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Abstract

Presentation Title

Trade Secret Prices And High-Tech Devices: How Medical Device Manufacturers Are Seeking To Sustain Profits By Propertizing Prices

Presenter's Name and Contact Information

Annemarie Bridy
Associate Professor of Law
University of Idaho College of Law
P.O. Box 442321
Moscow, ID 83844-2321
Tel: 208.885.7056
E-mail: abridy@uidaho.edu

Abstract

The business practices of medical device manufacturers have come under increasing legal and media scrutiny over the last several years, following a spate of product recalls that precipitated hundreds of class action product liability lawsuits beginning in 2004. Compared to stories of prematurely failing defibrillator batteries and unwanted surgical explants of pacemakers containing faulty seals, the modest headline in the November 17, 2007 Business Section of *The New York Times* announcing the eleventh-hour settlement of a lawsuit between Boston Scientific (formerly the Guidant Corporation) and the ECRI Institute promised nothing in the way of drama. Behind the ho-hum headline, however, is an important legal story about the quietly expanding scope of trade secrecy and the ways in which that expansion might contribute to the unsustainably rising cost of healthcare.

As Richard Epstein has noted, the law of trade secrets has taken a back seat to copyrights and patents in the explosion of scholarship on intellectual property issues in recent years. While scholars concerned for the future of the public domain have argued forcefully and persuasively against the continuing expansion of rights – both in scope and duration – for holders of copyrights and patents, they have said little about the corresponding “creep” that has been occurring in the law of trade secrets. The Guidant-ECRI settlement is a prime example both of how this creep is occurring and how it may

succeed, if not through the creation of legal precedent, then through the creation of a litigation-induced chilling effect on the sharing of information that is alleged, though never proven, to be a trade secret.

The Guidant story is, in reality, a tale of two lawsuits – not just one. In both, the Guidant Corporation, a leading manufacturer of implantable cardiac rhythm management (CRM) devices, advanced the novel legal theory that the invoice prices paid by hospitals for individual CRM devices are protectable as trade secrets. According to this theory, Guidant acquires new intellectual property rights in business information every time it sells a device. Both lawsuits settled on undisclosed terms following the denial of cross-motions for summary judgment on Guidant’s trade secret claims, leaving the current state of the law on price secrecy under the Uniform Trade Secrets Act (“UTSA”) murky.

What is at stake for device manufacturers like Guidant in the legal transformation of individual device prices into intellectual property is the perpetuation by new means of an imperfectly competitive and highly profitable device market that has historically been all but indifferent to price. What is at stake for hospitals, and indirectly for third-party payers and patients, is the ability of buyers in the healthcare marketplace to bring basic comparative price information to bear in high-cost purchasing negotiations and decisions.

The Guidant litigation demonstrates that whether device prices can be trade secrets as a matter of law is more than a doctrinal question about the proper scope of intellectual property rights; it is also a healthcare policy question, the answer to which may directly impact national healthcare spending over the coming decades. Through analysis of the evolution of trade secret doctrine, Guidant’s trade secret claims, the peculiar price dynamics of the CRM device market, and the implications of price secrecy for health policy, this presentation will advance the argument that trade secret protection for medical device prices should be precluded as a matter of substantive trade secret law.