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## **Injecting Trade Secret Principles into Pennsylvania’s Fracking Law, Extracting its First Amendment Deficiencies**

Laws that allow companies to withhold from the public information about their products or processes by claiming such information as “trade secrets”<sup>1</sup> present a troublesome dilemma for government: should the law protect the economic interests of companies who contribute useful innovation and stimulation to society while sacrificing citizens’ access to information?<sup>2</sup>

Traditionally, the potential impact of this dilemma was mitigated or even avoided by certain limiting doctrines inherent in the ordinary law of trade secrecy<sup>3</sup>. For example, ordinary trade secret protection is not absolute—it is balanced against competing public policies such as public health.<sup>4</sup> Further, both common law trade secrecy and modern state legislation modeled after the Uniform Trade Secrets Act<sup>5</sup> does not protect information that is in fact widely known to

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<sup>1</sup> The common law definition of a trade secret is “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.” RESTATEMENT (FIRST) OF TORTS §757 cmt. b at 5 (1939).

<sup>2</sup> See Andrew Beckerman-Rodau, *Prior Restraints and Intellectual Property: The Clash Between Intellectual Property and the First Amendment from an Economic Perspective*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 61 (“Providing legal protection for trade secrets acts as an incentive for investment in innovation.”). *But see* Travis D. Van Ort, *Hydraulic Fracturing Additives: A Solution to the Tension Between Trade Secret Protection and Demands for Public Disclosure*, 4 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 439, 451 (2012) (“A balance must be struck between the public demand to be informed and protected and the need to allow drilling companies to exploit important and large domestic energy supplies.”).

<sup>3</sup> Throughout this Note, the phrase “ordinary trade secret law” will be used to refer to common law and statutory trade secret protection, as distinguished from laws that contain incidental trade secret provisions as a part of their regulatory scheme.

<sup>4</sup> See Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777, 780, 787 (2007) (“most trade secret injunctions aim to regulate illegal or unethical conduct”). See also RESTATEMENT (THIRD) UNFAIR COMPETITION § 40 cmt c (1995); See Lyndon, *supra* note 2, at 458.

<sup>5</sup> The Uniform Trade Secrets Act is discussed in more detail in section C below.

competitors or obtained through a “lawful” means, such as reverse engineering.<sup>6</sup> Despite its prudent doctrines and strong common law foundations, the ordinary law of trade secrecy is no longer the exclusive means through which entities and individuals protect their trade secrets. Federal and state laws that mandate disclosure by potentially dangerous industries accommodate the economic imperatives of such industries and provide some protection for information with competitive value, including trade secrets. However, unlike ordinary trade secret law, such laws do not protect trade secrets through a “cause of action for misappropriation” initiated *ex post*.<sup>7</sup> Instead, these regulatory laws eliminate the need for such a cause of action because they simply exempt trade secrets from disclosure requirements or impose confidentiality requirements on agencies receiving the information.<sup>8</sup> While the purported intent of disclosure laws is to protect and improve the environment and public health<sup>9</sup>, this goal is nevertheless offset by the existence of exemptions and loopholes.<sup>10</sup> One such exemption excuses companies from a law’s

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<sup>6</sup> See RESTATEMENT (THIRD) UNFAIR COMPETITION; *see also* Lyndon, *supra* note 2, at 458.

<sup>7</sup> Lyndon, *supra* note 2 at 458.

<sup>8</sup> *See, e.g.*, Toxic Substances Control Act, 15 U.S.C. § 2613 (providing that a company may designate reported information as a trade secret in order to prevent the EPA from disclosing it). It is believed that “[i]n the past several years, 95 percent of the notices for new chemicals sent to the government requested some secrecy” under the TSCA. Lyndsey Layton, *Use of Potentially Harmful Chemicals Kept Secret Under Law*, WASHINGTON POST <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/03/AR2010010302110.html> (Jan. 4, 2010).

<sup>9</sup> *See, e.g.*, 15 U.S.C. § 2601(b)(2) (stating that “adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment”).

<sup>10</sup> *See, e.g.*, Todd Wynn, *ALEC Encourages Responsible Resource Production*, AM. LEGIS. (March 1, 2012), <http://www.americanlegislator.org/2012/03/alec-encourages-responsible-resource-production>; *see also* Cora Currier, *ALEC and ExxonMobil Push Loopholes in Fracking Chemical Disclosure Rules*, PROPUBLICA (April 24, 2012, 1:06pm), <http://www.propublica.org/article/alec-and-exxonmobil-push-loopholes-in-fracking-chemical-disclosure-rules>

“mandatory” chemical disclosure requirements if the company claims the required information contains trade secrets.<sup>11</sup>

It is through these trade-secret exemptions that participants in the hydraulic fracturing (hereinafter “fracking”) industry avoid disclosing information about the chemicals used in their operations, despite the hazards the chemicals pose to the environment and public health.<sup>12</sup>

Because of a loophole in a federal law that would otherwise sweep fracking into its jurisdiction, discussed further in Part I, Section B, *supra*, it is up to state legislatures to decide how fracking should be regulated. Pennsylvania is among states that have that have responded to heavy fracking activity by proposing and enacting regulations regarding chemical disclosure.

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<sup>11</sup> See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2613 (providing that information that trade secrets may not be disclosed by any agency except in a few narrowly defined circumstances); Federal Insecticide, Fungicide and Rodenticide Act § 7 U.S.C. §136(h)(b) (providing that “the Administrator shall not make public information which in the Administrator's judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential”). See also Lyndsey Layton, *Use of Potentially Harmful Chemicals Kept Secret Under Law*, WASHINGTON POST <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/03/AR2010010302110.html> (Jan. 4, 2010) (“Scientists and environmental groups say manufacturers have exploited weaknesses in the law to claim secrecy for an ever-increasing number of chemicals”). Layton explains that under the Toxic Substances Control Act, companies are required to notify the government when their chemicals pose a “substantial risk,” but most of the chemicals that firms say pose a substantial risk are those that are claimed to be secret. *Id.*

<sup>12</sup> Compare Theo Colborn, Carol Kwiatkowski, Kim Shultz & Mary Bachran, *Natural Gas Operations from a Public Health Perspective*, 17:5 HUMAN AND ECOLOGICAL RISK ASSESSMENT: AN INTERNATIONAL JOURNAL 1039, (2011) available at <http://dx.doi.org/10.1080/10807039.2011.605662> (explaining the negative health effects associated with fracking processes) with Jim Moscou, THE DAILY BEAST (Aug. 19, 2008, 8:00 PM) <http://www.thedailybeast.com/newsweek/2008/08/19/a-toxic-spew.html> (quoting Halliburton executive Ron Heyden saying that asking a company to disclose the chemical composition of its products is like “asking Coca-Cola to disclose the formula of Coke”) and Mike Soraghan, *Hydraulic Fracturing: Two-third of Frack Disclosures Omit ‘Secrets’*, ENVIRONMENT AND ENERGY PUBLISHING (Sept. 26, 2012). <http://www.eenews.net/public/energywire/2012/09/26/1> (“[f]or years, oil and gas companies opposed the disclosure of the contents of their fracking fluid by saying that giving away their proprietary recipes would put them at a competitive disadvantage”)

Part I of this Note will provide a background on the process of fracking and will describe the regulatory framework governing fracking operations. Part II will explore the merits of a recent Free Speech challenge brought against the medical gag rule by first examining the threshold issue of whether the medical gag rule interferes with the type of speech or expression that triggers First Amendment protection. Upon concluding, based on principles of First Amendment law, that the medical gag rule imposes a content-based restriction on speech, Part II will accordingly analyze the medical gag rule using a strict scrutiny standard to determine whether the provision is constitutional. Part III will examine whether fracking companies might nevertheless have a legitimate property right in their trade secrets that justifies limiting the rights of sick patients and doctors seeking information about chemical exposure. Part IV proposes changes to the medical gag rule that might repair its constitutional defects.

## **PART I**

### **A. FRACKING: WHAT IS IT, AND WHY ARE WE CONCERNED?**

In recent years, natural gas production from shale formations<sup>13</sup> has grown rapidly and currently supplies about 22% of the nation’s total energy.<sup>14</sup> There are several shale gas reserves throughout the United States, the largest one being the Marcellus Shale Play. The Marcellus Shale spans over 95,000 miles of the eastern United States and underlies Pennsylvania, among several other states.<sup>15</sup> Prior to the introduction of the fracking method, natural gas remained

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<sup>13</sup> Shale is a sedimentary rock that contains natural gas deposits. *See* GROUND WATER PROTECTION COUNCIL & ALL CONSULTING, MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER 30 (2009) [hereinafter, “SHALE GAS PRIMER”]. Natural gas derived from shale formations and other unconventional sources is expected to replace natural gas from other “conventional sources” such as sands and carbonate formations. Joseph A. Dammel, *Notes from the Underground*, 12:2 MINN. J.L.SCI. & TECH. 773, 776.

<sup>14</sup> SHALE GAS PRIMER, *supra* note 15, at 25.

<sup>15</sup> *Id.* at 100.

trapped in these rock formations because they could not be extracted economically.<sup>16</sup> Today, an estimated 90% of natural gas wells in the United States use fracking to extract the gas deposits from shale.<sup>17</sup> The modern and controversial method of fracking is known as horizontal slickwater fracturing, which frees the natural gas trapped in shale formations by injecting high-pressure “fracturing fluid” underground into the shale formations in order to crack the shale and allow the gas to escape into wells collecting the gas.<sup>18</sup> The fracturing fluid used to create the fractures and keep them open is composed primarily of water, but contains a small amount of chemical additives and sand to ease the flow into the wells.<sup>19</sup>

Proponents of hydraulic fracturing applaud it for being an efficient method of natural gas production, freeing the nation from dependence on foreign energy sources, and providing economic benefits to struggling towns located near drilling operations.<sup>20</sup> Opponents, on the other hand, argue that fracking is dangerous because the chemicals are injected deep underground and therefore might contaminate water supply, causing grave health problems for citizens.<sup>21</sup>

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<sup>16</sup> See Justin Kuepper, *The Definitive Guide to Fracking*, COMMODITY HQ (Nov 11, 2012) <http://commodityhq.com/2012/the-definitive-guide-to-fracking/>

<sup>17</sup> Dammel, *supra* note 15, at 778.

<sup>18</sup> *Id.* at 778.

<sup>19</sup> *Id.* at 779

<sup>20</sup> See Hannah Wiseman, *Trade Secrets, Disclosure, and Dissent In a Fracturing Energy Revolution*, 111 COLUM. L. REV 1, 3-4 (2011) (“This extraction technique will bolster America’s energy independence for this period”); see also *Frack Freely but Disclose Chemicals Put Into the Ground*, BLOOMBERG (April 11, 2012 7:00 PM), <http://www.bloomberg.com/news/2012-04-11/frack-freely-but-disclose-chemicals-put-into-the-ground.html> (“fracking holds great promise: It enables the extraction of natural gas, which is abundant, cleaner to produce and burn than other fossil fuels, and cheap.”)

<sup>21</sup> Mike Ludwig, *Former Oil Executive, Doctors, and Scientists Urge Obama to Wait on Fracking Exports Plan*, TRUTHOUT (Dec. 19, 2012), <http://truth-out.org/news/item/13413-former-oil-executive-doctors-and-scientists-urge-obama-to-halt-fracking-exports> (explaining that a former high-ranking Mobile Oil executive spoke out against expanding domestic fracking operations, voicing concerns about its effect on the water supply.)

Whatever the merits of fracking, several incidents have vindicated critics' concerns that chemicals are contaminating water supply and air. In June 2006, for example, a chemical plant in New Mexico spilled a large amount of fracking fluid, which created a large cloud of acid vapors.<sup>22</sup> People living near the plant soon began experiencing nausea and vomiting and about 220 people had to be evacuated from their homes.<sup>23</sup> In 2009 and 2010, oil and gas wastewater leaked into public drinking water in Wyoming, and high levels of 2-butoxyethanol, a chemical associated with liver and kidney damage, were subsequently detected in the water.<sup>24</sup>

In response to such incidents indicating the hazards of fracking, a few organizations conducted studies on the health effects of the chemicals used for fracking. For example, the Endocrine Disruption Exchange ("TEDX") conducted a study on the health effects of natural gas operations by gathering information largely through Material Safety Data Sheets (MSDS)<sup>25</sup> and accident and spill reports.<sup>26</sup> TEDX ultimately concluded that 43% of the chemicals known to be present in the fracking fluids it studied have potential hazardous effects on the human endocrine system, and other chemicals can potentially cause cancer, organ damage, and respiratory and

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<sup>22</sup> *Halliburton Spill Results in Acid Cloud, More than 220 People Evacuated to Mall*, YOURLAWYER.COM (June 7, 2006), [www.yourlawyer.com/articles/read/11832](http://www.yourlawyer.com/articles/read/11832).

<sup>23</sup> *Id.*

<sup>24</sup> Citizen Petition from Earthjustice, to Lisa P. Jackson, Administrator, Environmental Protection Agency (Aug. 4, 2011) at 14 [hereinafter Earthjustice Petition], *available at* [earthjustice.org/sites/default/files/fracking\\_petition.pdf](http://earthjustice.org/sites/default/files/fracking_petition.pdf)

<sup>25</sup> Product manufacturers are required by the Occupational Safety and Health Administration ("OSHA") to produce MSDS's in order inform employees who handle toxic chemicals about the content of and risks associated with those chemicals. *See* Colborn, Kwiatkowski, Shultz & Bachran, *supra* note 10, at 1. The health effects of each chemical disclosed were determined by the MSDSs themselves, published scientific studies, or publicly available databases. *Id.* MSDSs do not disclose the entire composition of the product, however, because the manufacturer often labels the product, at its own discretion, as proprietary or not hazardous. TEDX found that MSDSs of 43% of the products used in fracking reported only 1% of the total composition of the product. *See id.* at 1, 2.

<sup>26</sup> Colborn, Kwiatkowski, Shultz & Bachran, *supra* note 10.

gastrointestinal issues.<sup>27</sup> Despite the TEDX study and others like it, full knowledge of other possible health risks is largely inadequate because companies tend to rely heavily on trade secret exemptions to disclosure requirements, depriving scientists of the information they need to collect data on health effects.<sup>28</sup>

Even the EPA has been frustrated in its efforts to monitor fracking chemicals. There is controversy over the agency will publish results of the years-long study it recently completed on fracking's impact on drinking water. The EPA is currently unable to publish the findings because companies claimed the majority of information they provided to the EPA for the study as "confidential business information."<sup>29</sup>

Non-disclosure not only impedes scientific investigation but also poses a more immediate burden on citizens themselves. Citizens are unable whether fracking fluids have entered their water supply because they do not know for which chemicals to look.<sup>30</sup> Also, citizens are deprived of knowledge directly bearing on health problems. For example, in April 2008, a gas industry employee was admitted to an intensive care unit in Colorado after being caught in a fracking fluid spill.<sup>31</sup> The nurse who treated the patient began vomiting a few days later and her skin turned yellow. She was admitted to the ICU and subsequently diagnosed with chemical

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<sup>27</sup> *Id.*

<sup>28</sup> *See, e.g.* Ben Elgin, Benjamin Haas, and Phil Kuntz, *Fracking Secrets by Thousands Keep U.S. Clueless on Wells*, Bloomberg (Nov. 30, 2012), <http://www.businessweek.com/news/2012-11-30/frack-secrets-by-thousands-keep-u-dot-s-dot-clueless-on-wells#p1> ("Nationally, companies claimed trade secrets or otherwise failed to identify the chemicals they used about 22% of the time").

<sup>29</sup> *See* Rob Wile, *The EPA Hasn't Figured Out How to Publish Results Of Its Fracking Chemical Study Without Spilling Trade Secrets*, BUSINESS INSIDER (Jan. 7, 2013), <http://www.businessinsider.com/fracking-fluid-disclosure-epa-2012-12>.

<sup>30</sup> *Id.* *See also* Hannah Wiseman, *Trade Secrets, Disclosure, and Dissent In a Fracturing Energy Revolution*, 111 COLUM. L. REV 1, 2 (2011) ("Unless Congress or state legislatures partially remove trade secret protections from fracing fluids, communities . . . may have inadequate tools to evaluate and address the potential impact of this development).

<sup>31</sup> *Id.*

poisoning.<sup>32</sup> It was later determined that the employee she was treating was contaminated with a product known as “ZetaFlow,” a fracking fluid produced by Weatherford.<sup>33</sup> When doctors looked at the MSDS for ZetaFlow, it indicated that ZetaFlow contained methanol and two undisclosed “proprietary” chemicals that the manufacturer refused to disclose.<sup>34</sup> To this day, the Colorado nurse has no way of knowing exactly what landed her in the ICU. The incident in Colorado illustrates the consequences of a legal regime that favors secrecy over disclosure.<sup>35</sup>

## **B. WHO REGULATES FRACKING?**

At first blush, it appears that the Safe Water Drinking Act (“SDWA”), which specifically covers “the underground injection of . . . fluids which are brought to the surface in connection with oil or natural gas production”,<sup>36</sup> would cover fracking operations. However, the Energy Policy Act of 2005 amended the SDWA to explicitly remove injections used in fracking from within its reach.<sup>37</sup> This exclusion is known as the “Halliburton loophole,” named after “the world’s largest provider of fracking services” which was led by former Vice President Dick Cheney before he served as Vice President.<sup>38</sup> Other federal laws that regulate hazardous

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Mary L. Lyndon, *supra* note 2, at 450. (“the social costs of the . . . secret become greater with the passage of time, as the effect becomes more costly to identify and remedy”)

<sup>36</sup> 42 U.S.C. § 300(h)-4(a)(1).

<sup>37</sup> PL 109-58, Sec. 322 (providing that “the underground injection of fluids . . . pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities” is excluded from the Safe Drinking Water Act.); see also Van Ort, *supra* note \_\_\_\_ at 454 (“[T]here are chemicals that are carcinogens or hazardous air pollutants that are used in fracking but not regulated by the Safe Drinking Water Act.”).

<sup>38</sup> Mark Drajem and Katarzyna Klimasinska, *EPA Shrinking “Halliburton Loophole” Threatens Obama Gas Pledge*, BLOOMBERG.COM (Feb. 1, 2012), <http://www.bloomberg.com/news/2012-02-01/epa-shrinking-halliburton-loophole-threatens-obama-gas-pledge.html>

chemicals, such as the Emergency Planning and Community Right-to-Know Act of 1986 (“EPCRA”), the Toxic Substances Control Act (“TSCA”), and OSHA, may or may not touch of fracking operations depending on the specific circumstances pertaining to each operation, and nevertheless contain their own disclosure exemptions for trade secrets. There are therefore no specific disclosure requirements for fracking operations under federal law.<sup>39</sup> The states, rather than the federal government, are therefore responsible for enacting regulations governing fracking operations.

States differ widely on how much detail companies must disclose about their operations and to whom.<sup>40</sup> States vary, for example, on whether disclosure of chemical compositions must be made directly to the public by posing the information on public chemical registries, to a state agency, or to nobody at all.<sup>41</sup> More than half of the states which require disclosure, including Pennsylvania, provide some level of protection for companies claiming their products are trade secrets.<sup>42</sup>

### **i. PENNSYLVANIA’S REGULATORY REGIME FOR FRACKING**

Pennsylvania’s Oil and Gas Laws<sup>43</sup> regulate petroleum extraction. They include strict permitting and inspection provisions.<sup>44</sup> On February 14, 2012, Governor Tom Corbett signed

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<sup>39</sup> See *Wiseman*, supra note \_\_\_\_ at 5.

<sup>40</sup> BRANDON J. MURRILL & ADAM VANN, CONGRESSIONAL RESEARCH SERVICE, HYDRAULIC FRACTURING: CHEMICAL DISCLOSURE REQUIREMENTS 12 (2012) (explaining that chemical disclosure laws at the state level vary widely).

<sup>41</sup> OHIO REV. CODE ANN. § 1509.10 (West 2012).

<sup>42</sup> MURILL AND VANN, *supra* note 37, at 8.

<sup>43</sup> PA. CONS. STAT. ANN. § 2301 et seq. (West 2012).

<sup>44</sup> See, e.g., PA. CONS. STAT. ANN. § 3211 (“no personal shall drill or alter a well . . . without having first obtained a well permit . . .”); PA. CONS. STAT. ANN. § 3258(a.1) (“[t]he operator may not commence drilling activities until the department has conducted an inspection of the unconventional well site . . .”).

House Bill 1950, currently known as Act 13, into law. Act 13, which modified and augmented Title 58, went into effect in April 2012.<sup>45</sup> Perhaps the most pronounced change brought by Act 13 were well fees imposed on fracking operators. Many were disappointed the well fees collected were not set aside for health related studies, even though early versions of the law earmarked money for research into natural gas drilling's medical impact.<sup>46</sup> Instead, the money is allocated to state agencies, grants, and municipalities.

The other significant changes brought by Act 13 were disclosure requirements aimed participants in fracking operations. Specifically, Act 13 requires a fracking well operator to complete a chemical disclosure registry form and post the form on the state's chemical disclosure registry.<sup>47</sup> Information posted on that registry will become public record unless such information is "entitled" to protection as a trade secret or "deemed confidential proprietary information." Act 13 does not provide a definition for "trade secret," nor does it provide any mechanism for agency approval or challenge to a company's trade secrecy claim. In other words, a fracking well operator may claim any information as a trade secret or "confidential proprietary information" by simply submitting a signed written statement to that effect.<sup>48</sup>

In addition to requiring disclosure to the Commonwealth's agencies and registries, Act 13 also requires that "[a] vendor, service company or operator shall identify the specific identity and amount of any chemicals claimed to be a trade secret or confidential proprietary information to any health professional who requests the information in writing *if the health professional*

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<sup>45</sup> See 2012 Pa. Legisl. Serv. Act 2012-13 (H.B. 1950) (West).

<sup>46</sup> Scott Detrow, *Top Republican Floats Proposal to Create Marcellus Shale Health Panel*, STATEIMPACT.NPR.ORG (Sept. 26, 2012, 1:21 PM), <http://stateimpact.npr.org/pennsylvania/2012/09/26/top-republican-floats-proposal-to-create-marcellus-shale-health-panel/>

<sup>47</sup> PA. CONS. STAT. ANN. § 3221.1(b)(2) (West 2012).

<sup>48</sup> *Id.* §3221.1(b).

*executes a confidentiality agreement and provides a written statement of need.*<sup>49</sup> The law somewhat relaxes the formalities in the case of medical emergencies by requiring the company to turn over the information upon a doctor's mere "verbal agreement" that he or she will not use the information for "purposes other than the health needs asserted."<sup>50</sup> Still, if the company so requests, a confidentiality agreement may be executed in this situation "as soon as circumstances permit."<sup>51</sup> These provisions of Act 13 have been referred to by some doctors and citizens as "the medical gag rule." Act 13 has been heavily criticized for being a law that, on its face, places secrecy before public health and safety.<sup>52</sup>

## **ii. The Legal Challenge to Pennsylvania's Medical Gag Rule**

On July 27, 2012, Dr. Alfonso Rodriguez, a Pennsylvania resident and president of the Gas Drilling Awareness Coalition, brought suit against the Commonwealth of Pennsylvania, seeking to invalidate a portion of its fracking law as unconstitutional under the First Amendment free speech clause.<sup>53</sup> The specific portion Rodriguez is challenging, known as the "medical gag rule," requires a fracking company to provide to medical professionals information about the chemicals used in the operation if medical need so requires, but allows the company require a

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<sup>49</sup> *Id.* §3221.1(b)(10) (emphasis added).

<sup>50</sup> PA. CONS. STAT. ANN. §3221.1(b)(11) (West 2012).

<sup>51</sup> *Id.* §3221.1(b)(11).

<sup>52</sup> See Bernard Goldstein and Jill Kriesky, *The Pennsylvania Gas Law Fails to Protect Public Health*, PITTSBURGH POST-GAZETTE (Mar. 11, 2012), <http://old.post-gazette.com/pg/12071/1215612-109.stm> ("[r]ather than providing health personnel with direction on how to prepare for potential exposures to toxic chemicals . . . [Act 13] sets up an obstacle course that health care providers must navigate to secure information about proprietary chemicals."); See Steven Rosenfeld, *Fracking Democracy: Why Pennsylvania's Act 13 May be the Nation's Worst Corporate Give Away*, ALTERNET (Mar. 7, 2012) [http://www.alternet.org/story/154459/fracking\\_democracy%3A\\_why\\_pennsylvania%27s\\_act\\_13\\_may\\_be\\_the\\_nation%27s\\_worst\\_corporate\\_giveaway](http://www.alternet.org/story/154459/fracking_democracy%3A_why_pennsylvania%27s_act_13_may_be_the_nation%27s_worst_corporate_giveaway) ("Act 13 does many things to elevate the rights of gas companies above the civil rights of people and communities")

<sup>53</sup> See Complaint, *Rodriguez v. Krancer*, No. 12-1468 (M.D.Pa. filed July 27, 2012).

confidentiality agreement from the doctor if it believes the information provided contains trade secrets. Rodriguez is one of many doctors throughout the Commonwealth that perceives the medical gag rule not only as a violation of free speech, but a threat to their ethical and legal obligations.<sup>54</sup> On October 16, 2012, Linda Kelly, the Attorney General of the Commonwealth, filed a motion to dismiss Rodriguez’s complaint. In her brief, Kelly argues that the Commonwealth could not mandate unqualified disclosure from fracking participants without unconstitutionally “infringing on the . . . property rights of third parties.”<sup>55</sup> While not explicit in her brief, Kelly’s argument presumably rests on the fact a trade secret is considered property under Pennsylvania law.<sup>56</sup> Therefore, in light of specific constitutional doctrines protecting property, the Commonwealth might (arguably) enact and enforce measures in furtherance of that right, even at the price of inhibiting free speech.

The gravamen of Rodriguez’s complaint is that the medical gag rule presents an impediment to the proper practice of medicine. Rodriguez cites specific principles of the Ethics Code, promulgated by the American Medical Association, that inform his “professional and ethical obligation to communicate critical data and information obtained in the course of treating his patients, such as known environmental dangers, to other medical doctors, researchers, and the general public for the purpose of advancing scientific knowledge.”<sup>57</sup> For example, Rodriguez cites Principle V of the Ethics Code, which requires doctors to “study, apply, and advance

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<sup>54</sup> Susan Phillips, *Pennsylvania Doctors Worry Over Fracking ‘Gag Rule’*, NPR (May 17, 2012), <http://www.npr.org/2012/05/17/152268501/pennsylvania-doctors-worry-over-fracking-gag-rule> (stating that “[a] new law in Pennsylvania has doctors nervous”).

<sup>55</sup> See Brief of Defendant Linda Kelly at 8, *Rodriguez v. Krancer*, No. 12-1468 (M.D. Pa., filed October 31, 2012).

<sup>56</sup> See Kurt M. Saunders, *Can You Keep A (Trade) Secret?—The Pennsylvania Uniform Trade Secrets Act*, 75 PA B.A. Q. 139, 140 (“Pennsylvania courts have taken the position that legal protection for trade secrets derives from their status as a variety of intellectual property, rather than from the relationship between the parties.”).

<sup>57</sup> Complaint at ¶ 6, *Rodriguez v. Krancer*, No. 12-1468 (M.D. Pa. filed July 27, 2012).

scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated.”<sup>58</sup> He urges that violation of these professional standards could lead to revocation of his license to practice medicine in Pennsylvania.<sup>59</sup>

Had Rodriguez’s complaint consisted solely of the argument that the medical gag rule infringes on the doctor-patient relationship and forces doctors to violate the Ethics Code, he would not have a cognizable grounds upon which to invalidate Act 13. A similar issue arises in the context of contractual gag clauses imposed upon the health care providers by managed care organizations (“MCOs”) with whom they contract. As discussed by Julia A. Martin and Lisa K. Bjerknes, such gag clauses “violate the patient’s rights under the doctrines of informed consent, fiduciary duty and perhaps malpractice.”<sup>60</sup> Because of the absence of a common-law or constitutional doctrine that protects the doctor-patient relationship in particular, some states, including Pennsylvania, had to pass legislation in order to invalidate MCO gag clauses that prevent a health care provider from engaging in certain communication with patients. The legislation allows a health care provider to “file a grievance” pursuant to the statute if he or she believes the gag clause is interfering with his or her doctor-patient relationship.<sup>61</sup> In the absence such affirmative legislation, however, particularly narrow instances of interference with the doctor-patient relationship, there is no broad avenue to address the problem.

Rodriguez does have an actionable claim against Act 13, however, because he also alleges that the medical gag rule is a “content-based regulation of speech” that violates his free

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<sup>58</sup> Complaint at ¶ 47(citing AMA, Principles of Medical Ethics (1952)).

<sup>59</sup> *Id.* at ¶ 15.

<sup>60</sup> Julia A. Martin & Lisa K. Bjerknes, The Legal and Ethical Obligations of Gag Clauses in Physician Contracts, 22 Am. J. L. & Med. 433, 449. (1996)

<sup>61</sup> § 991.2113

speech rights by under the First Amendment.<sup>62</sup> Before the First Amendment can be invoked to mitigate the damaging effects of the medical gag rule, it must first be determined, as a threshold matter, whether the provision is the sort that triggers First Amendment protection.<sup>63</sup>

## **PART II: DOES THE MEDICAL GAG RULE IMPLICATE THE FIRST AMENDMENT?**

The goal of the free speech clause is geared less toward maintaining individual autonomy and more toward providing public access to a rich marketplace of ideas by fostering “discussion, debate, and the dissemination of information and ideas.”<sup>64</sup> One of the main rationales underlying freedom of speech is that society will benefit and flourish from uninhibited discourse among its citizens.<sup>65</sup> A state therefore may not infringe on speech because of its “message, subject-matter, or its content”<sup>66</sup> unless it can satisfy the strict scrutiny standard. In order to pass muster under strict scrutiny, the law must be “narrowly tailored to promote a compelling Government interest.” In other words, “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”<sup>67</sup>

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<sup>62</sup> U.S. CONST. amend. I. *See* Complaint, *supra* note 14.

<sup>63</sup> As discussed in more detail in Part II, Section A below, “the physician’s right to discuss a patient’s treatment alternatives under the First Amendment is controversial.” Martin & Bjerknes at 460. The medical gag rule, however, implicates interests beyond the doctor-patient relationship, so the First Amendment remains a feasible grounds on which to challenge the law.

<sup>64</sup> *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978).

<sup>65</sup> *See* Robert Post

<sup>66</sup> *Police Dep’t of Chi. v. Mosely* 408 US 92, 95 (1972).

<sup>67</sup> *U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000)

The Supreme Court and lower courts have struggled with the degree of protection warranted by speech between a professional and a client.<sup>68</sup> In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>69</sup> however, the Supreme Court discussed, albeit tersely, whether speech occurring within the doctor-patient relationship implicates the interests underlying free speech and thus warrants First Amendment protection. The Court concluded that speech occurring in the doctor-patient setting is not entitled to First Amendment protection, and is therefore “subject to reasonable . . . regulation by the State.”<sup>70</sup> The Court’s conclusion in *Casey* is likely a recognition that “traditional First Amendment values . . . seem to carry very little force in the context of professional speech.”<sup>71</sup> That is, “private, professional communications between doctors and their patients plainly do not count as public discourse” that enhances the marketplace of ideas.<sup>72</sup>

Despite the notion that professional speech lacks free speech value, Act 13 reaches speech that takes place outside the bounds of the doctor-patient relationship. That is, the medical gag

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<sup>68</sup> See generally Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV 939 (2007); see also Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, U. 147 U. PA. L. REV 771, 834 (1999) (“[T]he Supreme Court and lower courts have rarely addressed the First Amendment contours of a professional’s freedom to speak to a client.”).

<sup>69</sup> 505 U.S. 833 (1992).

<sup>70</sup> *Id.* at 884. The Supreme Court in *Casey* upheld a state statute requiring doctors to provide state-mandated information to patients seeking an abortion.

<sup>71</sup> *Post* at 951. See also Daniel Halberstam, *supra* note 67 at 832 (“[T]he speech . . . between physician and patient, lies beyond the traditional conception of unbounded public discourse, because it takes place as part of a predefined communicative project”)

<sup>72</sup> *Post* at 973. Post explains the view that “because the First Amendment value of such speech is different from that of public discourse, it receives a ‘subordinate’ kind of constitutional protection that is structurally distinct from the protections accorded to public discourse.” Scholars have attacked the lack of First Amendment protection the Court gives private speech, arguing that while the public form “is indeed the catalyst for much discussion of public matters,” important exchanges often take place “among people in much more cloistered settings.” See Frederick Schauer, *“Private” Speech and the “Private” Forum: Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217, 236 (1979).

rule controls *how* doctors can use information about chemical formulas in general. Data and facts, such as chemical formulas, while generally devoid of opinion and viewpoint, nevertheless further some of the major goals of free speech: namely, truth-seeking and public debate. In fact, in her brief, the Attorney General recognized that Rodriguez wanted to use information about the chemical formulas contained in fracking fluid to “further his own personal and political views regarding hydraulic fracturing and the development of the oil and gas industry in Pennsylvania.”<sup>73</sup>

Because of the potential free speech value of data and facts, courts apply the strict scrutiny standard to laws that suppress the dissemination of such information.<sup>74</sup> To illustrate, suppose a state imposed a ban on imparting any data relating to the field of quantum mechanics. This restriction on dissemination of scientific fact would be content-based and thus subject to strict scrutiny under the First Amendment. The medical gag rule presents a slightly different, yet constitutionally significant, restriction: the state is dictating *how* information with certain content can and cannot be used. Another aspect of the medical gag rule that differs from the simple example given above and complicates the First Amendment inquiry is the fact that the rule restricts information that doctors obtain through state-mandated disclosure rather than individual knowledge or discovery. In her brief in support of her motion to dismiss, the Attorney General argues that the medical gag rule does not infringe on Rodriguez’s First Amendment rights because “[w]ithout [the medical gag rule], Dr. Rodriguez and other doctors would simply have

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<sup>73</sup> Brief for Defendant Linda L. Kelly in Support of Motion to Dismiss at 7, *Rodriguez v. Krancer*, No. 12-1458 (M.D. Pa. Oct. 16, 2012), ECF No. 10.

<sup>74</sup> *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 US 768, 762 (1976) (citing *Bigelow v. Virginia*, 421 US 809, 822 (1975)) (“purely factual matter of public interest may claim protection”).

no means to obtain valuable information for medical purposes.”<sup>75</sup> The Supreme Court’s recent decision in *Sorrell v. IMS Health*,<sup>76</sup> however, suggests that this nuance does not insulate the law from invalidation on First Amendment grounds.

**A. The Circuit Split Over Prescription Confidentiality Laws and the Supreme Court’s Ultimate Resolution in *Sorrell v. IMS Health***

When doctors write prescriptions, state and federal laws require them to provide prescriber-identifying information (“PI”) to the pharmacy filling the prescription.<sup>77</sup> It is common in the pharmaceutical industry that data mining companies purchase this information from pharmacies and sell it to pharmaceutical manufacturers. Through this information, pharmaceutical manufacturers learn “physicians’ prescribing patterns in terms of gross number of prescriptions and inclination to prescribe a particular drug” in order to refine and target their marketing practices.<sup>78</sup> Several states, beginning with New Hampshire, followed by Maine and Vermont, passed statutes restricting this particular use of PI.<sup>79</sup> New Hampshire’s law imposed a flat ban on the use and transmission of PI for commercial purposes.<sup>80</sup> Maine’s law deviated in an important way from New Hampshire’s: its default position was to allow use and transmission of PI for commercial purposes *unless* a physician elected to prevent pharmaceutical companies from using or selling their particularized information for marketing purposes.<sup>81</sup> Both the New

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<sup>75</sup> Brief for Defendant Linda L. Kelly in Support of Motion to Dismiss at 8, *Rodriguez v. Krancer*, No. 12-1458 (M.D. Pa. Oct. 16, 2012), ECF No. 10.

<sup>76</sup> 131 S. Ct. 2653 (2011).

<sup>77</sup> *Id.* at 2660.

<sup>78</sup> 631 F.Supp.2d 434, 441 (D. Vt. 2009), *rev’d*, 630 F.3d 263 (2d Cir. 2010), *aff’d*, 131 S.Ct 2653 (2011).

<sup>79</sup> *Id.* at 442-44.

<sup>80</sup> *Id.* at 442.

<sup>81</sup> *Id.* at 442-43.

Hampshire and Main District Courts invalidated the laws for violating the First Amendment, and the First Circuit reversed.<sup>82</sup>

Vermont’s PI law (hereinafter “Act 80”) was neither a flat ban nor an “opt-out” law against the sale or use of PI data for marketing. Instead, Vermont’s law is “opt-in”—that is, entities are prohibited from selling or using PI data for marketing purposes unless the prescriber consents.<sup>83</sup>

On the other hand, Act 80 carved out certain uses of PI that did not require any consent from a prescribing physician: researching health care, complying with health insurance companies’ preferred drug lists, and educating doctors about cost-effective ways to prescribe medication.<sup>84</sup>

The stated purposes of Act 80 were: “to protect the privacy of medical information; to promote public health by ensuring that prescription decisions are based on scientific evidence, rather than one-sided marketing pitches; and to help contain health care costs by encouraging prescription of cheaper, generic drugs.”<sup>85</sup>

Pharmaceutical manufacturers and data miners brought an action challenging the constitutionality of Act 80.<sup>86</sup> The state advanced two arguments to the Supreme Court for Act 80 did not implicate the First Amendment: (1) the statute was a restriction on “nonpublic information” and (2) regardless of the type of information the statute sought to reach, the law did

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<sup>82</sup> *Id* at 443.

<sup>83</sup> See VT. STAT. ANN. TIT. 18 §463(d)(2009), invalidated by *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (pharmaceutical manufacturers and pharmaceutical marketers shall not use prescriber-identifiable information for marketing or promoting a prescription *unless the prescriber consents*”) (emphasis added).

<sup>84</sup> *Sorrell* page 2660.

<sup>85</sup> Marcia M. Boumil, Kaitlyn Dunn, Nancy Ryan & Katrina Clearwater, *Prescription Data Mining, Medical Privacy and the First Amendment: The U.S. Supreme Court in Sorrell v. IMS Health Inc.*, 21 ANNALS HEALTH L. 447, 448 (2012) (citing *Sorrell* at 2661).

<sup>86</sup> 631 F.Supp.2d 434, 444 (D. Vt. 2009), *rev’d*, 630 F.3d 263 (2d Cir. 2010), *aff’d*, 131 S.Ct 2653 (2011).

not restrict protected expression because it involved mere commercial conduct.<sup>87</sup> As to the state’s “non-public information” argument, the Supreme Court noted that once information reaches private hands, regardless of its source, the “individual’s right to speak is implicated” by laws restricting or preventing dissemination of that information.<sup>88</sup> Perhaps most relevant for First Amendment analysis of the medical gag rule was the Supreme Court’s holding that because the law allowed the information to be used for some purposes but not for others, it “impose[d] burdens that [we]re based on the content of speech and that [we]re aimed a particular viewpoint.”<sup>89</sup> In other words, the Court believed it was improper for the state to ban information from being used in a way that the legislature found distasteful, while allowing the same information to be used for purposes the legislature found beneficial.

**B. Comparing and Contrasting Act 80 and the Medical Gag Rule to Determine Whether the Medical Gag Rule Implicates the First Amendment and Warrants Strict Scrutiny Thereunder**

Act 80 and the medical gag rule have in common many key characteristics that suggest the Supreme Court would treat them similarly for purposes of First Amendment analysis. For example, like Act 80, the medical gag rule utilizes the “opt-in” mechanism, which “more closely resembles . . . [a] total ban than does . . . [a] more limited, opt-out approach.”<sup>90</sup> Also, both laws pick and choose the purposes for which PI can be used without first obtaining a prescriber’s consent. In her brief, the Attorney General suggests that the medical gag rule does not infringe

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<sup>87</sup> Boumil, Dunn, Ryan & Clearwater, *supra* note 57, at 475.

<sup>88</sup> Sorrell at 2665.

<sup>89</sup> Sorrell at 2663-4. Because the Court concluded that the law could not even survive intermediate scrutiny, an analysis under strict scrutiny would have been futile. Therefore, the Court did not ultimately engage in a strict scrutiny analysis despite explicitly concluding that the law required heightened scrutiny.

<sup>90</sup> Boumil, Dunn, Ryan & Clearwater, *supra* note 57, at 455-56.

on free speech because “[t]here is nothing which would suggest that [a doctor] would be penalized for using this information for the medical treatment of his patients”.<sup>91</sup> Even though the permissible uses of PI under Act 80 were those that were aimed to benefit society, the Supreme Court nonetheless concluded that it is constitutionally impermissible to single out the ways in which information can and cannot be used, regardless of the state’s apparent benevolence in doing so. In light of this holding, the medical gag rule is not insulated from First Amendment scrutiny merely because it allows doctors to use the chemical formulas to address a pressing medical need. Finally, both Act 80 and the medical gag rule regulate the use of information that was obtained only by virtue of other laws mandating disclosure of the information.

Admittedly, Act 80 and the medical gag rule do differ from each other in significant ways. Most of the points on which the two laws differ, however, actually suggest that the medical gag rule deserves even greater scrutiny than Act 80 under the First Amendment. Act 80 inhibited borderline “commercial speech,” which has typically been viewed as deserving less constitutional protection than other types of speech. The Supreme Court nevertheless found it antithetical to the First Amendment.<sup>92</sup> The medical gag rule, on the other hand, appears to prohibit doctors from using the formulas disclosed to them for a much broader range of purposes, including scientific debate. The Natural Resources Defense Council explained that disclosure of the chemicals used in fracking is important because “[a] robust public disclosure regime is essential for scientific research that will provide a better understanding of the cumulative

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<sup>91</sup> Brief for Defendant Linda L. Kelly in Support of Motion to Dismiss at 6, *Rodriguez v. Krancer*, No. 12-1458 (M.D. Pa. Oct. 16, 2012), ECF No. 10.

<sup>92</sup> *See Cent. Hudson Gas & Electric Corp., v. Pub. Serv. Comm’n of NY*, 447 U.S. 557, 562-63 (1980) (explaining that the “Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression,” and establishing a separate and less demanding standard under which to analyze constitutionality of burden on commercial speech). Commercial speech is expression related solely to the economic interests of the speaker and its audience. *Id* at 561.

environmental and health effects of fracking and serve as a basis for well-informed policies to protect the public.”<sup>93</sup> Such a broad prohibition necessarily impedes at least two fundamental goals of free speech: the “marketplace of ideas” and the promotion of truth-seeking.

The other differences between Act 80 and the medical gag rule are subtle ones that do not bear on whether the First Amendment can or cannot be applied. For example, Act 80 directly banned certain uses of information by imposing civil penalties on anyone who violated its provisions, while the medical gag rule indirectly burdens speech via confidentiality agreement. However, the fact that a law indirectly burdens rather than directly bans speech is not material in determining whether the law is repugnant to the First Amendment.<sup>94</sup> Further, unlike Act 80, the medical gag rule was not accompanied by “legislative findings” in which the state expressed its disdain and distrust for certain uses of fracking fluids.<sup>95</sup> It is apparent, however, that these legislative findings were not necessary to the Court’s holding, for the Court mentioned the legislative findings only *after* concluding that “[t]he law on its face burdens disfavored speech by disfavored speakers.”<sup>96</sup> Thus, the fact that Pennsylvania’s legislature has not been as explicit

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<sup>93</sup> *State Hydraulic Fracturing Disclosure Rules and Enforcement: A Comparison*, NATURAL RESOURCES DEFENSE COUNSEL, <http://www.nrdc.org/energy/fracking-disclosure.asp>

<sup>94</sup> *United States v. Playboy Ent’mnt Group, Inc*

<sup>95</sup> To illustrate the nature of the legislative findings set forth by the Vermont legislature, an example of one of the findings is provided: “The marketplace for ideas on medicine safety and effectiveness is frequently one-sided in that brand-name companies invest in expensive pharmaceutical marketing campaigns to doctors. The one-sided nature of the marketing leads to doctors prescribing drugs based on incomplete and biased information, particularly for prescribers that lack the time to perform substantive research assessing whether the messages they are receiving from pharmaceutical representatives are full and accurate.” 2007 Vt. No. 80, § 1(4).

<sup>96</sup> *Sorrell* at 2663. The Court explains that although the “inevitable effect” of a law may render it unconstitutional without any examination of the state’s motive for enacting it, the Court may still consider a statute’s stated purposes. *Id.* (citing *United States v. O’Brien*, 391 US 367, 384 (1968)).

about its legislative intent as has Vermont's does not mean that a Court cannot find the medical gag rule unconstitutional based on its effect alone.

### **C. APPLYING STRICT SCRUTINY TO THE MEDICAL GAG RULE**

#### **i. Is Pennsylvania's Interest in Protecting the Fracking Industry's Trade Secrets a Compelling One?**

The Supreme Court has identified a compelling interest as one that is "of the highest order."<sup>97</sup> In fact, the rigorous standard a state must satisfy to show a compelling governmental interest is likely the reason why strict scrutiny is often described as "strict in theory and fatal in fact."<sup>98</sup> The question that must be answered is whether a state's interest in protecting trade secrets is compelling enough to justify infringement of free speech.

Both the states and the federal government have a long history of providing legal protection for trade secrets of companies and individuals. For example, 47 states, including Pennsylvania, and the District of Columbia have adopted statutes modeled after UTSA.<sup>99</sup> The few states that have not adopted UTSA continue to provide trade secret protection through the traditional common law of trade secrecy.<sup>100</sup> While the long tradition of trade secrecy law might seem to suggest that the government's interest in protecting trade secrets is of quite a "high order," an in-depth examination of trade secrecy doctrines reveals that trade secret protection is itself not

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<sup>97</sup> Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993)

<sup>98</sup> Gerald Gunter, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

<sup>99</sup> Melvin F. Jager 1 Trade Secrets Law § 3:29. The Uniform Trade Secrets Act was formed by the National Conference of Commissioners on Uniform State Laws in order to provide uniformity to the state common law of trade secrets. *Id.*

<sup>100</sup> *Id.*

absolute, so there is little reason to believe that trade secrecy interests are strong enough to trump First Amendment infringement.<sup>101</sup>

Unlike a patent, an owner's rights in his or her trade secret rights are not exclusive but are instead protected against appropriation only by "unfair or nefarious means," such as industrial espionage.<sup>102</sup> The Restatement (First) of Torts explains that with respect to a trade secret, an "actor is free to engage in any proper conduct for the very purpose of discovering the secret."<sup>103</sup> Among such proper means of discovering the secret explicitly listed in both the Restatement and the UTSA is reverse engineering, which involves "intentional access to another's product for the purpose of lawfully discerning what it is, how it was made, how it works, and what its advantages and limitations may be."<sup>104</sup> The law also allows discovery of the trade secret through independent lab research or inadvertent disclosure by the holder.<sup>105</sup> Further illustrating the flexibility of trade secret protection is the principle that "[a] privilege is likely to be recognized . . . in connection with the disclosure of information that is relevant to public health or safety, or to the commission of a crime or tort, or to other matters of substantial public concern."<sup>106</sup> For

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<sup>101</sup> This section of the Note will examine trade secrecy law largely by analyzing common-law doctrines. While the vast majority of states no longer follow the common law approach to trade secrecy, the principles embodied in the Restatements have persisted throughout most of the history of trade secret law and are for the most part preserved in the Uniform Trade Secret Act. See Dan L. Burk, *Misappropriation of Trade Secrets in Biotechnology Licensing*, 4 ALB. L.J. SCI. & TECH. 121, 125 ("The UTSA, however, relies on the Restatement definition and on the case law interpreting it.")

<sup>102</sup> Dan L. Burk, *Misappropriation of Trade Secrets in Biotechnology Licensing*, 4 ALB. L.J. SCI. & TECH. 121, 131 (explaining that an "[a]n exclusive property right, such as a patent, entails both the right to practice the invention and the right to exclude others from practicing the invention" while "[a] trade secret, by contrast, is not an exclusive right."); *Id.* at 125; *Id.* at 126.

<sup>103</sup> Restatement (First) of Torts §757 cmt g.

<sup>104</sup> Peter J. Courture page 618.

<sup>105</sup> Restatement (First) of Torts §757 cmt a.

<sup>106</sup> Restatement (Third) Unfair Competition cmt c. See also *Philip Morris, Inc v. Reilly* 312 F.3d

example, the Restatement (Third) of Unfair Competition notes that “[a] privilege is likely to be recognized . . . in connection with the disclosure of information that is relevant to public health or safety, or to the commission of a crime or tort, or to other matters of substantial public concern.”<sup>107</sup> Trade secrecy is subordinated even when the societal interests at stake are not constitutionally significant. The limits embedded in trade secrecy law are evidence that a state’s interest in protecting trade secrets is not unyieldingly imperative, at least to the degree that would justify infringing on First Amendment rights.

Not only must the state’s interest be a compelling one, but it must also be genuine.<sup>108</sup> That is, the purpose behind the law must actually be what the state claims it is. Even assuming *arguendo* that a court could find a state’s interest in protecting trade secrets a compelling one, it would likely not be satisfied that Pennsylvania’s purported interest, though compelling, is genuine. There is an abundance of evidence that the medical gag rule may have been the result of a political bargaining and nepotism for the natural gas industry. Act 13 was proposed by Pennsylvania’s House of Representatives, which is controlled by Republicans. It was signed into law by Pennsylvania’s Republican Governor Tom Corbett despite opposition from most House democrats.<sup>109</sup> Because many participants in the oil industry have made large contributions to the

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24 (appellants relying on the Restatement (First) of Torts §757 cmt d. to argue that the state of Massachusetts “has long established that in can require public disclosure of trade secrets to advance public health and safety.”)

<sup>107</sup> Restatement (Third) Unfair Competition cmt c. *See also* Philip Morris, Inc v. Reilly 312 F.3d 24 (appellants relying on the Restatement (First) of Torts §757 cmt d. to argue that the state of Massachusetts “has long established that in can require public disclosure of trade secrets to advance public health and safety.”)

<sup>108</sup> *See, e.g.,* Parents Involved in Community Schools v. Seattle School Dist. No 1, 551 U.S. 701, 755 (2007) (“neither of these plans can survive strict scrutiny because neither plan serves a *genuinely* compelling state interest) (emphasis added).

<sup>109</sup> *Senate Delays Marcellus Bill, House Republicans Field Governor's Proposals, Plus, PA ENVIRONMENT DIGEST* (Nov. 7, 2011), <http://www.paenvironmentdigest.com/newsletter/default.asp?NewsletterArticleID=20623>

political action committees of Governor Corbett and many Republican legislators, it is highly likely that the medical gag rule and other provisions favoring the fracking industry are the party's way of thanking the oil industry.<sup>110</sup> Doug Shields, Pittsburgh's City Council President, claims that Act 13 was essentially "written by the oil and gas industry" with an eye toward avoiding tort liability for spills, accidents, and health problems created by its fracking operations.<sup>111</sup> Shields explains that in particular, the medical gag rule is a huge advantage to fracking companies because "if the information is locked away behind confidentiality agreements," bringing a civil suit becomes extremely difficult.<sup>112</sup> In fact, by participating in the American Legislative Exchange Counsel ("ALEC"), many oil companies indeed authored many states' fracking laws, including those of Pennsylvania. ALEC is a conservative pro-business organization whose members consist of large corporations such as ExxonMobil, the country's largest producer of shale gas, and Republican legislators from various states.<sup>113</sup> One of ALEC's roles is drafting model bills "that broadly advance a pro-business, socially conservative agenda."<sup>114</sup> ALEC's model fracking bill, the "Hydraulic Fracturing Fluid Disclosure

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<sup>110</sup> Walter Brasch, *FRACKING Part 3: Corruption-a Part of Pennsylvania's Heritage* COMMONSENSE2.COM (Apr. 2012), <http://commonsense2.com/2012/04/naturalgasdrilling/fracking-part-3-corruption-a-part-of-pennsylvania%E2%80%99s-heritage/>; see also Sharon Guynup, *Fracking the Law*, DAILYCOMET.COM (Oct. 25 2012, 4:16 pm), <http://www.dailycomet.com/article/20121025/OPINION01/121029763?Title=Fracking-the-law> ("[t]he oil and gas industry has already handed at least \$30 million in 2012 campaign contributions to members of Congress and fossil fuel political action committees.").

<sup>111</sup> Steven Rosenfeld, *supra* note 50.

<sup>112</sup> Steven Rosenfeld, *supra* note 50.

<sup>113</sup> Sara Jerving, *ALEC's (Corporate) Love Affair with Fracking*, Common Dreams (Sept. 27, 2012), <https://www.commondreams.org/headline/2012/09/27-7>; Cora Currier, *supra* note 8.

<sup>114</sup> Mike McIntire, *ALEC, a Tax-Exempt Group, Mixes Legislators and Lobbyists*, NYTimes.com (Apr. 21, 2012), [http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?\\_r=1&ref=politics](http://www.nytimes.com/2012/04/22/us/alec-a-tax-exempt-group-mixes-legislators-and-lobbyists.html?_r=1&ref=politics).

Composition Act”, was adopted by several states that regulate fracking, including Pennsylvania.<sup>115</sup>

**ii. Even if a Court were to Find that Pennsylvania’s Interest in Providing Trade Secret Protection is Both Compelling and Genuine, Is the Medical Gag Rule Narrowly Tailored to Serve that Interest?**

A trade secret is “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.”<sup>116</sup> Trade secret laws “punish industrial espionage and deny competitors an advantage they have obtained by unfair means.”<sup>117</sup> Trade secret law is thus aimed largely at preventing commercial exploitation of a party’s economically valuable trade secret—hence why trade secret law “requires a level of culpability”, while copyright and patent infringement are strict liability offenses.<sup>118</sup>

Despite the culpability requirement of trade secret law, there is no language in the medical gag rule that limits it to situations in which the recipient poses an economic threat. It is highly unlikely that health care providers want to sell or use the chemical formulas for unfair economic purposes.<sup>119</sup> Instead, as stated by Rodriguez in his complaint, doctors want to use the information they obtain from the companies to “alert the public, in the broadest possible manner,

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<sup>115</sup> See *Wynn*, supra note \_\_\_\_\_. The model act can be viewed here: [http://www.eenews.net/assets/2012/05/01/document\\_ew\\_01.pdf](http://www.eenews.net/assets/2012/05/01/document_ew_01.pdf)  
[http://www.eenews.net/assets/2012/05/01/document\\_ew\\_01.pdf](http://www.eenews.net/assets/2012/05/01/document_ew_01.pdf)

<sup>116</sup> Restatement (Third) of Unfair Competition §39 (1995).

<sup>117</sup> *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 749.

<sup>118</sup> Samuelson at 786. See also Restatement (Third) of Unfair Competition § 40 cmt. C (1993) (explaining that an individual may have a “privilege to disclose another’s trade secret” depending upon “the purpose of the disclosure”, among other circumstances.).

<sup>119</sup> Samuelson notes that “the mere absence of competitive uses should not, of itself, lead courts to deny preliminary injunctions,” but “the absence of competitive use makes these kinds of trade secret cases different from the ordinary claim and so closer scrutiny of the claim . . . is warranted.” Samuelson, supra note 3, at 815, n. 232.

of known dangers posed by high-volume [fracking], and the . . . health risks imposed on the community.”<sup>120</sup> The fact that Rodriguez wants to disclose the information to the public at large further weakens any threat of economic exploitation. As Pamela Samuelson explains, “misappropriators generally have the same interest as the secret’s developer in maintaining secrecy” for two reasons: (1) misappropriators want to reap full benefit from free-riding on the trade secret by excluding other companies from using it, and (2) revealing secrets to the public would increase the likelihood of detection by the owner of the trade secret.<sup>121</sup> The medical gag rule therefore reaches an unnecessarily broad class of actors to achieve its goal of protecting trade secrecy in light of the minimal threat posed by doctors to whom economically valuable information is disclosed.

Not only is the medical gag rule overly broad and inaccurate with regard to the type of actors it targets, but it is also overly broad with regard to the information it seeks to protect. That is, the medical gag rule reaches information that is unlikely to be considered a trade secret under relevant law. To illustrate, current Pennsylvania law provides that “the crucial indicia for determining whether certain information constitutes a trade secret are ‘substantial secrecy’ and ‘*competitive value to the owner*’.”<sup>122</sup> This view is also embraced by most states and the Restatement (Second) of Torts.<sup>123</sup> As to whether the chemical composition of fracking fluids is substantially secret, according to Rodriguez, the “general ‘recipe’ of hydraulic fracturing fluid is common knowledge within the gas drilling industry.”<sup>124</sup> Additionally, Phil Rossi, attorney for Dr. Rodriguez, has said that the chemical formulas have “nothing to do with proprietary

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<sup>120</sup> Complaint ¶ 58.

<sup>121</sup> Samuelson, *supra* note 3, at 781-2

<sup>122</sup> *Shepherd v. Pittsburgh Glass Works, LLC* 25 A.3d 1233, 1244 (Pa. Super. Ct. 2011) (emphasis added).

<sup>123</sup> Restatement (Second) of Torts §757 cmt b.

<sup>124</sup> Complaint at ¶¶ 23, 25.

information,” and “none of [it] is secret to the people in the industry.”<sup>125</sup> It is unlikely that a competitor would benefit from learning the chemical composition of a particular fracking fluid because “[d]ifferent shale formations, and even different well sites within one formation, may require different chemicals.”<sup>126</sup> Thus, any competitor who learned the composition of a fracking fluid used in one operation could not that formula in other wells. Further, revealing a mere list of chemical ingredients would not be the same as revealing a chemical formula, so the threat of free-riding on another company’s invention is virtually non-existent. To be sure, there may exist some circumstances in which a fracking fluid’s formula constitutes a valuable trade secret. The problem with the medical gag rule, however, is it is not narrowly tailored to reach only those types of circumstances. Despite the medical gag rule’s constitutional infirmities, fracking companies may have a property interest in their chemical formulas that trumps any competing free speech concern.

### **PART III: Balancing Property Rights and Free Expression**

A common defense of trade secret exemptions in disclosure laws is that they prevent the trade secret holder from asserting a constitutional-takings claim against the government.<sup>127</sup> In her brief, the Attorney General asserts that the medical gag rule is necessary to safeguard “the legitimate property rights of companies and individuals who have a vested right in maintaining

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<sup>125</sup> Elizabeth Skrapits, *AG Seeks Dismissal of ‘Gag Rule’ Lawsuit*. CITIZENVOICE.COM (Oct. 17, 2012), <http://citizensvoice.com/news/ag-seeks-dismissal-of-gag-rule-lawsuit-1.1389165>

<sup>126</sup> *Wiseman* at 11 (citing Ground Water Prot. Council, U.S. Dep’t of Energy, *Modern Shale Gas Development in the United States: A Primer* 62 (2009), available at [www.netl.doe.gov/technologies/oil-gas/publications/EPreports/Shale\\_Gas\\_Primer\\_2009.pdf](http://www.netl.doe.gov/technologies/oil-gas/publications/EPreports/Shale_Gas_Primer_2009.pdf); see also Earthjustice Petition, *supra* note 22, at 2.

<sup>127</sup> See Elizabeth A. Rowe, *Striking a Balance: When Should Trade-Secret Law Shield Disclosures to the Government?*, 96 IOWA L. REV. 791, 800 (2011).

secrecy over techniques and products they have developed.”<sup>128</sup> The Attorney General’s argument, however, is problematic for two reasons: (1) having concluded above that the law is violative of First Amendment rights, it must be established that such rights are limited by property rights and (2) even if that is established, fracking companies have relinquished the trade secrecy status of their fracking fluids and thus no longer have a property right therein.

### **A. DO PROPERTY RIGHTS IN TRADE SECRETS TRUMP FIRST AMENDMENT RIGHTS?**

While courts have “shown a special solicitude for the guarantees of the First Amendment, th[e] Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.”<sup>129</sup> More specifically, the right to “exclude third parties from accessing, using or interfering with the property” is a “a basic component of a free society”.<sup>130</sup> Thus, two prominent constitutional law professors have noted that “when free speech claims are weighed in the balance, property interests determine on which side of the scales ‘the thumb of the Court’ will be placed.”<sup>131</sup> While it has been firmly established that, at least with respect to real property, the

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<sup>128</sup> Brief for Defendant Linda L. Kelly in Support of Motion to Dismiss at 9-10, *Rodriguez v. Krancer*, No. 12-1458 (M.D. Pa. Oct. 16, 2012), ECF No. 10

<sup>129</sup> *Lloyd Corp., LTD v. Tanner*, 407 U.S. 551, 568 (1972).

<sup>130</sup> Andrew Beckerman-Rodau, *Prior Restraints and Intellectual Property: The Clash Between Intellectual Property and the First Amendment from an Economic Perspective*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 64, 7.

<sup>131</sup> Norman Dorsen & Joel M. Gora, *Free Speech, Property, and the Court: Old Values, New Balances*, 1982 SUP. CT. REV. 195. See also Mark Cordes, *Property and the First Amendment*, 31 U. RICH. L. REV. 1, 35 (“The combined result of [*Lloyd Corp., Ltd v. Tanner*, 407 U.S. 551 (1972)] and [*Hudgens v. N.L.R.B.*, 424 U.S. 507 (1976)] is to place a property owner's right to exclude others above First Amendment concerns in almost all cases.”).

scale weighs in favor of property rights, it is much less settled whether the same holds true for *intangible* property rights (i.e., intellectual property).<sup>132</sup>

The debate among scholars on this topic has arisen in the context of preliminary injunctive relief for disclosure of informational trade secrets. Preliminary (and permanent) injunctions are “routinely utilized to protect property interests.”<sup>133</sup> It is unusual that a preliminary injunction involving real or tangible property would conflict with free speech because such injunctions usually target conduct rather than speech. Thus, because of the similarities between real property and copyrights and trademarks, preliminary injunctions are often permitted in such disputes without any First Amendment concern.<sup>134</sup> Other the other hand, in actions for libel, obscenity, and other kinds of unprotected speech, preliminary injunctions are virtually forbidden because they may “temporarily suppress speech that ultimately proves to be protected” since they are issued before the case is decided on the merits.<sup>135</sup> This presumption against granting preliminary injunctions where speech is involved is known as the “prior restraint doctrine.”<sup>136</sup> Damage caused by injurious speech such as defamation and libel is therefore

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<sup>132</sup> See Samuelson at 778 (“there is no consensus in the caselaw or law review literature about whether trade secrets are categorically immune (or nearly so) from First Amendment scrutiny and whether preliminary injunctions forbidding disclosure of informational secrets should be considered prior restrains on speech.”).

<sup>133</sup> Beckerman-Rodau at 2.

<sup>134</sup> Mark A. Lemley & Eugene Volokh, *Freedom Of Speech And Injunctions In Intellectual Property Cases*, 48 DUKE L.J. 147, 150 (1998) (“in copyright cases. . . preliminary injunctions are granted pretty much as a matter of course, even when the defendant has engaged in creative adaptation, not just literal copying.”)

<sup>135</sup> Lemley & Volokh at 211. As Professors Lemley and Volokh explain, this risk exists because of the nature of preliminary injunctions. That is, in order to grant a preliminary injunction, a court “need not conclude that the plaintiff is 95% likely to succeed on the merits, or even 51% likely.” *Id.* at 200. See also Martin A. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 Va. L. Rev. 53, 53 (“[A] prior restraint must often restrict *all* relevant expression, whether or not fully protected, while the adjudicatory body determines whether the expression should be subjected to a final restraint.”).

<sup>136</sup> See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 91 (

redressed *post hoc* through an action for damages. The constitutionality of preliminary injunctions in trade secret disputes is less clear than the two extremes presented by property interests and injunctions restricting injurious speech. Like confidentiality agreements, preliminary injunctions restrain the future use and disclosure of trade secrets.

One side of the debate argues that trade secret claims and remedies, including preliminary injunctions, are immune from First Amendment scrutiny. The arguments in support of this view echo the notion that property interests trump free speech. Professor Beckerman-Rodau argues that disclosure of a trade secret is “analogous to trespassing on real property.”<sup>137</sup> Thus, he argues that the need to preserve “the private property interest embodied in a trade secret” via preliminary injunction justifies any incursion on speech.<sup>138</sup> Professor Richard Epstein, another proponent of this view, explains that “[t]he suppression of the publication of stolen information does nothing to hamper the critic from denouncing any firm that chooses to preserve its trade secrets, or to chide any government agency for its lackluster enforcement of the general law” and therefore “the private interests against disclosure seem manifestly to outweigh the public interest for disclosure.”<sup>139</sup> He also argues that restricting disclosure of trade secrets, at least those of regulated industries, is not harmful to society. For example, the EPA and other agencies, although forbidden to disclose them to public, has access to the trade secrets of many industries and can examine them for any harmful effects it may have on health or the environment.<sup>140</sup> Similarly, Professor Beckerman-Rodau argues that rights of exclusion, and thus,

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<sup>137</sup> Beckerman-Rodau at 64-5.

<sup>138</sup> Beckerman-Rodau at 67.

<sup>139</sup> Epstein at 1043-44.

<sup>140</sup> Epstein at 1041.

preliminary injunctions, are as (if not more) important for trade secrets as they are for real property because of the need to preserve incentives to invest in innovation.<sup>141</sup>

This view is not without supporting case law. In *DVD Copy Control Ass'n, Inc. v. Bunner*,<sup>142</sup> the California Supreme Court reversed the appellate court's decision that a preliminary injunction to prevent disclosure of trade secrets was unconstitutional under the First Amendment. The appellate court had decided that the injunction was a restraint on "pure speech" and the presumption against it could only be overcome by "an interest more fundamental than the First Amendment itself."<sup>143</sup> The California Supreme Court agreed with the lower court that the speech at issue was in fact protected by the First Amendment, but held that "[t]he First Amendment does not prohibit courts from incidentally enjoining speech in order to protect a legitimate property right."<sup>144</sup> Despite scattered examples of cases like *Bunner*, the application of the property-trumps-First-Amendment doctrine to trade secrets has never been explicitly adopted by the Supreme Court and has been criticized by scholars.<sup>145</sup>

Critics of the approach described above believe that analogizing intellectual property to tangible property is not enough to avoid the First Amendment dangers posed by preliminary

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<sup>141</sup> Beckerman-Rodau at 5.

<sup>142</sup> 31 Cal. 4th 864

<sup>143</sup> *DVD Copy Control Ass'n v. Bunner*, 113 Cal. Rptr. 2d 338, 351. (2001) (GIVE SUBSEQUENT HISTORY)

<sup>144</sup> *DVD Copy Control Ass'n v. Bunner* at 14. *See also* Samuelson, *supra* note 3, at 804 ("the importance of the trade-secrets-as-property rights argument . . . is evident from the more than twenty references to property rights in core parts of Justice Brown's First Amendment analysis.").

<sup>145</sup> *See* Samuelson, *supra* note 3, at 811 ("leading intellectual property scholars have argued that courts have been too quick to grant preliminary injunctions in . . . trade secret cases and insufficiently sensitive to free speech considerations, in large part because they have relied too heavily on the weak crutch of the property rights metaphor"); *see also* Mark A. Lemley & Eugene Volokh, *Freedom Of Speech And Injunctions In Intellectual Property Cases*, 48 DUKE L.J. 147, 229-31; David Greene, *Trade Secrets, The First Amendment, And The Challenges Of The Internet Age*, 23 HASTINGS COMM. & ENT. L.J. 537, 552055 (2001).

injunctions in intellectual property disputes. Professors Lemley and Volokh argue that even if one accepts that copyrights, patents, and trade secrets are equivalent to tangible property, preliminary injunctions in intellectual property cases are nevertheless “content-based” restrictions “specifically targeted at speech” and thus raise free speech concerns.<sup>146</sup> Professors Lemley and Volokh argue that copyrighted material and trade secrets often consists of “socially significant” speech involving art, entertainment, comedy, and political speech, the restriction of which is repugnant to free speech values.<sup>147</sup> Aside from scholarly discourse supporting this view, there is some case law favoring this approach. For example in *Ford Motor Co. v. Lane*,<sup>148</sup> the court found that a preliminary injunction restricting defendant from publishing Ford’s trade secrets would be an invalid prior restraint of free speech in violation of the First Amendment. In *Ford*, defendant got a hold of Ford’s trade secrets through anonymous sources and published them on his website. Even though the court conceded that defendant’s actions likely violated trade secret law, it held that Ford’s commercial interest in its trade secrets was not to justify a prior restraint on free speech.

Even if one were to take the side of the debate more favorable to fracking companies and argue that trade secrets are property interests whose preservation justifies free speech incursion, fracking companies may have lost the property interest in their trade secrets.

## **B. Do Fracking Companies Possess a Property Interest in Their Trade Secrets?**

In *Ruckelshaus v. Monsanto*,<sup>149</sup> the Supreme Court explicitly recognized trade secrets as a form of property protected by the Fifth Amendment “takings” clause if the particular state in

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<sup>146</sup> Lemley & Volokh at 183.

<sup>147</sup> Lemley & Volokh at 187-88.

<sup>148</sup> 67 F. Supp. 2d 745 (E.D. Mich. 1999)

<sup>149</sup> 467 U.S. 986 (1984).

which the entity operates recognizes a trade secret as a cognizable property interest.<sup>150</sup>

Pennsylvania law has long embraced the view that “protection for trade secrets derives in the first instance from their status as a species of intellectual property, rather than from the relationship between the parties.”<sup>151</sup> However, if the chemical formulas of fracking fluids do not meet the legal requirements of trade secret status, there is no property right sufficient to justify free speech curtailment. Further, if the chemical formulas were initially true trade secrets, the property right in those trade secrets was possibly “extinguished” based on the Supreme Court’s analysis in *Monsanto*.

Information does not qualify for protection under either common law trade secrecy or PUTSA unless the information is actually a secret.<sup>152</sup> The secrecy requirement illustrates the rationale underlying trade secret law, which is to provide maximum economic return for innovating by preventing others from capturing that return. As discussed in Part II, Section C, Pt. ii, *supra*, there is at least some question as to whether the chemical composition of fracking fluids is legitimately secret. If that is true, then the medical gag rule cannot be viewed as an acceptable incursion on free speech, even if the property-trumps-free speech view is accepted.

## **PART VI: IMPROVING THE MEDICAL GAG RULE**

There is no doubt that trade secrets need protection. Ordinary trade secret laws “enable businesses to enter into good faith transactions, form stable relationships, and share confidential

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<sup>150</sup> *Monsanto* at 1003-04.

<sup>151</sup> *Sims v. Mack Truck Corp.* 488 F.Supp 592 at 598 (E.D.Pa. 1980)

<sup>152</sup> *See* Restatement (First) Torts §757 cmt b (“[m]atters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret.”); *See also* *Bimbo Bakeries USA, Inc. v. Botticella*, 613 F.3d 102 (C.A. 3 Pa 2010) (stating that among one of the factors Pennsylvania courts look to in determining whether information is protected as a trade secret is “the extent to which the information is known outside of the company’s business.”).

information, which in turn assists in product development.”<sup>153</sup> In other words, protection from competitive harms provides an incentive for innovation, and innovation is essential to society. However, as much as innovation benefits society, so does free speech. A balance must therefore be struck between the clear need for trade secret protection and the equally essential need for dissemination of information. Where there is no real threat of competitive harm or taking of property posed by trade secret disclosure, free speech should not be inhibited. Because the medical gag rule as currently written has the potential to interfere with free speech rights without a compelling property right, the law must be changed to avoid unconstitutional incursions on free speech. There are two major changes that could eliminate the constitutional infirmities of the medical gag rule: requiring trade secret substantiation and tailoring the scope of the confidentiality agreement.

#### **A. Trade Secret Substantiation**

Trade secret substantiation is crucial to determining the legitimacy of restricting disclosure. Professor Elizabeth Rowe has come up with a model for striking the balance between trade secret protection and public interest. Trade secret substantiation is the first step in Professor Rowe’s “shield-or-disclose” model, because the question of whether the information in question meets the status of a trade secret “could be determinative of the entire issue of disclosure because if the information is not a trade secret, then that significantly weakens the argument against disclosure.” Trade secret substantiation ensures that competitive harm would actually result to the company upon disclosure, which is “in keeping with trade-secret law’s focus on protecting against unfair competition.”<sup>154</sup> Thus, the medical gag rule should require a company to

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<sup>153</sup> *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 749 (E.D. Mich. 1999).

<sup>154</sup> Elizabeth A. Rowe, *Striking a Balance: When Should Trade-Secret Law Shield Disclosures to the Government?*, 96 IOWA L. REV. 791, 829-30.

substantiate its trade secret claim. This is not a novel proposal for fracking laws—in March, 2012, Earthjustice, a non-profit environmental law firm, filed a lawsuit against the Wyoming Oil and Gas Conservation Commission (“WOGCC”), arguing that regulators are rubber-stamping trade secret requests without looking into their merits. Earthjustice asked the court to “[s]et aside WOGCC’s approval of insufficiently supported and overly broad trade secret . . . exemptions.”<sup>155</sup> Some of the states with fracking disclosure laws that exempt trade secrets have included some form of substantiation mechanism. For example, although Colorado “considered and rejected a trade secrets regime that would have required the COGCC to review and approve all trade secret claims”,<sup>156</sup> Colorado’s fracking law “allows an adversely affected individual to notify the COGCC [Colorado Oil and Gas Conversation Commission] if they believe that a trade secret claim is invalid” and the COGCC will order the company to “substantiate the validity of its claim.”<sup>157</sup> If the aggrieved individual disagrees with the COGCC’s determination or the COGCC declines to bring any action, that individual could “seek judicial review.”<sup>158</sup> In fact, the COGCC may choose resolution by the court, “which should have more experience, and better procedural tools and protections.”<sup>159</sup> Similarly, Texas’s fracking law allows a state agency or a landowner on whose property the well is located or adjacent to “challenge a claim of entitlement to trade secret protection.”<sup>160</sup>

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<sup>155</sup> Complaint for Declaratory Relief at ¶ 3. A Wyoming Judge began hearing oral arguments in the case on January 22, 2013, and the state moved for dismissal. The judge has not yet reached a ruling to date.

<sup>156</sup> Proposed Statement of Basis, Specific Statutory Authority, and Purpose, Additions to 200 Series Rules: Rule 205A., Hydraulic Fracturing Chemical Disclosure <http://cogcc.state.co.us/orders/orders/1R/114.html>

<sup>157</sup> 2 ccr 404-1: Appendix I.

<sup>158</sup> 2 ccr 404-1: Appendix I.

<sup>159</sup> 2 C.C.R. 404-1: Appendix I.

<sup>160</sup> V.T.C.A § 91.851(a)(5).

While limiting trade secret claims by substantiation provides some hope that the states are not handing over the reigns to the oil industry, they are still not the most sufficient way to cure unsubstantiated trade secret claims. Litigation is an extremely expensive process, so it is unlikely that an individual would go through the expense and hardship of challenging an oil company's trade secrecy claim. Without proper substantiation of trade secret claims, the medical gag rule and laws like it restrain speech without any certainty that doing so is at all necessary. The more comprehensive approach to trade secret substantiation taken by the federal government provides a more promising means of avoiding needless speech incursion.

The EPA has been proactive in cracking down on trade secret claims.<sup>161</sup> The EPA's recent regulations under the Toxic Substances Control Act ("TSCA") illustrate the federal government's improved posture towards trade secrets. Under the TSCA, the EPA makes the final determination about whether the information is entitled to confidential treatment.<sup>162</sup> TSCA regulations now provide that any person asserting a claim of confidentiality for a reportable chemical substance under the Chemical Data Reporting Rule of the TSCA must substantiate that claim, providing "detailed written answers" to questions such as:

- (i) What harmful effects to your competitive position, if any, or to your supplier's competitive position, do you think would result from the identity of the chemical substance being disclosed in connection with reporting under this part? How could a competitor use such information? Would the effects of disclosure be substantial? What is the causal relationship between the disclosure and the harmful effects?

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<sup>161</sup> See, e.g., *Increasing Transparency in TSCA*, <http://www.epa.gov/oppt/existingchemicals/pubs/transparency.html>

<sup>162</sup> See 40 CFR §2.205(a)(1)

...

- (iv) Has the identity of the chemical substance been kept confidential to the extent that your competitors do not know it is being manufactured or imported for a commercial purpose by anyone?

...

- (ix) If the chemical substance leaves the site in a product that is available to the public or your competitors, can the chemical substance be identified by analysis of the product?<sup>163</sup>

These substantiation questions go straight to the heart of classical trade secret principles, and ensure that free speech and public health are not jeopardized by a company's mere desire to avoid bad publicity. Essentially, these questions embody a sort of mini-adjudication that would have taken place if a company were bringing a claim for misappropriation under state or federal trade secrecy law. Pennsylvania should adopt similar substantiation questions for trade secret status.

### **B. Standard Forms for Confidentiality Agreements**

Substantiating the trade secret claim is only the first step to ensuring that the medical gag rule does not unreasonably restrict free speech and endanger public health. In addition to imposing substantiation requirements, the medical gag rule should better define and tailor the terms of the confidentiality agreement it endorses. Colorado's fracking law requires that the confidentiality agreement between a health care provider and an oil company must be exclusively embodied in a

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<sup>163</sup> 40 CFR 711.30

standard form provided in the appendix of the statute, known as “Form 35.”<sup>164</sup> However, Form 35 merely makes explicit what is otherwise presumed in the medical gag rule—it prohibits health providers from disclosure for any reason other than the specific health needs asserted.<sup>165</sup> That means that disclosure for research on health issues at large, public debate, or other socially valuable purposes is still forbidden. Professor Rowe’s model would allow for disclosure whenever “the health and safety of the public . . . outweigh any competitive harm that the proprietor of the trade secret may suffer.”<sup>166</sup> This approach is more consistent with the First Amendment, because it permits a much wider range of uses for the information disclosed. To be sure, Colorado is on the right track with providing a standard form for its confidentiality requirements—however, the scope of confidentiality is more than is needed under ordinary trade secret law.

The standard form confidentiality agreement should prohibit only the type of disclosures and conduct that would impair the value of a company’s trade secrets. For example, Pennsylvania would provide in its standard confidentiality agreement form that a health provider is prohibited from using the information in any manner that violates PUTSA. In an attempt to be even more specific, the form should incorporate the provisions of PUTSA or at least include them by reference. These provisions would render the medical gag rule constitutional—by only prohibiting misconduct instead of protected speech, the law would be narrowly tailored to achieve the goal of adequate trade secret protection.

The proper balance between trade secret protection and free speech can be reached in Pennsylvania’s fracking disclosure law by drawing on the principles underlying ordinary trade

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<sup>164</sup> 2 COLO. CODE REGS. § 404-1:205A(b)(5) (2012). Form 35 can be found at [http://cogcc.state.co.us/forms/PDF\\_Forms/Form41\\_05312012.pdf](http://cogcc.state.co.us/forms/PDF_Forms/Form41_05312012.pdf)

<sup>165</sup> See 2 COLO. CODE REGS. § 404-1:205(e).

<sup>166</sup> See Rowe at 834.

secret law. The implementation of a substantiation process and a tailored confidentiality agreement will ensure that fracking companies will not be harmed by disclosure of cutting-edge technologies that give them a competitive advantage; at the same time, implementing these measures will eliminate the danger that free speech, and more importantly public health, will not be jeopardized the misguided purpose of protecting large companies from liability.

### **C. Qualified Transparency**

Finally, fracking disclosure laws can adopt a system of “qualified transparency” to ensure that trade secrets are protected, but not to the extent that jeopardizes public health. Professor Frank Pasquale created the idea of qualified transparency in response to prevalent secrecy in cyberspace. Internet intermediaries employ certain algorithms to “monitor and track what users do” and “generate reputations based on that data.”<sup>167</sup> Intermediaries also threaten competition by skewing the types of advertisements that it allows to appear on any given search, dependent upon a deal made with a specific entity. These practices raise concerns about privacy, discrimination, and unfair or deceptive practices in advertising, marketing, and sales. These concerns are heightened in light of the fact that “consumers lack . . . the ability to detect such manipulation.”<sup>168</sup> However, it is virtually impossible to determine whether a given intermediary is engaging in practices that could constitute a violation of privacy or consumer protection law because their algorithms are protected trade secrets. Just as trade secrecy in the fracking industry is defended as an incentive for innovation, so too is secrecy of internet algorithms: innovation is needed for things like search engine algorithms and spam detection. The solution to this dilemma, explains Professor Pasquale, is qualified transparency. Under qualified transparency of

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<sup>167</sup> Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 *Northwestern L. Rev.* 105, 112.

<sup>168</sup> Pasquale at 156.

internet intermediaries, a self-regulatory council would be formed, consisting of lawyers, “engineers, and programmers who could fully understand the technology affecting data, ranking, and traffic management practices.”<sup>169</sup> The council would follow up on complaints made by the public, and only involve the Federal Trade Commission or Federal Communications Commission when. This approach is preferred over regulation by the Federal Trade Commission or the Federal Communications Commission because “only a dedicated group of engineers, social scientists, attorneys, and computer scientists are likely to understand particular complaints” about the actions of intermediaries, and the risks of disclosure of trade secrets are decreased.<sup>170</sup>

While the idea of qualified transparency was spawned in the context of the internet, it is easily applied to the similar dilemma posed by the fracking industry, albeit with some nuances.<sup>171</sup> A council of scientists, doctors, lawyers, and engineers could be assembled. Disclosure of practices and formulas would be made to this council instead of the public, but it would accomplish many of the goals that public disclosure aspires to achieve. The council’s doctors and scientists could determine the magnitude of harm posed to the public, while the engineers, on the other hand, could properly evaluate the genuineness of competitive harm posed to fracking companies. Thus, a more accurate, realistic balance would be struck by the expert council than would be by a state agency evaluating trade secret claims, all while maintaining the integrity of trade secrets. Qualified transparency should be combined with trade secret

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<sup>169</sup> Pasquale at 169.

<sup>170</sup> Pasquale at 170-71. Pasquale declined to specify whether the council would be a governmental or private entity. *Id.* at 169.

<sup>171</sup> See Pasquale at 163 (“Undisclosed intermediary practices are a species of a larger genus of problems related to trade-secret-protected innovation”).

substantiation to determine the precise amount of disclosure and secrecy needed to adequately protect the competing interests at stake.

## CONCLUSION

While trade secrecy is generally beneficial to innovation and thus to society, the medical gag rule uses trade secrecy much to the detriment of society. Not only does granting fracking formulas the dubious status of “trade secret” unjustifiably curtail free and important speech, but it endangers the health of citizens. These harms are so grave that they would be hard to justify *even if* fracking formulas could fairly be characterized as trade secrets. Stimulating economic prosperity and innovation, while certainly important, cannot come at the price of society’s well-being. In drafting the medical gag rule, the Pennsylvania legislature, and other states with similar provisions, has simply not struck the proper balance between trade secret protection and societal interests. The changes proposed in this Note reflect a more realistic and disinterested balance and will leave neither the fracking companies nor citizens in a worse-off position than they would be without the changes. Of course, fracking companies would likely be exposed to greater tort liability, but this can hardly be viewed as a negative effect. The net effect of eliminating the virtually immunity to liability that fracking companies enjoy will be to encourage more responsible and cautious operations. If the legislature declines to make these necessary changes on its own—a likely scenario in light of the nepotism to the industry—the First Amendment exists as a strong ground upon which the law can be successfully challenged for the reasons discussed throughout this Note.