STATUTORY DISCLOSURE OF TOBACCO INGREDIENTS: SECRETS UP IN SMOKE?

I. INTRODUCTION

In recent years, no industry has been the focus of more attention than the industry responsible for the manufacture and sale of tobacco products. Consumers have become increasingly aware of and concerned with the effects of tobacco products, leading to greater government scrutiny of the industry and increased government regulation of it. Manufacturers and marketers of cigarettes and smokeless tobacco have been forced to adapt to regulations for advertising and requirements for warning labels on packaging.[1] The industry as a whole has been swamped with massive litigation. Recently, some state legislatures have again attempted to intervene in the industry by statutorily requiring that tobacco companies marketing their products within those states disclose the identity of ingredients, other than tobacco, in their products. Although Texas and Minnesota have adopted some form of disclosure statute,[2] seemingly the most controversial legislation originated in the Commonwealth of Massachusetts—the Massachusetts Tobacco Ingredients and Nicotine Yield Act.[3] As enacted, the statute required tobacco companies marketing their products in Massachusetts to disclose for each brand the identity of each added ingredient in order of weight, measure, or count.[4] Unlike the statutes in Texas and Minnesota, the Massachusetts statute provided absolutely no protection for these additives as trade secrets.[5]

The structure of the disclosure statute enabled the Massachusetts Department of Public Health (the Department) to study additives in particular brands of tobacco products to determine whether they presented health risks.[6] The Department contended that any study focusing on additive safety could, in fact, provide valuable information and contribute to public health.[7] If certain requirements for public disclosure were met, the Department was

1. *See* Michael Kelly, Editorial, *The Nurse Ratched State*, BALT. SUN, June 27, 1997, at 15A.

2. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 161.351-.355 (Vernon 2001); MINN. STAT. § 461.17 (2001).

3. MASS. GEN. LAWS ch. 94, § 307B (1997).

4. *Id.*

5. *See id.*; *see also* TEX. HEALTH & SAFETY CODE ANN. §§ 161.351-.355 (Vernon 2001); MINN. STAT. § 461.17 (2001).

6. Philip Morris, Inc. v. Reilly, Nos. 00-2425, 00-2449, 2001 WL 1215365, at *2 (1st Cir. Oct. 16, 2001) (opinion withdrawn from bound reporter by request of the court).

7. *Reilly*, 2001 WL 1215365, at *2.

able to inform consumers whether a particular brand of a tobacco product contained ingredients determined to be associated with adverse health effects, including enhanced nicotine delivery.[8] For example, the Department was able to inform consumers whether the designation of several brands as "light" or "ultra light," based on estimates of low tar and nicotine delivery, was misleading.[9] It was this ability of the Department to make such disclosures that formed the basis for immediate conflict, even before the true effects of the statute could be determined.

Not surprisingly, the tobacco companies marketing their products in Massachusetts, treating such information as trade secrets, challenged the statute on constitutional grounds.[10] Numerous manufacturers of tobacco products became involved in the constitutional challenge to the disclosure statute. The cigarette companies involved in the fight were Philip Morris, Inc., R.J. Reynolds Tobacco Co., Lorillard Tobacco Co., and Brown & Williamson Tobacco Corp.[11] Joining these manufacturers were several smokeless tobacco companies, including U.S. Smokeless Tobacco Co., Conwood Co., L.P., National Tobacco Co., L.P., Pinkerton Tobacco Co., and Swisher International, Inc.[12] The tobacco companies viewed the disclosure requirements of the statute as a serious threat not only to the tobacco industry, but to any industry that deals with intellectual property.[13] However, much to the displeasure of the manufacturers, a divided panel of the United States Court of Appeals for the First Circuit upheld the constitutionality of the statute.[14] Advocates for the statute saw the decision as a significant public health victory.[15] However, the First Circuit opinion was withdrawn soon after its release, and a new opinion was handed down after a rehearing en banc, declaring the statute unconstitutional.[16] Thus, the issue in Massachusetts, and in the First Circuit in general, seems to be settled. The tobacco companies won their battle, perhaps as they should have. The impact of the statute on the tobacco industry and competition within it could have been quite significant.

Despite this recent development, this novel issue still warrants greater discussion. Considering the increased government involvement in tobacco, it seems likely that other state legislatures, having strong precedent on their side, could follow suit and adopt statutes identical to the Massachusetts statute. Additionally, other appellate courts could follow the reasoning of the opinion originally handed down by the First Circuit commensurate with the recent increase in scrutiny of the industry. Such disclosure could be dev-

8. *Id.*
9. *Id.*
10. *Id.* at *3.
11. *Id.* at *2 n.1.
12. *Reilly*, 2001 WL 1215365, at *2 n.1.
13. Carolyn Magnuson, *First Circuit to Review Massachusetts Tobacco Law*, TRIAL, Jan. 1, 2002, *available at* 2002 WL 15115840.
14. *Reilly*, 2001 WL 1215365, at *18.
15. Magnuson, *supra* note 13.
16. Philip Morris, Inc. v. Reilly, 312 F.3d 24, 47 (1st Cir. 2002).

astating to the tobacco industry, virtually eliminating any competitive edge that one company might gain over another. This disturbing possibility compels an analysis of the First Circuit's original reasoning in *Reilly*.

II. THE HISTORY OF THE MASSACHUSETTS TOBACCO INGREDIENTS AND NICOTINE YIELD ACT AND *PHILIP MORRIS, INC. V. REILLY*

A. The Use of Added Ingredients in Tobacco Products

Beginning in the late 1970s, consumers became more conscious of potential side effects of tobacco use and began demanding lower tar and nicotine levels in tobacco products.[17] Since that time, tobacco manufacturers have increased the number of additives other than tobacco in their products, in a supposed effort to offset the loss of flavor and taste.[18] This use of additives has grown tremendously in the industry, and manufacturers now report using approximately 700 such ingredients in their products.[19] Manufacturers claim that the additives used not only improve taste, flavor, and aroma, but also serve as solvents, processing aids, and pH modifiers, in addition to providing other chemical functions.[20] Each product brand contains a unique combination of added ingredients that, according to tobacco manufacturers, substantially contributes to the distinctiveness of that brand and, thus, its competitive success.[21] Consequently, the formulas used for each brand give each manufacturer a competitive edge over other manufacturers who cannot, in today's technological environment, imitate them.[22] Viewing such formulas as market advantages, tobacco manufacturers have invested many millions of dollars in the creation of their own distinctive blends and have taken extensive precautions in protecting the identity of the ingredients in their products.[23]

B. Government Attempts to Require Disclosure of Added Ingredients

Many of the additives used by the tobacco manufacturers are currently the focus of concern for many public health officials.[24] This concern has led to government attempts to require the disclosure of ingredients used by manufacturers in cigarettes and smokeless tobacco.

17. *Reilly*, 2001 WL 1215365, at *2.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Reilly*, 2001 WL 1215365, at *2.
23. *Id.*
24. *Id.*

1. Disclosure under Federal Law

Currently, federal law requires that tobacco manufacturers submit an aggregate list of ingredients used in cigarettes to the Department of Health and Human Services under the Federal Cigarette Labeling and Advertising Act.[25] However, this disclosure does not require the identification of the relevant manufacturer or brand, and it does not demand that information concerning quantities be released.[26] Although this federally mandated disclosure protects the various formulas used by tobacco companies in their products, the public health concern is not addressed at all.[27] The required lists of ingredients do not identify the ingredients or their amounts used in any particular brand of tobacco product.[28] Further, the generic lists of ingredients do not enable public health officials to research how the ingredients might impact the health of users when combined in particular amounts with others.[29] In fact, a considerable concern of public health officials is that many of the added ingredients could be causes of diseases or adverse health effects if ingested in sufficiently high doses, as it is unclear what potentially harmful byproducts might be produced when tobacco additives are burned alone or in combination.[30]

2. The Issue at Hand—The Massachusetts Statute

In response to these concerns, the Massachusetts legislature enacted the Massachusetts Tobacco Ingredients and Nicotine Yield Act.[31] The statute required that each tobacco manufacturer provide the Department with an annual report listing, for each brand, the identity of any added constituent in descending order according to weight, measure, or numerical count.[32] The statute defined "added constituent" as "any ingredient, substance, chemical or compound other than tobacco, water, or reconstituted tobacco sheet, which is added by the manufacturer to the tobacco, paper or filter of a cigarette or the tobacco of a smokeless tobacco product during the processing, manufacture, or packing."[33] Most importantly, and most controversially, the statute provided that both the ingredient list and nicotine yield rating (the estimated amount of nicotine an average consumer would ingest when using the product) would become a public record if two conditions were met.[34] First, the Department was required to determine that there was a reasonable

25. 15 U.S.C. §§ 1331-1341 (2001).
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*
30. *Reilly*, 2001 WL 1215365, at *2 (quoting David Satcher, M.D., Ph.D., Director of Centers for Disease Control).
31. MASS. GEN. LAWS ch. 94, § 307B (1997).
32. *Id.*
33. MASS. REGS. CODE tit. 105, § 660.003 (2001).
34. *Id.* §§ 660.200(A)-(E).

scientific basis for concluding that the availability of such information could reduce risks to public health.[35] Second, the Massachusetts Attorney General was required to advise the Department that the public release of the information would not constitute an unconstitutional taking of the property.[36]

If the attorney general decided that the disclosure would not be an unconstitutional taking, the statute required the Department to give the tobacco manufacturer written notice of the information to be disclosed sixty days in advance of such disclosure.[37] At that point, the manufacturer could cease sales in Massachusetts or remove the product from the Massachusetts market in order to reformulate it without the added ingredients identified as problematic by the Department.[38]

Advocates of the statute asserted that the Constitution does not grant tobacco companies a right to sell tobacco products without stating what is in them.[39] Arguing that very little is known about the health effects of tobacco additives that could possibly make a potentially harmful product even more potentially harmful, supporters of the disclosure statute viewed its disclosure requirements as giving a public health department the ability to study tobacco additives and to inform the public of any risks that the added ingredients may pose to smokers or users of smokeless tobacco.[40] However, the tobacco companies obviously opposed this disclosure, fearing the loss of valuable trade secrets.

C. Procedural History of the Constitutional Challenge

1. The Tobacco Manufacturers Get Fired Up

The original decision of the First Circuit came after a long and complicated litigation process involving the matter. The tobacco manufacturers initially filed an action in the fall of 1996.[41] The manufacturers asserted that the statute violated the Fifth Amendment and Fourteenth Amendment of the United States Constitution by affecting an uncompensated taking, as well as violating the Due Process Clause and the Commerce Clause.[42] The companies further claimed that the Massachusetts statute was preempted by both the Federal Cigarette Labeling and Advertising Act[43] and the Comprehensive Smokeless Tobacco Health Education Act of 1986,[44] previously enacted federal statutes.[45] On February 7, 1997, the district court held that the

35. *Id.* §§ 660.200(A)-(C).
36. *Id.* §§ 660.200(D)-(E).
37. *Id.* § 660.200(E).
38. MASS. REGS. CODE tit. 105, § 660.200(F) (2001).
39. Magnuson, *supra* note 13.
40. *Id.*
41. *Reilly*, 2001 WL 1215365, at *3.
42. *Id.*
43. 15 U.S.C. §§ 1331-1341 (2001).
44. 15 U.S.C. §§ 4401-4408 (2001).
45. *Reilly*, 2001 WL 1215365, at *3.

Massachusetts disclosure statute was not preempted by either of these federal laws, and on interlocutory review, the First Circuit affirmed the decision.[46] In September 1997, the tobacco manufacturers moved for a preliminary injunction to prevent the enforcement of the statute's ingredient-reporting requirements.[47] Subsequently, in December 1997, the district court enjoined the enforcement of these provisions, finding that the companies were likely to succeed on the merits of their taking claim and that they faced irreparable harm.[48] Again on interlocutory appeal, the First Circuit affirmed the holding of the lower court.[49]

In February 1998, all parties to the lawsuit filed motions for summary judgment, and on September 7, 2000, the district court granted the manufacturers' motions and denied the motion filed by the Commonwealth of Massachusetts.[50] The district court made several findings: the ingredient-reporting provisions of the statute, by depriving the manufacturers of their property interest in their trade secrets, would effect an uncompensated taking of the manufacturers' trade secrets in violation of the Fifth Amendment; the statute would impose an undue burden on interstate commerce in violation of the Commerce Clause; and the statute would deny the manufacturers due process by depriving them of a meaningful opportunity to argue against publication of their trade secrets prior to public release.[51] The court permanently enjoined the enforcement of the disclosure provisions of the statute, and the Commonwealth of Massachusetts appealed.[52]

2. A Smoky Result in the First Circuit

A divided panel of the First Circuit upheld the constitutionality of the Massachusetts statute in its October 16, 2001, decision.[53] However, at the request of the tobacco companies, the panel opinion was withdrawn on November 9, 2001.[54] Although a rehearing en banc was scheduled for January 7, 2002,[55] the First Circuit did not hand down an opinion until December 2, 2002. The opinion declared the statute unconstitutional, finding it invalid under the Takings Clause.[56] Disagreeing with the analysis of the original opinion dealing with regulatory takings, the court held that the statute constituted a regulatory taking and enforced injunctive relief in favor of the tobacco companies.[57] The court reasoned that Massachusetts could not be

46. Philip Morris, Inc. v. Harshbarger, 122 F.3d 58, 87 (1st Cir. 1997).
47. *Reilly*, 2001 WL 1215365, at *3.
48. *Id.*
49. Philip Morris, Inc. v. Harshbarger, 159 F.3d 670, 680 (1st Cir. 1998).
50. *Reilly*, 2001 WL 1215365, at *3.
51. *Id.*
52. *Id.*
53. *Id.* at *18.
54. Magnuson, *supra* note 13.
55. *Id.*
56. Philip Morris, Inc. v. Reilly, 312 F.3d 24, 47 (1st Cir. 2002).
57. *Id.*

allowed to condition the right to sell tobacco on the forfeiture of any constitutional protections that the tobacco companies have to their trade secrets, likening such a requirement to that of the government forcing a landowner to grant a public easement across his property.[58] While this result seems constitutionally sound, the reasoning of the original decision of the First Circuit is most instructive, as it leaves the door open for other states to attempt to enact this potentially contentious legislation.

III. THE LAW: THE CONTEXT OF *PHILIP MORRIS, INC. V. REILLY*

In its original opinion, the First Circuit focused on the two constitutional challenges of the manufacturers, unconstitutional taking and violation of the Commerce Clause. After analyzing the disclosure statute under each, the court found no constitutional problems.

A. Unconstitutional Taking

Although the court had previously considered the commonwealth's appeal from the entry of a preliminary injunction against enforcement of the statute and affirmed the injunction, the court again considered the taking issue.[59] The court prefaced its analysis by saying that, at the previous time, the commonwealth did not satisfy its weighty burden of demonstrating that the district court committed a clear error of law or an abuse of discretion in granting the preliminary injunction.[60] The court asserted that it had not, at the previous time, ruled definitively on the point, and that it believed further review was necessary.[61] Analyzing the statute under the per se and regulatory taking doctrines, the court found that the disclosure statute was constitutionally sound.[62]

1. Per Se Taking

Government action categorically violates the Takings Clause if it results in the permanent physical occupation of property or if it denies the owner all economically beneficial use of his property.[63] In these instances, known as per se takings, just compensation is required, no matter how minor the invasion or how great the public purpose served by the regulation.[64] The First Circuit addressed two types of categorical takings, as the district court had done, and found no unconstitutional taking.[65]

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58. *Id.*
59. *Reilly*, 2001 WL 1215365, at *6.
60. *Id.*
61. *Id.*
62. *Id.* at *12.
63. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).
64. *Lucas*, 505 U.S. at 1015.
65. *Reilly*, 2001 WL 1215365, at *7-*12.

In *Lucas v. S.C. Coastal Council*,[66] the owner of beachfront property brought an action alleging that the application of the South Carolina Beachfront Management Act to his property constituted a taking without just compensation.[67] The owner contended that even though the statute may have been a lawful exercise of state police power, its application to his property deprived him of all economically viable use of his property.[68] In considering the case under the Takings Clause, the Supreme Court distinguished its takings analysis of a land use regulation from that of the government's exercise of its power to regulate, without compensation, the sale of goods in commerce.[69] The Court stated that property owners necessarily expect the uses of their property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.[70] Some values, the Court stated, are enjoyed under an implied limitation and must yield to the police power.[71] In the case of personal property, because the state traditionally has a high degree of control over commercial dealings, property owners should be aware of the possibility that new regulation might even render their property economically worthless.[72] In contrast, the Court found that title to land cannot be held subject to the implied limitation that the state may subsequently eliminate all economically valuable use.[73]

The First Circuit asserted that the essential rationale of this Supreme Court jurisprudence was to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[74] However, in the First Circuit's opinion, the requirements of the disclosure statute did not ask the tobacco manufacturers to bear a burden that should, instead, be borne by Massachusetts's citizens as a whole.[75] Thus, the unconstitutional taking rationale of the Court in *Lucas*, the First Circuit opined, had no relevance to the Massachusetts statute.[76]

The court also looked at the other type of categorical taking that occurs when the government denies all economically beneficial or productive use of the property.[77] Although the court acknowledged that a complete seizure of personal property may amount to a categorical taking, it refused to extend such a rationale to the regulation of personal property that may be destruc-

66. 505 U.S. 1003 (1992).
67. *Lucas*, 505 U.S. at 1009.
68. *Id.*
69. *Id.* at 1027-28.
70. *Id.*
71. *Id.*
72. *Lucas*, 505 U.S. at 1027-28.
73. *Id.*
74. *Reilly*, 2001 WL 1215365, at *7 (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 836 n.4 (1987)).
75. *Id.*
76. *Id.*
77. *Id.* (citing *Lucas*, 505 U.S. at 1015).

tive of the value of trade secret information.[78] The court reasoned that the disclosure statute merely established a regulatory scheme that conditioned the ability of tobacco manufacturers to sell tobacco products in Massachusetts on the reporting of potential public disclosure of trade secret information, deemed by the legislature to serve the interest of public health.[79]

2. *Regulatory Taking*

In analyzing noncategorical regulatory takings cases, courts engage in an ad hoc, factual inquiry to determine whether the government regulation goes too far and exceeds constitutional limitations.[80] The First Circuit, finding absolutely no per se taking, engaged in an extensive factual inquiry to determine if the disclosure statute resulted in an unconstitutional regulatory taking.

In *Ruckelshaus v. Monsanto Co.*,[81] an applicant for registration of a pesticide brought suit seeking injunctive and declaratory relief from the operation of data-consideration and data-disclosure provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, alleging that the challenged provisions effected an uncompensated taking in violation of the Fifth Amendment.[82] The statute required all pesticides sold in interstate or foreign commerce for use within the United States to be registered with the Secretary of Agriculture and appropriately labeled.[83] Further, it empowered the Secretary of Agriculture to require applicants for registration to submit testing data, including pesticide formulas and data on a pesticide's health, safety, and environmental impact.[84] After several amendments, the ultimate version of the statute, the challenged version, provided for the disclosure of all health, safety, and environmental data, notwithstanding the prohibition against disclosure of trade secrets contained elsewhere in the statute.[85] The provision did not authorize disclosure of information that would reveal manufacturing or quality control processes or the identity or percentage quantity of deliberately added inert ingredients unless the Environmental Protection Agency first determined that the disclosure was necessary to protect against an unreasonable risk of injury to health or the environment.[86]

In addressing Monsanto's contention that the use or disclosure of any health, safety, and environmental information containing trade secrets constituted a regulatory taking, the Supreme Court acknowledged that, to the extent that Monsanto had an interest in its health, safety, and environmental

78. *Id.* (citing Yee v. City of Escondido, 503 U.S. 519, 527 (1992); Armstrong v. United States, 364 U.S. 40, 46 (1960)).
79. *Reilly*, 2001 WL 1215365, at *7.
80. *Lucas*, 505 U.S. at 1015.
81. 467 U.S. 986 (1984).
82. *Monsanto*, 467 U.S. at 998-99.
83. *Id.* at 991-92.
84. *Id.*
85. *Id.* at 995-96.
86. *Id.* at 996.

data cognizable as a trade secret property right under state law, that property right was protected by the Takings Clause.[87] The Court identified three factors to be considered in determining whether government action has gone beyond regulation and effects an unconstitutional taking: "'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.'"[88] The Court found the force of the last factor so significant that it was dispositive of the case.[89]

Analyzing the last of its three factors, the Court stated that such "[a] 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'"[90] Because Monsanto chose to submit the requisite data in order to receive a registration, the Court found that it could not argue that its reasonable investment-backed expectations were disturbed when the Environmental Protection Agency chose to use or disclose the data in a manner that was authorized by law.[91] As long as Monsanto was aware of the conditions under which the data was submitted, and the conditions were rationally related to a legitimate government interest, its voluntary submission of data in exchange for the economic advantages of a registration, the Court held, could not be considered an unconstitutional taking.[92] The right of a manufacturer to maintain secrecy as to compounds and processes, the Court proclaimed, must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth.[93] The Court found that Monsanto should be willing to bear the burden of such potential restrictions in exchange for the advantage of living and doing business in a civilized community, and in this instance, for the ability to market pesticides in the United States.[94]

The First Circuit, considering the challenge of the tobacco manufacturers, agreed with the Court, finding that the benefit Monsanto received in exchange for the submission of data, the ability to market pesticides in the United States, was no different than the benefit the tobacco companies received for submission of their data, the ability to market tobacco products in Massachusetts.[95] The court asserted that the Commonwealth had clear power to regulate the marketing of tobacco products within its borders, especially considering that tobacco was a source of public concern and the subject of government regulation.[96] Massachusetts, in the court's opinion, had an unquestionable right to condition the sale of legal items of com-

87. *Monsanto*, 467 U.S. at 1003-04.

88. *Id.* at 1005 (quoting PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74, 83 (1980)).

89. *Id.*; *see also Reilly*, 2001 WL 1215365, at *8.

90. *Monsanto*, 467 U.S. at 1005-06 (quoting Webb's Fabulous Pharm., Inc. v. Beckwith, 449 U.S. 155, 161 (1980)).

91. *Id.* at 1006-07.

92. *Id.* at 1007-08 (citing Corn Products Ref. Co. v. Eddy, 249 U.S. 427, 431-32 (1919)).

93. *Id.* (citing *Corn Products*, 249 U.S. at 431-32).

94. *Id.* at 1007.

95. *Reilly*, 2001 WL 1215365, at *10.

96. *Id.* (citing *Monsanto*, 467 U.S. at 1007).

merce, like tobacco products, on the disclosure of certain information, even if manufacturers consider such information to be trade secrets.[97] Ultimately, the court concluded that the Massachusetts statute was a valid exercise of the police power of the Commonwealth and, in the absence of explicit guarantees of confidentiality from the Commonwealth itself, the statute did not effect an unconstitutional taking of trade secret information.[98]

B. Commerce Clause

Although there is a residuum of power in a state to make laws governing matters of local concern that may affect interstate commerce or even, to some extent, regulate it, a finding that a state has acted to further matters of local concern does not end the constitutional inquiry.[99] Even in cases involving health and consumer protection, which bear significant local interest characteristics, an analysis is still necessary to ensure that the regulation does not have unconstitutional ramifications.[100] The First Circuit discussed the Massachusetts statute under two doctrines of the Dormant Commerce Clause: extraterritorial regulation and excessive burden.

1. Extraterritorial Regulation

One such Dormant Commerce Clause inquiry involves an analysis to determine if a state statute has an extraterritorial reach, regulating commerce occurring wholly outside the state's borders or having the practical effect of requiring out-of-state conduct to be carried on according to in-state terms.[101] Such a statute is a per se violation of the Dormant Commerce Clause.[102]

In *Healy v. Beer Institute*,[103] an association of domestic brewers and importers of beer brought suit seeking a declaratory judgment that the beer price affirmation provisions of the Connecticut Liquor Control Act violated the Commerce Clause.[104] The requirement demanded that out-of-state beer shippers affirm that their posted prices in Connecticut were no higher than their lowest prices in any border state.[105] The Supreme Court struck down the requirement, finding that the statute had extraterritorial effect by preventing brewers from undertaking out-of-state competitive pricing based on prevailing market conditions and requiring out-of-state shippers to forgo the implementation of competitive pricing schemes in out-of-state markets be-

97. *Id.* at *13.
98. *Id.*
99. Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 350 (1977) (citing Southern Pac. Co. v. Arizona *ex rel* Sullivan, 325 U.S. 761, 767 (1945)).
100. *See Hunt*, 432 U.S. at 350.
101. Pharm. Research & Mfrs. of Am. v. Concannon, 249 F.3d 66, 79 (1st Cir. 2001).
102. *Concannon*, 249 F.3d at 79.
103. 491 U.S. 324 (1989).
104. *Healy*, 491 U.S. at 329.
105. *Id.* at 328.

cause those pricing decisions were imported by statute into the Connecticut market regardless of local competitive conditions.[106]

In considering *Healy*, the First Circuit saw the case to be inapposite.[107] The court reasoned that the case involved price affirmation requirements, restricting the advantage of interstate sellers in local markets by extending a state's control over prices across state lines.[108] However, the court distinguished this scenario from the effects of the Massachusetts statute, asserting that the statute did not purport to regulate across state lines and opining that the statute was not an attempt at economic protectionism by the commonwealth.[109] The court held that any out-of-state effect caused by the disclosure statute was merely incidental to the in-state, non-price regulatory scheme and that any loss of competitive advantage was unrelated to interstate commerce.[110]

2. Excessive Burden

In further considering the Dormant Commerce Clause, the First Circuit looked at the excessive burden doctrine of the Dormant Commerce Clause, in which a court applies a relatively low level of scrutiny when the state statute does not discriminate but has incidental effects on interstate commerce.[111]

In *Pike v. Bruce Church, Inc.*,[112] a grower of high-quality cantaloupes brought an action against an official charged with the enforcement of the Arizona Fruit and Vegetable Standardization Act seeking to enjoin as unconstitutional an order prohibiting the grower from transporting uncrated cantaloupes from an Arizona ranch to a nearby California city for packing and processing.[113] The Court set out a test under the Dormant Commerce Clause: Where a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.[114] If a legitimate local interest is found, the question becomes one of degree.[115]

Applying the *Pike* test to the Massachusetts statute, the First Circuit held that the statute regulated evenhandedly to effectuate a legitimate local public interest, the protection of the health and safety of Massachusetts citizens by investigating and possibly disclosing the additives in the products they use, and that the effects of the statute on interstate commerce were only

106. *Id.* at 338-39.
107. *Reilly*, 2001 WL 1215365, at *14.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at *16-17.
112. 397 U.S. 137 (1970).
113. *Pike*, 397 U.S. at 138-39.
114. *Id.* at 142.
115. *Id.*

incidental.[116] Thus, the court then looked to see whether the burden imposed by the statute compared to its putative local benefits was clearly excessive.[117]

The court held that the only possible burden imposed by the statute on tobacco manufacturers was its possible effect on the profits of the individual manufacturers.[118] This, the court stated, was not sufficient to rise to a Commerce Clause burden, as the clause protects the interstate market, not individual interstate firms, from prohibitive or burdensome regulations.[119] Further, given the low level of scrutiny, the court held that there was substantial reason to expect that public disclosure of potentially harmful ingredients in tobacco products would benefit the public in Massachusetts.[120] The First Circuit asserted that the Supreme Court had emphasized that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States, and that smokers are highly responsive to information about health risks.[121] Thus, the court found sufficient justification for its holding.

Ultimately, the First Circuit found no violation of the Dormant Commerce Clause, effectively supporting the statute on all constitutional grounds.

IV. CONCLUSION: LOOKING AHEAD AT *REILLY*'S IMPACT

While states clearly have an interest in ensuring the safety of their citizens and promoting their education as to health matters, the brand-specific ingredient lists required by disclosure statutes like the statute endorsed by Massachusetts could be potentially devastating for individual tobacco companies that, at the present time, use various additives to remain competitive in the market. Although tobacco companies gain the right to sell their products through compliance with such statutory schemes, this benefit, supposedly offered for value by the government, should not be used to force tobacco companies to forfeit their trade secrets without just compensation. The recent decision of the First Circuit recognized this and struck down the constitutionality of the Massachusetts statute, correcting the oversights of the earlier panel.

While the problem appears to be settled in the First Circuit, a concern remains that other states could adopt similar legislation. It seems plausible that a circuit split could develop and that that the Supreme Court could be the ultimate voice on this issue. If, however, disclosure statutes similar to the Massachusetts statute are ever declared constitutional, tobacco compa-

116. *Reilly*, 2001 WL 1215365, at *16.
117. *Id.*
118. *Id.* (citing *Concannon*, 249 F.3d at 84).
119. *Id.*
120. *Id.*
121. *Reilly*, 2001 WL 1215365, at *16 (citing FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000); Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1128 (7th Cir. 1995)).

nies will feel a strong blow. Such a result could truly be the end of the individualization of tobacco products that make some brands more appealing than others to some consumers. The trade secrets of tobacco companies could be all but destroyed—truly secrets up in smoke.

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