coal Company had conveyed to Mahon surface rights to a parcel of land while expressly reserving the right to remove all coal beneath the surface. Mahon took the premises with all risks and waived all claims for damages that might arise. Upon passage of the statute, Mahon brought suit to enjoin the coal company from mining. The coal company in defense claimed that since providing supports for the overstrata of the coal was economically infeasible, the coal which had to remain unmined had therefore been "taken" for a public purpose. Pennsylvania, as amicus curiae, argued that since the regulation prevented a harmful use of the property, it was a valid exercise of the police power.

¹⁵⁹ See text at notes 111-114, *supra*.

¹⁶⁰ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978).

¹⁶¹ See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

¹⁶² See *Miller v. Schoene*, 276 U.S. 272 (1928).

¹⁶³ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

¹⁶⁴ 260 U.S. 393 (1922).

Realizing the harm that would result if the company's right to mine coal became valueless by reason of the restriction on subsurface mining, the Court in an opinion by Justice Holmes said:

"For practical purposes, the right to coal consists in the right to mine it." What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does.¹⁶⁵

The statement shows that the Court focused on the fact that the company's ability to profit from its mining operation was virtually destroyed by reason of the statute. Barring extraordinary changes in the marketplace, nothing the coal company could do in relation to the coal—its only interest in the land—could make its mining operations profitable in competition with other coal companies.

The fact that the coal company expressly reserved coal mining rights, while yielding all surface rights, was of particular importance. Under the circumstances, the Court had no other interests in the land to consider. The approach taken in *Pennsylvania Coal* is, in this respect, but a previous application of the principle recognized but not applied, for lack of proof, in *Goldblatt*, that governmental action can be so onerous as to amount to a "taking". Because there were no other reasonable uses for subsurface mining rights in *Pennsylvania Coal*, the Court necessarily had to base its determination on the impact of the legislation on the specific interests affected. In *Goldblatt*, the Court recognized the principle of *Pennsylvania Coal*,¹⁶⁶ but went beyond the specific interests in question and based its determination on other assumed uses of the land.

The Court in *Pennsylvania Coal* grounded its decision on the general principle that when a police power regulation "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."¹⁶⁷ Whether this test, focusing strictly on the degree of interference, with distinct investment-backed expectations¹⁶⁸ still has

¹⁶⁵ *Id.* at 414-15 (citations omitted).

¹⁶⁶ *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

¹⁶⁷ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

¹⁶⁸ The phrase "distinct investment-backed expectations" was not used by the Court in

vitality after *Penn Central* is questionable. In *Penn Central* the Court resolved the "taking" issue by concentrating on the uses of the property left to the railroad despite the fact that the denial of air rights would cause substantial harm. The Court stated that Penn Central's submission that it "may establish a 'taking' simply by showing that [it has] been denied the ability to exploit a property interest that [it] heretofore had believed was available for development is quite simply untenable."¹⁶⁹ Just before its analysis of *Pennsylvania Coal*, however, the Court did note that if a regulation had an "unduly harsh impact upon the owner's use of the property" it might "perhaps" result in a "taking".¹⁷⁰ Thus, the Court left the door ajar on the question of the *Pennsylvania Coal* test. How far it will open it remains to be seen.

In sum, the Supreme Court has used three types of tests to determine whether a particular governmental action constitutes a "taking." The "reasonable beneficial use" test focuses upon the uses of the property retained by the owner after regulation. The "appropriation" test focuses upon the fact that the government is acting in an enterprise capacity to the exclusion of the property owner. Finally, the "distinct investment-backed expectations" test focuses on the degree of interference with the claimant's property interests. In addition, each of these tests also underscores one of the concepts viewed as critical to a "taking" inquiry by the Court in *Penn Central*. The "reasonable beneficial use" test emphasizes the fact that in the usual case, the impact of the governmental action is to be measured against the claimant's "parcel as a whole" and not solely against rights affected by the governmental action in question. The "appropriation" test concentrates on the "character" of the government's action. The "distinct investment-backed expectations" test highlights the "nature and extent" of the governmental interference with the owner's interests. Examination of the role each of these concepts plays in a particular fact situation facilitates the selection of the appropriate test to employ in deciding whether a "taking" has occurred.

Pennsylvania Coal but was the characterization given to the *Pennsylvania Coal* test by the Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978). See text at notes 111-114, *supra*.

¹⁶⁹ *Id.* at 130.

¹⁷⁰ *Id.* at 127.

V. APPLICATION OF PENN CENTRAL TO THE AMCHEM LITIGATION

In deciding whether the 1978 FIFRA mandatory licensing¹⁷¹ and disclosure¹⁷² provisions constitute a "taking" of the plaintiffs' trade secret data in *Amchem*, the district court's choice of which "taking" test to apply will depend upon its view of how these provisions affect plaintiffs' uses of the data. It is helpful, then, to review the ways in which the plaintiffs do use the data before examining the "taking" issue more closely. The words of the plaintiffs in *Amchem* perhaps best relate the uses and the value of the data:

Because they enable plaintiffs to characterize the safety and efficacy of their products, and to obtain state, federal and international registrations, these research data are the key to the market, and this is reflected in their value. Moreover, this value is substantial. For example, a typical plaintiff marketed approximately \$70 million of pesticide chemicals in fiscal 1978 alone. . . . Beyond these uses, [the] research data have extraordinary value for product development and improvement.¹⁷³

Thus, if the data were not required for registration purposes under FIFRA, the chemical companies would still have to produce similar data if they wanted to meet state and foreign registration requirements. If data were not required for any registration purposes, it is likely that the companies would still produce similar data in order to establish the products' safety and efficacy. Indeed, some of the plaintiff companies in *Amchem* have been producing data since 1939,¹⁷⁴ eight years before the enactment of FIFRA. Without the mandatory licensing and disclosure requirements of FIFRA, the companies would be able to maintain the value of the competitive advantage derived from the data as long as they could keep the data secret. In addition, the chemical companies would be free to sell or license rights to the data to any companies wishing to buy.

As it happens, however, in order to derive any competitive advantage at all from marketing a pesticide, the pesticide must be registered and data submitted. Thus, the data have three separate categories of use: research and development, sale or licensing,

¹⁷¹ 7 U.S.C.A. § 136a(c)(1)(D) (West Supp. 1979). See note 52, *supra*.

¹⁷² 7 U.S.C.A. § 136h(b)-(d)(1) (West Supp. 1979). See note 57, *supra*.

¹⁷³ *Amchem* Memo, *supra* note 4, at 10 (footnotes omitted).

¹⁷⁴ *Id.* at 5.

and registration. A company may produce data for any one of these purposes without conflicting with its ability to use it for any other purpose. These uses are affected in different ways by the fact that under the 1978 FIFRA amendments registration of a pesticide is tantamount to removal of any trade secret protection insofar as the data are mandatorily licensed or disclosed.¹⁷⁵

The lack of trade secret status most heavily damages a producer's ability to sell or license the data. A company wishing only to register its own product on the basis of another company's data would have no reason to purchase or license the data from the original producer, except when safety and efficacy data disclosed is subject to FIFRA's "exclusive use" provision.¹⁷⁶ If, however, the company wanted the data for its own internal use, it would have free access to the disclosed safety and efficacy data but would have to negotiate for any other information not disclosed. As no company will pay for data that can be obtained for free, the original producer's ability to sell or license the data is, in many cases, destroyed. The situation is different with respect to research and development, and with respect to registration. The status of trade secrecy does help to ensure the profitability or value of these uses, but the lack of trade secret status obviates neither the business necessity to produce the data nor the ability to use it for these purposes.

The fact that these other uses exist is important in evaluating the "taking" claim in *Amchem*. If, as the plaintiffs maintain,¹⁷⁷ the status of trade secrecy is the only relevant factor to be considered, it is difficult to refute the proposition that the mandatory licensing and disclosure provisions effect a "taking" of that status. If, on the other hand, these other uses of the data are considered, the question would be whether these uses are reasonably beneficial.¹⁷⁸ It is helpful to view the problem in terms of the three concepts presented above.¹⁷⁹

A. *The "Parcel as a Whole": Are Other Uses of the Data To Be Considered?*

The arguments put forth by the parties in *Amchem* address

¹⁷⁵ See notes 52, 57, *supra*.

¹⁷⁶ 7 U.S.C.A. § 136a(c)(1)(D)(i) (West Supp. 1979). See note 52, *supra*.

¹⁷⁷ *Amchem* Reply Memo, *supra* note 76, at 50-53.

¹⁷⁸ See text at notes 115-117, *supra*.

¹⁷⁹ See text at notes 133-170, *supra*.

this issue indirectly. The plaintiffs maintain that since the government's action represents an impermissible appropriation, other uses of the data are irrelevant.¹⁸⁰ EPA maintains that, since reasonable use of the data remains, there is no "taking."¹⁸¹ Each party assumes that the "parcel as a whole" is as large or as small as its theory demands.

As *United States v. Causby*¹⁸² demonstrated, the definition of the "parcel as a whole" can vary with relation to the character of government's action once substantial damage is ascertained. Under the interpretation of that case in *Penn Central Transportation Co. v. City of New York*,¹⁸³ the *Amchem* plaintiffs would have to prove that the government was acting in an enterprise capacity in appropriating the data.¹⁸⁴ If the plaintiffs can do so, and since it is possible that substantial damage can be established, the district court is likely to consider other uses of the data to be irrelevant to the "taking" claim. The "parcel as a whole" would be the right to prevent unauthorized use or disclosure of the data and the government would be liable for compensation for having appropriated this right.

If, under the analysis employed in *Pennsylvania Coal v. Mahon*,¹⁸⁵ the district court focuses on the chemical companies' investment-backed expectations and finds that the regulation has gone too far in diminishing those expectations, a "taking" could be found despite the fact that the court considered other uses of the data as relevant. The difficulty with applying this analysis to *Amchem* is that, unlike the situation of the coal company in *Pennsylvania Coal* where the only use for the coal was prevented by the statute,¹⁸⁶ the companies in *Amchem* have other uses for the data not prevented by reason of the licensing and disclosure provisions. It would seem that, in this light, the court's treatment would depend on just how distinct it thought the plaintiffs' investment in the trade secrecy of their data was, or on just how harsh it considered the impact of the legislation to be on the plaintiffs' use of the data.

¹⁸⁰ Amchem Reply Memo, *supra* note 76, at 50-53.

¹⁸¹ EPA Memo, *supra* note 86, at 65-68.

¹⁸² 328 U.S. 256 (1946). See text at notes 143-154, *supra*.

¹⁸³ 438 U.S. 104 (1978).

¹⁸⁴ See text notes 143-154, *supra*.

¹⁸⁵ 260 U.S. 393 (1922). See text at notes 160-170, *supra*.

¹⁸⁶ See text notes 165-166, *supra*.

In each of these instances, the definition of the "parcel as a whole" would be a function of the district court's focus on either the character or the extent of the government's action. If, as in *Penn Central*, the court in *Amchem* instead finds neither an appropriation nor an unduly harsh interference with expectations, it is apparent from *Goldblatt* and *Penn Central* that the chemical companies face a uphill battle if they attempt to define their property interest in the data solely as the right to prevent unauthorized use and disclosure. The plaintiffs can neither deny that uses of the data exist beyond the property right claimed nor assert that they will be forced out of business by virtue of having their trade secrets used and disclosed. They can assert that the value of their property has greatly diminished but even that, as the Supreme Court noted in *Goldblatt*,¹⁸⁷ is not conclusive of the invalidity of the governmental action.

In *Mobay Chemical Corp. v. Costle*,¹⁸⁸ the district court took an approach similar to that employed in *Penn Central* in analyzing the property which the Mobay Chemical Company claimed had been taken from it under FIFRA without due process of law. The case concerned the 1975 amendment to the mandatory licensing provision which eliminated both the requirement for compensation and the protection for trade secret data for any data submitted before January 1, 1970.¹⁸⁹ Mobay claimed that the amendment "took" its property for a private purpose and without compensation, both in violation of the Fifth Amendment. Noting that the objective of the statute was clearly not private gain, the court dismissed the first claim. The court resolved the second claim by finding that no "taking" had occurred. The court noted that the plaintiff produced the data under government regulation and that it retained copies for its own use. Since the plaintiff could not show that its actual use of the data had been diminished in any respect, the court could not find that the EPA's use of the data to register another company's pesticide, without disclosing the data, violated the Fifth Amendment.¹⁹⁰

¹⁸⁷ *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962). See text at notes 129-142, *supra*.

¹⁸⁸ 12 ENVIR. REP. (BNA) 1572 (W.D. Mo. 1978) (opinion of three judge panel), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979). See note 123, *supra*.

¹⁸⁹ 7 U.S.C. § 136a(c)(1)(D) (1976) (amended 1978). See text at notes 49-52, *supra*.

¹⁹⁰ *Mobay Chemical Co. v. Costle*, 12 ENVIR. REP. (BNA) 1572, 1580-81 (W.D. Mo. 1978), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979). Because of the similarity of issues between this case and the situation in *Amchem*, the court's words are

Whether the FIFRA disclosure provision added in 1978¹⁹¹ would have made a difference in the court's decision is unclear. In a footnote, the court cited with approval two Supreme Court cases where laws requiring the labeling of certain products with alleged trade secret data were upheld.¹⁹² What is pertinent to the issue in *Amchem* is that the district court in *Mobay* not only considered all other uses of the data in rendering its decision but also found such uses reasonable despite whatever diminution in the

instructive:

Under the circumstances presented herein, however, this Court has difficulty ascertaining any real deprivation to plaintiff. Plaintiff produces data which it is required to produce under government regulation which plaintiff does not contest. Plaintiff voluntarily submits that data to the Administrator of the EPA, and it is used by the Administrator in support of plaintiff's application for a pesticide registration. The data remains in the agency's files, where it is used to support other applications for the same or similar products which plaintiff may make in the future. Plaintiff retains a copy of its data to use for its own purposes. The data is not transferred by the agency to any third parties.

Plaintiff has neither stated nor shown that its own actual use of its data has been diminished in any respect; plaintiff may continue to use its "property" as it has in the past. The statute subjects that "property" to no burden, casts no duty or restraint upon it, and only in an indirect way, if any, can it be said that its pecuniary value is affected by the statute. All other accoutrements of ownership remain with plaintiff. Thus, the sole "property interest" which plaintiff claims is diminished by the 1970 cutoff date of § 3 (c)(1)(D) is an alleged right to *exclusively* use the data; that is, to prevent others from using it. Defendant responds that plaintiff does not possess such a right, under the Constitution or the common law. Whether or not plaintiff possesses a right to exclusive use of its property within the bundle of rights which make up property ownership, this Court finds that the interference of § 3(c)(1)(D) with that alleged "right" does not rise to the level of a taking of plaintiff's property. This Court simply cannot reasonably conclude that the Administrator's mere consideration of data which is required by and which he already possesses pursuant to a lawful regulatory scheme in order to determine the registrability of a pesticide product—that is, to assure its efficacy and safety prior to its transportation in interstate commerce—without disclosing the contents of that data to any other person and without diminishing in any manner the originator's use of its own data violates the Fifth Amendment to the United States Constitution.

Id. at 1579-80 (footnotes omitted) (emphasis in original).

¹⁹¹ See text at notes 57-61, *supra*, and note 57, *supra*.

¹⁹² *Mobay Chemical Co. v. Costle*, 12 ENVIR. REP. (BNA) 1572, 1580 n.20 (W.D. Mo. 1978), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979). The footnote stated that the mandatory licensing provision:

[D]oes not, of course, require disclosure of any of plaintiff's data to any other parties. Moreover, the United States Supreme Court has held that a producer's interest in the secrecy of its proprietary information, even including its secret formula, is subject to the right of the state to exercise its police power and to promote fair dealing. *Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 431 (1918); *Nat'l. Fertilizer Ass'n v. Bradley*, 301 U.S. 178, 182 (1936).

Id. See text at notes 202-204, *infra*.

value of the data occurred because of the licensing provision.

In sum, definition of the "parcel as a whole" of the *Amchem* plaintiffs' data may vary depending upon which aspect of the "taking" claim the district court focuses upon. If the court focuses upon the character of the government action, a "taking" may be found despite other uses of the data. If the court considers that FIFRA has gone too far in diminishing the companies' legitimate expectations, it may also find a "taking" on this basis. The "parcel as a whole" would be rather narrowly defined in either case. However, if the court focuses upon the fact that uses of the data exist beyond the status of trade secrecy, the "taking" issue would be resolved upon a determination of whether such uses were reasonably beneficial. Given that the Supreme Court has upheld legislation which effectively diminished a claimant's property value by more than 85 percent,¹⁹³ it is unlikely that the ability to use the data for research and development and registration would be found to be less than a reasonably beneficial use.

B. The "Character of the Action": Regulation v. Appropriation

The plaintiffs in *Amchem* claim that because the government's action in carrying out the mandatory licensing and disclosure provisions of FIFRA would allow other members of the public to benefit from their property, the effect of the 1978 amendments is an appropriation of their property, impermissible unless just compensation is made.¹⁹⁴ They distinguish this effect from that of a legitimate regulation of property under the police power¹⁹⁵ which operates by imposing restrictions upon the use an owner may make of his or her property, generally to protect public health, safety or welfare against offensive use by the owner.¹⁹⁶ Because the law is an appropriation according to the plaintiffs, other uses of the data should not be considered in any judicial decision.¹⁹⁷

¹⁹³ *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). The property value was estimated to be \$800,000 before regulation and \$60,000 after. *Id.* at 405. See text at note 140, *supra*.

¹⁹⁴ *Amchem* Reply Memo, *supra* note 76, at 44-45.

¹⁹⁵ In amending FIFRA Congress was acting pursuant to its powers under the Commerce Clause. U.S. CONST. art. 1, § 8. However, as noted previously, congressional power under the Commerce Clause is analogous to the police power of the states and is subject directly to the same constitutional limitations applied to the states through the Fourteenth Amendment. See text at notes 92-105, *supra*, and note 104, *supra*.

¹⁹⁶ *Amchem* Reply Memo, *supra* note 76, at 44-45.

¹⁹⁷ *Id.* at 50-53.

Under the analysis employed in *United States v. Causby*,¹⁹⁸ such a claim could prevail provided the government was acting either in an enterprise capacity or to the exclusion of the original property owner.¹⁹⁹ Since the chemical companies in *Amchem* cannot show that EPA's licensing or disclosure of the data is to the exclusion of their own ability to use the data, it would seem that the companies must show that the government was acting in an enterprise capacity. First, however, they must show that the mandatory licensing and disclosure provisions do in fact constitute an appropriation of the data.

The FIFRA sections in question are not worded in terms of restrictions.²⁰⁰ Rather, they are mandates for specified uses and disclosures of data under certain conditions and with certain limitations. If, however, the statute instead was worded as a restriction on the right to keep data secret, the effect would be no different. Such semantic niceties are not helpful in resolving the problem.²⁰¹ The real issue is whether laws which may be characterized as appropriations in the sense that they require a data producer to make its trade secret data available to the public can be upheld as properly within the domain of the police power. Most pertinent to the issue in *Amchem* are two cases where the Supreme Court upheld laws which required general disclosure of alleged trade secret data.

In *Corn Products Refining Co. v. Eddy*,²⁰² the Court upheld a Kansas law which required labelling of the percentages of ingredients of table syrup sold within the state. The ostensible purpose of the law was to prevent adulteration and misbranding. There was no provision for compensation. The Court rejected the claim by the syrup manufacturers that the law deprived them of their trade secret property without due process of law because their products contained no deleterious or injurious ingredients. The Court stated, with reference to a number of earlier cases,²⁰³ that a

¹⁹⁸ 328 U.S. 256 (1946).

¹⁹⁹ See text at notes 143-154, *supra*.

²⁰⁰ See notes 52 and 57, *supra*.

²⁰¹ See Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165 (1967): "Word play—in short dogged adherence to the constitutional formulas of 'taking' and 'property'—cannot justify any sharp line of distinction between government encroachments which take the different forms of affirmative occupancy and negative restraint." (footnote omitted). *Id.* at 1186-87.

²⁰² 249 U.S. 427 (1919).

²⁰³ *Id.* at 432. See, e.g., *Savage v. Jones*, 225 U.S. 501 (1912); *Heath & Milligan Mfg. Co.*

manufacturer's right to maintain secrecy as to his compounds and processes was subject to the police power of the state to require, in the promotion of fair dealings, the disclosure of the nature of the product. It was "too plain for argument" that a manufacturer had no constitutional right to sell goods without giving the purchaser "fair information" as to what was being sold.²⁰⁴

In 1937, in *National Fertilizer Association, Inc. v. Bradley*,²⁰⁵ the Court upheld a similar law in South Carolina against a challenge on due process grounds by fertilizer manufacturers. At issue was the so-called "Open Formula" amendment to a pre-existing law requiring labels stating certain facts concerning the contents of fertilizer containers. The amendment required that fertilizer containers sold bear a tag disclosing amounts, analyses and sources of specified ingredients. The purpose of the law was to inform farmers of the contents so they could better carry out their farming.²⁰⁶ The manufacturers claimed that the law was neither necessary nor reasonable and thus deprived them of property without due process of law. The Court stated simply: "In response to the assertion that compliance with the 'Open Formula' amendment would require complainants to reveal secret formulas and, thus, unlawfully deprive them of property, it is enough to refer to *Corn Products Refining Company v. Eddy*. . . ."²⁰⁷

These cases do not settle the "taking" issue in *Amchem* for a number of reasons. First, the claims were based on "due process" grounds. Second, neither law required submission of data to the government.²⁰⁸ Third, the laws had only prospective effect. The

v. *Worst*, 207 U.S. 338 (1907).

²⁰⁴ *Corn Products Ref. Co. v. Eddy*, 249 U.S. 427, 431-32 (1919).

²⁰⁵ 301 U.S. 178 (1937).

²⁰⁶ *Id.* at 182 n.2. The Court, in this footnote, quoted the findings of the lower court as to the reasonableness of the type of regulation in question:

[The laws in question] do most positively tend to meet an actually existing need and to serve the purpose which the Legislature clearly had in mind; namely, to so *regulate* the fertilizer business as to give the farmer that information which would tend to aid in the carrying on of the major industry of the State of South Carolina.

Id. (emphasis supplied). The Supreme Court, however, did not use the word "regulate" in its opinion in either this case or in *Corn Products*.

²⁰⁷ *Id.* at 182.

²⁰⁸ In both *Corn Products* and *National Fertilizer*, the plaintiffs were required to reveal information which disclosed the identity and percentages of the ingredients of their products. While plaintiffs in *Amchem* are required to label their products with the name and percentage of each active ingredient, 7 U.S.C.A. § 136a (West Supp. 1979), the disclosure provision does not authorize disclosure of information which would reveal the identity or percentage of any deliberately added inert ingredient. 7 U.S.C.A. § 136h(d)(1) (West Supp.

syrup and fertilizer manufacturers could prevent disclosure of their data, albeit at the cost of their trade in the respective states, by refraining from selling their products in those states. In *Amchem*, the alleged trade secret data may be disclosed whether or not the plaintiffs continue to sell pesticides, with the only sure way of avoiding disclosure being not to market the products at all. The cases do, however, seem to settle any argument the plaintiffs in *Amchem* might make that because the FIFRA provisions allow others to benefit from the data, they are necessarily impermissible appropriations and outside the police power.²⁰⁹

Whether the fact that the data passes through government hands before licensing and disclosure is enough to invalidate the regulation is another question. However, in *Utah Fuel v. National Bituminous Coal Commission*,²¹⁰ the Supreme Court sustained the power of Congress to require the submission of detailed business information and to authorize its disclosure to a group that included competitors of the submitter. The Court there stated: "Obviously publication may be harmful to petitioners but as Congress had adequate power to authorize it and has used language adequate thereto we can find here no sufficient basis for an injunction."²¹¹

The facts in *Utah Fuel* distinguish it from *Amchem* in a number of respects. There was no Fifth Amendment challenge, the data were not alleged to be trade secrets, and the disclosure provision had been enacted before submission of the data. But it is the Court's expressed deference to congressional power to require submission and release of otherwise confidential information, even though such disclosure might prove harmful to the submitting party, that is of interest here. Extending this rationale to the situation in *Amchem*, it is unlikely that the fact that the EPA handles the data before disclosure is enough to make the disclo-

1979). See note 57, *supra*. In the sense that they retain some secrecy over the formula of the product, disclosure of the data in *Amchem* would be less harmful to the plaintiffs than the disclosures in either *Corn Products* or *National Fertilizer* were to the plaintiffs in those cases.

²⁰⁹ See also *Dow Chemical Co. v. Costle*, 464 F.Supp. 395 (E.D. Mich. 1978); *Mobay Chemical Co. v. Costle*, 12 ENVIR. REP. (BNA) 1572 (W.D. Mo. 1978) (opinion of three judge panel), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979) (both cases upholding application of 1975 FIFRA mandatory licensing provision). See text at notes 188-192, *supra*.

²¹⁰ 306 U.S. 56 (1939).

²¹¹ *Id.* at 61-62.

sure provision invalid.

As for EPA's actual use of the data of one company to register another company's product, it would seem that, under *Penn Central's* interpretation of *Causby*²¹² such action would have to be the result of government's action in an enterprise capacity for some strictly governmental purpose before it would be considered an appropriation of the data.

As the intentions of Congress in amending FIFRA to protect public health, safety and the environment, as well as to promote competition²¹³ are all within the government's legitimate police power, the use of data to further these interests is arguably not government use for some strictly governmental purpose. EPA is not in competition with any pesticide producer and its use of the data is neither profitable nor to the exclusion of the original producer. In addition, neither of the two federal district courts which have addressed challenges to the 1975 version of the mandatory licensing provision²¹⁴ found any irregularity with the EPA's use of the data.²¹⁵ For those reasons, the mandatory licensing and disclosure provisions do not affect an impermissible appropriation of the *Amchem* plaintiffs' trade secret data.

C. *The Extent of the Interference: How Is the Loss Measured?*

As the Supreme Court has recognized that "taking" jurisprudence often involves "essentially ad hoc, factual inquiries,"²¹⁶ it is appropriate to begin discussion of the extent of a producer's loss in the context of the *Amchem* case by examining the factors which combine to increase or decrease such loss.

Once the data submitted by a producer under FIFRA are made available for registration of another product or for general disclosure, the potential market for those wishing to sell such data diminishes to the vanishing point. The fair market value of data available for such use and disclosure, the usual criteria for establishing the amount of just compensation, drops to zero.²¹⁷ In addi-

²¹² See text at notes 150-151, *supra*.

²¹³ See text at notes 62-69, *supra*.

²¹⁴ See note 209, *supra*.

²¹⁵ See text at notes 188-192, *supra*, and notes 85 and 190, *supra*.

²¹⁶ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

²¹⁷ The fair market value is generally calculated in terms of the highest and most profitable use for which the property is suitable. See, e.g., *United States v. Toronto, Hamilton &*

tion, the producing company loses the value of the competitive advantage it gained by reason of having exclusive use of the data. However, while the fair market value of the data is negligible, and the value of the lost competitive advantage great, the producer retains all uses of the data it had regardless of the data's trade secret status. While, at first glance, the drop in fair market value and the loss of competitive advantage may seem staggering compared to the values derived by the producer in using the data for other purposes, a number of factors tend to mitigate the actual loss suffered by a pesticide producer because of licensing or disclosure of its data.

If a producer did not want to sell or license his data in the first place, he of course would not be affected by the decline in fair market value. If he did wish to sell or license his data, a producer would, under the "exclusive use" provision,²¹⁸ still have the opportunity to sell or license safety and efficacy data submitted after September 30, 1978 to those companies desirous of using the data for registration purposes before the ten-year exclusive-use period expired. Similarly, the "exclusive use" provision tends to mitigate the competitive harm done to a producer by reason of disclosure if he is not willing to sell or license the data. In any case, the disclosure provision prohibits EPA from releasing data which discloses manufacturing and quality control processes, the details of any method used to discover the quantity of any deliberately added inert ingredient, or the identity or percentage of any deliberately added inert ingredient, unless EPA determines that disclosure is necessary to protect against unreasonable risk to health or the environment.²¹⁹

As for any data submitted after December 31, 1969 the mandatory licensing provision of the 1978 FIFRA amendments requires that any subsequent applicant seeking to rely on the data must submit a specific offer of compensation to the original producer before the data may be used by EPA.²²⁰ In addition, the plaintiffs in *Amchem* are free to use another producer's data to

Buffalo Navigation Co., 338 U.S. 396 (1949); *United States v. Causby*, 328 U.S. 256 (1946). It has also been said that fair market value is "what a willing buyer would pay in cash to a willing seller". *Almota Farmers' Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973).

²¹⁸ See note 52, *supra*.

²¹⁹ See note 57, *supra*.

²²⁰ See note 52, *supra*.

the same extent and under the same conditions that another company would be able to use their data. Finally, the original applicant enjoys the benefits of being first in the market.²²¹ Its know-how and customer loyalty, as well as benefits from its already-established advertising campaign and marketing systems and strategies would lessen the impact of a new producer's entrance into the market.

While the appearance of a competitor may lessen the original applicant's market share, it can hardly be said to make continued production economically infeasible when one considers the success of products such as brand name drugs in a marketplace full of eager competitors selling the exact same chemical product. Given that the data, in some cases at least, are likely to be independently generated by others working to develop similar products,²²² the advantage conferred by the FIFRA provisions and market place conditions make application of the mandatory licensing and disclosure provisions considerably less invidious to the producer than might appear at first impression.

Certainly, the actual dollars and cents loss to the data producer is considerable. In addition, the Supreme Court has stated that it is the loss of the owner, not the gain of the taker that will be considered in judging whether a "taking" has occurred.²²³ But in making this judgment, one can look to either what the owner retains after regulation or simply to the quantum of impact upon his expectations. In essence, these are the approaches employed in *Penn Central*²²⁴ and *Pennsylvania Coal*²²⁵ respectively. In

²²¹ In *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979), the Supreme Court acknowledged the tremendous advantage that can be gained from being first in the market. The case concerned Quick Point's attempts to abrogate its royalty agreement with Aronson since she had not obtained a patent on the keyholder she had licensed to it. The keyholder was ingenious but readily duplicated and the design lost all secrecy upon marketing. The Court stated:

Requiring Quick Point to bear the burden of royalties for the use of the design is no more inconsistent with federal patent law than any of the other costs involved in being the first to introduce a new product to the market, such as outlays for research and development and marketing and promotional expenses. For reasons which Quick Point's experience with the Aronson keyholder demonstrate, innovative entrepreneurs have usually found such costs to be well worth paying.

Id. at 263.

²²² The Supreme Court recognized the likelihood of simultaneous discoveries in *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 490-91 (1974).

²²³ See *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

²²⁴ See text at notes 125-132, *supra*.

²²⁵ See text at notes 164-170, *supra*.

some circumstances, the choice of which approach is to be used may itself seem an "ad hoc" determination. Leaving aside for the moment any question of whether the *Pennsylvania Coal* test is still viable after *Penn Central*, there is an essential difference between *Amchem* and *Pennsylvania Coal* that arguably tips the balance towards use of the *Penn Central* "reasonable beneficial use" test in the *Amchem* case.

In *Pennsylvania Coal*, the coal company had only subsurface rights to the land. Prevented from mining coal, it was effectively prohibited from all uses of its interest. Assuming that in *Amchem* the plaintiffs' most valuable interest in the data is the status of trade secrecy, the plaintiffs still have other uses for the data which do not depend upon that status from which they can derive profit.²²⁶ Moreover, with respect to data which might be licensed or disclosed under FIFRA, a producer's ability to profit from such data in direct competition with other chemical companies is not ended by the existence of the mandatory licensing and disclosure provisions. Rather, a producer's ability to profit from its data compilations by marketing pesticides is left to market-place forces as they are, without extraordinary change. This is unlike the situation in *Pennsylvania Coal* where, because of the law's very existence, the coal company's mining operations were rendered commercially impracticable. Thus, if the district court in *Amchem* were to apply the *Pennsylvania Coal* test and look only to the degree of the FIFRA amendments' impact upon the value of the data as trade secrets, it would be, because of the data's other uses, extending the test beyond the circumstances in which it was originated.

In addition, the FIFRA provisions do confer some benefits upon a pesticide producer, such as the ability to use another company's data for its own purposes. In *Pennsylvania Coal*, Justice Holmes was unable to find in the law in question the "average reciprocity of advantage that has been recognized as a justification of various laws."²²⁷ Whether he would have found it in the FIFRA amendments is at least arguable.

As to the viability of the *Pennsylvania Coal* test at all, it bears repeating that the Supreme Court in *Penn Central* was careful to rule out any contention based on *Pennsylvania Coal* that one

²²⁶ See text at notes 171-178, *supra*.

²²⁷ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

could define one's property interest solely in terms of the rights affected by governmental action.²²⁸ Far from considering the impact upon investment-backed expectations, it was precisely the fact that Penn Central had a "present ability to use the Terminal for its intended purpose and in a gainful fashion"²²⁹ that formed the basis for the Court's opinion in that case. On this basis, it would seem that the resolution of the "taking" claim in *Amchem* must depend on a judgment as to whether the plaintiffs' "present ability" to use the safety and efficacy data can be exercised in a gainful fashion.

Although the loss suffered by the data producers by virtue of the mandatory licensing and disclosure provisions would be great, it is unlikely that such loss would destroy their ability to compete profitably in the pesticide market place, especially considering the limitations upon those provisions and the fact that all producers would be able to use each others' data on the same basis. The district court should therefore find that the extent of interference with the plaintiffs' expectations, which are essentially the expectations of profits from their work, does not amount to a "taking." Such a finding would be supportable by Supreme Court precedent in cases where the diminution of value was severe²³⁰ or where the claimant was prohibited from carrying on a previously beneficial use of the property, such as in *Goldblatt v. Town of Hempstead*.²³¹ In addition, the "distinct investment-backed expectations" test, as employed in *Pennsylvania Coal*, does not seem to fit the situation in *Amchem* where the plaintiffs have other uses for their property which are not precluded by reason of the governmental action. Indeed, under the reasoning employed by the Court in *Goldblatt*,²³² it would be assumed that such uses of the data were profitable. The Court's treatment of the "distinct investment-backed expectations" test in *Penn Central* also seems to indicate that this test has fallen into disfavor.

Finally, the Supreme Court has noted that:

²²⁸ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130 n.27 (1978). See text at notes 125-132, *supra*.

²²⁹ *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 138 n.36 (1978). The Court also stated in this footnote that Penn Central may be able to obtain relief if the terminal ceased to be "economically viable." *Id.*

²³⁰ *E.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

²³¹ 369 U.S. 590 (1962).

²³² See text at notes 135-142, *supra*.

[A] distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former.²³³

With this in mind, it is suggested that rather than view the mandatory licensing and disclosure provisions as interferences with investment-backed expectations, the district court should instead adopt the attitude of the Supreme Court in *Day-Bright Lighting, Inc. v. Missouri*,²³⁴ where it upheld a law which allowed workers to take time off with pay in order to vote. The Court observed that "most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization."²³⁵

VI. CONCLUSION

Originally enacted in 1947 as little more than a labelling law, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) was amended in 1972 to regulate the pesticide industry so as to ensure safety and environmental quality, to promote competition within the industry itself, and to allow public access to information upon which the Environmental Protection Agency bases its decisions. In 1975 and 1978, amendments to FIFRA reflected these concerns by gradually removing the absolute protection for all trade secret data submitted to support an application for registration. As of 1978, pesticide companies submitting data pursuant to FIFRA subjected their data to possible mandatory licensing or disclosure. In order to maintain the confidentiality of their data, a number of pesticide producers have challenged the FIFRA provisions which allow such use and disclosure. *Amchem Products Co. v. Costle* is one of the first cases to arise under the 1978 amendments, and the litigation there reflects a number of the issues disputed in earlier cases with regard to the "taking" of trade secret data.

Assuming a data producer can prove that it has a property interest in preventing unauthorized use or disclosure of its data, it

²³³ *Packard v. Banton*, 264 U.S. 140, 145 (1924) (sustaining a law which required taxicab drivers to either obtain insurance or post security bond).

²³⁴ 342 U.S. 421 (1952).

²³⁵ *Id.* at 424.

must then demonstrate that its "property" has, in fact, been "taken". The Supreme Court has recently set forth three concepts of critical importance in making such a "taking" analysis: the "parcel as a whole," the "character of the action", and the "nature and extent of the interference". While the "parcel as a whole" is often a function of the other two concepts, the Court has demonstrated different sensitivities to each of these concepts depending upon the factual circumstances of each case. In "taking" cases concerning land, the Court has employed three different approaches, each emphasizing one of the concepts. Under the "reasonable beneficial use" test, the Court employs a wide definition of the "parcel as a whole" and even a severe economic loss will not necessarily be seen as a "taking". This is the approach employed in zoning law cases and recently adopted for historic preservation cases in *Penn Central Transportation Co. v. City of New York*. If the Court instead finds substantial damage resulting from government "appropriation" of the property while acting in an enterprise capacity or to the exclusion of the original owner, it may be content to sever that portion of the property appropriated, if possible, and allow compensation on the basis of the damage done to the available uses of the property. In this second approach, the other uses of the property are not considered in judging whether a "taking" has occurred. Finally, under the analysis presented in *Pennsylvania Coal Co. v. Mahon*, if the regulation in question goes "too far" in its interference with distinct investment-backed expectations, it may become a "taking" on that basis alone.

An application of these concepts to trade secret data submitted under FIFRA highlights the fact that emphasis on any one of the concepts could be decisive of the "taking" issue. The Supreme Court decisions in a series of cases challenging disclosure of trade secret or confidential data would seem to indicate that the "character" of the FIFRA disclosure is not impermissible. Similarly, the decision of two federal district courts on suits challenging earlier versions of the FIFRA mandatory licensing provisions seem to indicate that there is no irregularity with the "character" of that provision.

Thus, the "taking" questions seems to focus on whether the Court will consider all of the uses of the data as part of the "parcel as a whole" and employ a "reasonable beneficial use" test or, instead, consider the impact of the FIFRA amendments in light

of Amchem's economic expectations in keeping the data secret. In *Mobay Chemical Co. v. Costle*, a district court panel considered all uses of the data in deciding that the 1975 mandatory licensing provision did not effect a "taking". In addition, the very fact that other uses of the data exist at all differentiates *Amchem* from the situation in *Pennsylvania Coal v. Mahon*, the leading case for the "investment-backed expectations" test. There, the coal company had no other use for its interest in the land other than that prohibited by the regulation. Thus, it would seem that the "reasonable beneficial use" test is the appropriate test for the *Amchem* court to employ in judging whether trade secret data submitted to support registration of pesticides under FIFRA have been unconstitutionally "taken." Presumably, if the court finds that the plaintiffs in *Amchem* can use their data despite the lack of trade secrecy status, it will find no "taking."