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Pesticide Test Data: A Limited Property Interest

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PESTICIDE TEST DATA: A LIMITED PROPERTY INTEREST

PROPERTY LAW—TEST DATA: Private manufacturer has no common law property right of exclusive use, absent compensation, for test data submitted to the federal government for product registration. Federal statutes provide limited protection. *Chevron Chemical Co. v. Costle*, 641 F.2d 104 (3rd Cir. 1981).

In *Chevron Chemical Co. v. Costle*[1] the Court of Appeals for the Third Circuit denied Chevron's request for a preliminary injunction prohibiting the Environmental Protection Agency (EPA) from using test data submitted by Chevron in support of new chemical compounds to approve applications from other, later manufacturers.[2] The court rejected the claim that Chevron had a common law property right in test data submitted to the EPA; it held that only limited property interests were conferred by 18 U.S.C. § 1905 (The Trade Secret Act) and 7 U.S.C.§ 136a(c)(1)(D), the Environmental Pesticide Control Act (Pesticide Act).[3] The court's conclusions about the relationship between the common law of property and the federal government make the case noteworthy.

The Chevron Chemical Company spent more than $1 million to test the safety of naled and paraquat, two chemical compounds effective in controlling fungus and insect damage in agricultural products.[4] Chevron performed these tests in part to fulfill EPA registration requirements for the sale of products in interstate commerce. The EPA could not reveal the test data publicly because the Trade Secret Act imposed criminal penalties for disclosure.[5] However, it did use the test data in confidence to support later manufacturers' applications for the registration of identical products. Thus other companies had the benefit of Chevron's research without the burden of similar test expenditures.

In 1972 Congress debated whether product developers were receiving fair treatment from the EPA. Some members feared that allowing a company to withhold the use of data already on file with the EPA would give initial applicants a quasi-patent of indefinite duration and bar the entry of competitors.[6] The Acting Attorney General testified that duplicative tests were wasteful and imposed a needless burden on small manufac-

1. 641 F.2d 104 (3rd Cir. 1981).
2. *Id.* at 106.
3. *Id.* at 117.
4. *Id.* at 106.
5. *Id.* at 106–107. 18 U.S.C. § 1905 (1979).
6. *See* remarks of Congressman Foley, H.R. REP. NO. 511, 92d Cong., 1st Sess. (1971) at 6; remarks of Congressman Dow, *id.* at 72.

turers.[7] Other Congressmen, however, thought that pesticide producers would lack incentives to develop new products if manufacturers could exploit test results of large competitors in order to receive approval of the same chemical compound.[8]

Product developers won a partial victory in 1972 when the passage of the Pesticide Act created certain limited property interests.[9] A major provision of that act required new applicants to pay reasonable compensation to product developers for EPA's later use of initial test data.[10] Manufacturers could file court claims if compensation was too low and even could exempt some test data from agency use by classifying it as "trade secret."[11] However, later amendments to the Act weakened the hand of product developers by eliminating provisions for trade secrets and for court redress for manufacturers dissatisfied with reimbursement rates.[12] Instead the amendments empowered the administrator of the EPA to negotiate settlements through binding arbitration.[13] Furthermore, manufacturers could not seek compensation for test data submitted before January 1, 1970.[14]

Chevron turned to federal court to question the constitutionality of internal agency use of test data by the EPA prior to 1970 and the use and compensation scheme set forth in the 1978 amendments to the Pesticide Act.[15] The court of appeals rejected a district court assumption that Chevron had a property interest in the submitted data.[16] The court of appeals never reached the constitutional questions of whether there had been a taking of private property for private purposes or whether Chevron had been deprived of the opportunity for a judicial determination of just compensation.[17] Instead it explicitly avoided the conclusions of the district court and affirmed on different grounds.[18] The focus was on a search for relevant property interests in state and federal law.

The court found that two federal statutes provided minimal protection for product developers. The Trade Secret Act created a limited property

7. *See* remarks of Acting Attorney General Kliendienst, S. REP. NO. 92-970, 92d Cong., 2d Sess. (1972) *reprinted in* U.S. CODE CONG. & AD. NEWS 3993, 4097.

8. *See* remarks in S. REP. NO. 838, 82d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4023, 4024, 4040.

9. Federal Environmental Pesticide Control Act of 1972, Pub. L. 92-516, 86 Stat. 972 (1972).

10. 86 Stat. 979-80.

11. *Id.*

12. 7 U.S.C. § 136a(c)(1)(D) (1978).

13. *Id.*

14. *Id.*

15. 641 F.2d at 106, 114.

16. *Id.* at 114.

17. *Id.*

18. *Id.*

right to non-disclosure which conferred no private cause of action,[19] but might provide a standard by which to judge the legality of proposed agency regulations.[20] The Pesticide Act conferred a property right to data in the files of the EPA by creating an expectation of reimbursement to product developers for EPA use of test data for the benefit of other manufacturers.[21] However, agency practice recognized no private property right in the data, and 1975 amendments to the Pesticide Act implicitly rejected any property right associated with EPA use of test data before 1970.[22] The court never reached the question of a private cause of action in the Pesticide Act because Chevron had shown no violation of the property interest created by its provisions.[23]

The court noted that test data was protected by state law as long as it remained in the possession of a private corporation. That protection ended as soon as the federal government received it to meet the requirements for placing a product in interstate commerce.[24] The court rejected Chevron's reliance on Restatement of Torts §757 to establish a common law property right for test data in agency hands; it saw the section as irrelevant due to its failure to address the issue of use without a violation of confidentiality.[25] Furthermore the court knew of no state law purporting to protect test data submitted to the federal government.[26] Even if it could find such a law, the court doubted that it would survive Supremacy Clause scrutiny because of the conflicting responsibilities which might be imposed on a federal agency by differing state laws.[27]

In effect, the court of appeals put Chevron and other large pesticide manufacturers on notice that there are no common law property rights to test data used, but not disclosed, by the federal government. State property law cannot reach this interest. The Trade Secret Act and the Pesticide Act, with their extreme limitations, are the only source of protection for product developers. Major corporations will have at least 10 years from the date of original submission under the Pesticide Act to exclusively exploit new products which may require the expenditure of significant sums to develop; test data submitted after 1969 will be compensable for 15 years.[28] If corporations believe the provisions are unfair, they may

19. *Id.* at 115.
20. *Id.* at 109.
21. *Id.* at 109, 115.
22. *Id.* at 110–111.
23. *Id.* at 117.
24. *Id.* at 116.
25. *Id.* at 115. RESTATEMENT OF TORTS in § 757 (1939).
26. 641 F.2d at 116.
27. *Id.*
28. 7 U.S.C. § 136a(c)(1)(D) (1978).

seek redress through Congress. They may also file a court claim proving actual damage in order to test the constitutionality of the compensation provisions of the Pesticide Act.

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