

**Texas Intellectual Property Law Journal**  
Winter 2009

Article

**TRADE SECRET PRICES AND HIGH-TECH DEVICES: HOW MEDICAL DEVICE MANUFACTURERS ARE  
SEEKING TO SUSTAIN PROFITS BY PROPERTIZING PRICES**

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**I. Introduction**

The business practices of medical device manufacturers have come under increasing scrutiny over the last several years following a spate of product recalls that precipitated hundreds of class action product liability lawsuits starting around 2004.<sup>1</sup> When compared with stories of prematurely failing defibrillator batteries \*188 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<sup>2</sup>) and the Emergency Care Research Institute (ECRI) promised nothing in the way of drama.<sup>3</sup> 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 health care.

As Richard Epstein has noted, trade secrets have taken a back seat to copyrights and patents in the explosion of scholarship on intellectual property issues in recent years.<sup>4</sup> 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.<sup>5</sup> The Guidant-ECRI litigation is a prime example of both 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. Because the case settled before a decision on the merits of Guidant’s novel claim that the prices paid for its cardiac rhythm management (CRM) devices are trade secrets, the legality of sharing device prices remains indeterminate, and the practice of sharing them is therefore fraught with risk for Guidant’s hospital customers and the consultants who advise them.

What is at stake for device manufacturers like Guidant in the legal transformation of device prices into intellectual property is the perpetuation by new means of an imperfectly competitive and highly profitable market for implantable \*189 devices that

has historically been all but indifferent to price.<sup>6</sup> What is at stake for hospitals, and indirectly for third-party payers and patients, is the ability of buyers in the health care marketplace to bring basic comparative price information to bear in high-cost purchasing negotiations and decisions. The Guidant litigation thus 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 health care policy question, the answer to which may directly impact national health care spending over the coming decades. Through analysis of Guidant's trade secret claims, the evolution of trade secret doctrine, the peculiar price dynamics of the market for CRM devices, and the implications of price secrecy for health policy, this Article advances the argument that trade secret protection for medical device prices should be precluded as a matter of both trade secret law and health law.

## II. A Tale of Two Lawsuits: Guidant Presses the Case for Secret Prices

The Guidant story is, in reality, a tale of two lawsuits, not just one. In both, Guidant, one of the three leading U.S. manufacturers<sup>7</sup> of CRM devices--a category that includes implantable pacemakers, defibrillators, and cardiac resynchronization therapy devices (CRT-Ds)<sup>8</sup>--brought claims for misappropriation of trade secrets based on the disclosure of information relating to prices paid by hospitals for its devices.<sup>9</sup> Guidant brought the first lawsuit in Minnesota against Aspen Healthcare Metrics (Aspen), a health care consulting company that advises hospital clients on supply purchasing decisions by reviewing the clients' contracts with vendors and comparing the pricing in those contracts with pricing obtained by other clients for \*190 the same or competing supplies.<sup>10</sup> In its complaint against Aspen, Guidant "assert[ed] trade secret protection under the Minnesota Uniform Trade Secrets Act for three aspects of its pricing: (1) Guidant's strategic pricing process; (2) Guidant's contracts; and (3) each hospital's price and contract terms."<sup>11</sup> Guidant also expressly asserted, however, that it was not seeking protection for "discrete price points paid by a particular hospital; and . . . average sales prices of Guidant's CRM devices across multiple hospitals."<sup>12</sup>

The second suit was brought as a declaratory judgment action in Pennsylvania by ECRI, a non-profit research center that publishes a subscription-based online price benchmarking database for single-use medical supplies, including CRM devices.<sup>13</sup> The suit was filed in response to demand letters in which Guidant claimed that ECRI was misappropriating Guidant's trade secrets by publishing device prices submitted by hospitals to the database,<sup>14</sup> which enabled subscribers to compare their own prices for specific supplies with low and average prices paid both regionally and nationally by other subscribers for the same supplies.<sup>15</sup> In its counterclaim against ECRI, Guidant made a more ambitious trade secrets claim than it had made against Aspen, asserting protection under the Pennsylvania Uniform Trade Secrets Act not only for its strategic pricing process and the compilation of price-related terms contained in hospital contract documents, terms which generally include volume commitments and rebates linked to the realization of those commitments, but also for the actual "prices paid by hospitals to Guidant for its CRM devices."<sup>16</sup> Whereas, in Aspen, Guidant had expressly not claimed trade secret protection for "discrete price points paid by a particular hospital," it did make a claim for actual prices paid in its suit against ECRI.<sup>17</sup> According to this more ambitious "prices paid" theory, Guidant acquires new intellectual property \*191 rights in business information every time it sells a CRM device to a hospital, probably thousands, if not tens of thousands, of times a year.

The aim of Guidant's legal efforts has been to prevent device buyers-- usually group purchasing organizations, health systems, or individual hospitals--from shopping device prices, which they have routinely done by sharing price-paid information among themselves, hired health care consultants, and subscription-based benchmarking services like ECRI's, which exist to help hospitals hold down their supply costs.<sup>18</sup> Many hospital administrators view the sharing of such price information as a necessary condition for cost containment in an economic environment of increasing device costs and stagnant Medicare reimbursements for implant procedures.<sup>19</sup> Guidant, by contrast, views such sharing as a source of unfair leverage for buyers.<sup>20</sup> As a company spokesman said, "We simply don't want the price negotiated privately with one hospital based on one set of circumstances used against us in negotiations with another hospital with an entirely different set of circumstances."<sup>21</sup> Guidant's desire to conceal the prices hospitals pay is thus motivated not by the concern that competitors will acquire and use the information to their economic advantage, which is the traditional concern in trade secrets cases, but by the concern that customers will. This focus on secreting information from customers as opposed to competitors is a feature that makes the \*192 Guidant litigation unique, if not unprecedented, among reported trade secrets cases. Guidant's theory, if it is ultimately accepted by courts, could have profound implications not only for the health care market, including the market for pharmaceuticals, but for every market in which the prices paid for goods are subject to contractual negotiation between sellers and buyers.

Guidant's bid to propertize CRM device prices as a means of preserving the firm's negotiating leverage did not go unnoticed in the health care trade press, which reported on the litigation during its pendency with some alarm, quoting cost-conscious

hospital administrators who worried publicly about the likely consequences of a Guidant victory.<sup>22</sup> The irony of this collective fretting is that hospital administrators have arguably tied their own hands when it comes to sharing prices by assenting in large numbers to strict confidentiality provisions that, according to Guidant's legal pleadings, cover the substance of all negotiated contract terms--taken both individually and collectively--including sales volume, product mix, and price.<sup>23</sup> By agreeing to broadly drafted confidentiality provisions, hospitals have not only assumed a contractual duty to Guidant, they have strengthened Guidant's case against third party consultants and benchmarking services that the individual prices paid for devices are subject to reasonable efforts to protect their secrecy and therefore eligible for statutory protection as trade secrets.<sup>24</sup> Thus can individual contract promises, enforceable only against the contracting parties, become a foundation for statutory rights that are enforceable against the world.

Both the Aspen and ECRI cases settled on undisclosed terms following the denial of cross-motions for summary judgment on Guidant's trade secret claims.<sup>25</sup> \*193 The court in Aspen held that "genuine issues of material fact remain[ed] as to whether Guidant's pricing information was readily ascertainable, whether it provid[ed] an economic advantage, and whether it [was] subject to reasonable measures of protection."<sup>26</sup> The court in ECRI, which was presented with the more ambitious assertion of trade secret rights for actual prices paid, reached a similar conclusion.<sup>27</sup> With neither case having gone to a full trial on the merits, the current status under the Uniform Trade Secrets Act (UTSA) of actual prices paid by hospitals for medical devices remains murky, and entities that continue to engage in or facilitate the dissemination of such prices therefore remain exposed. The exposure may not be great for hospitals, inasmuch as device manufacturers are unlikely to bite the hands that feed them, but it is certainly more substantial for third party purveyors of purchasing advice and comparative price information. These entities, like Aspen and ECRI, have made no contractual promises of confidentiality to manufacturers but simply cannot know, in the wake of the Guidant litigation, whether they are, in effect, bound as a matter of trade secret law by the promises their hospital clients and subscribers have made. Under the common law of trade secrets, Guidant's claim of protection for actual prices paid is demonstrably unfounded,<sup>28</sup> but under the UTSA, which supposedly merely codified the basic principles of the common law,<sup>29</sup> Guidant's claim is plausible. The following section explains why this is true and how it came to be that the drafters of the UTSA expanded the potential reach of trade secrecy in ways both accidental and detrimental to price competition and market efficiency.

### **III. From the Common Law to the UTSA: Ephemeral Information and the Expanding Embrace of Trade Secrecy**

The notion that trade secrets are a kind of property has been controversial among intellectual property scholars, who have rightly argued that property rights in information are both more problematic to define and more difficult to enforce \*194 than property rights in tangible things.<sup>30</sup> It has also been pointed out that the "relational focus of trade secret's liability rules aligns trade secret law more closely with the law of contract than with the law of property."<sup>31</sup> The characterization of trade secrets as property, however, has a pedigree in the U.S. common law that reaches all the way back to the earliest-decided cases, among the first of which was *Peabody v. Norfolk*.<sup>32</sup> In *Peabody*, the executors of a Massachusetts mill owner's estate successfully sued the mill's former engineer for breaching a contract in which the engineer had agreed to use "all the means in his power" to prevent others from obtaining information relating to a secret process for manufacturing gunny cloth from jute butts.<sup>33</sup> As a matter of contract law, the court concluded that the engineer was "bound . . . never to disclose the secret confidentially imparted to him during the term of his actual service."<sup>34</sup> The court also grounded its decision in property law, invoking the rule from the English case of *Morison v. Moat*<sup>35</sup> to hold that "[one] who invents or discovers, and keeps secret, a process of manufacture, whether proper for a patent or not, . . . has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons."<sup>36</sup>

With *Peabody*, the English common law of trade secrets made its transatlantic crossing as an equitable rule governing the conduct of employees with respect to secret manufacturing processes developed by their employers and recognized by courts as a type of property. The rule from *Morison*, by way of *Peabody*, was subsequently adopted in many states in a range of cases from around the turn of the twentieth century involving secret manufacturing processes, designs, patterns, and formulas.<sup>37</sup> Also influential in the early U.S. common law cases was Justice \*195 Story's *Commentaries on Equity Jurisprudence* (1835), according to which equity protects secrets communicated during the course of employment.<sup>38</sup> Justice Story divided such secrets into three categories: "secrets of trade or secrets of title, or any other secrets of the party important to [the employer's] interests."<sup>39</sup> Although neither the *Commentaries* nor the early reported decisions provide any specific definition for "secret of trade," the great majority of the cases involved claims for secret manufacturing processes.<sup>40</sup> In a minority of cases, protection was sought and granted for other types of secret business information, including books containing information about farmers' insurance policies;<sup>41</sup> a "secret code" for determining the sale price of goods sold from

catalogs by traveling salesmen;<sup>42</sup> compilations of \*196 price quotations for stocks and commodities;<sup>43</sup> and names, addresses, and requirements of customers on a sales route.<sup>44</sup>

By the 1920s, courts in several states had adopted the definition of trade secret from William Mack's *Cyclopedia of Law and Procedure* (1906)<sup>45</sup>:

A trade secret is a plan or process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it is necessary to confide it. It is a property right which equity, in the exercise of its power to prevent a breach of trust, will protect. It differs from a patent in that as soon as the secret is discovered, either by an examination of the product or in any other honest way, the discoverer has the full right to use it. A process commonly known to the trade is not a trade secret and will not be protected by injunction.<sup>46</sup>

Among the courts adopting the *Cyclopedia*'s definition was the Court of Appeals of Kentucky, which declined, in the seminal case of *Progress Laundry Co. v. Hamilton*, to extend trade secret protection to a list of customers on a sales route.<sup>47</sup> Denying the injunctive relief requested by the plaintiff--the defendant's former employer--the court held that a list of customers, which the defendant reproduced from memory, was not the type of information that qualified as a trade secret.<sup>48</sup> As far as the court was concerned, the limited scope of the *Cyclopedia* definition was "sufficiently broad to cover and protect all applied methods, formulas, and processes in which a proprietary interest may be acquired in connection with the manufacturing, and even marketing, the product handled and disposed of by the employer."<sup>49</sup> The court saw no justification for protecting as property information \*197 "which is common and is essential and necessary to the prosecution of any business" and which was not "the product of any kind of special ingenuity."<sup>50</sup>

As in some of the early cases involving customer lists, claims of trade secret protection for information not readily classifiable as a method, formula, or process and not the product of any "special ingenuity" were regarded with skepticism by courts, which sought to distinguish trade secrets from ordinary, albeit private, business information. In a case from 1910, for example, a corporate litigant attempted unsuccessfully to resist a subpoena for its books and records on grounds that they were protected as trade secrets.<sup>51</sup> The court held that

[t]he term 'trade secret' as it is usually understood means a secret formula or process, not patented, known only to certain individuals who use it in compounding or manufacturing some article of trade having a commercial value. It is rarely, if ever, used to denote the mere privacy with which an ordinary commercial business is carried on.<sup>52</sup>

The impulse to limit the scope of trade secrecy by denying protection for ordinary, private commercial information is memorialized in the First Restatement of Torts, in which the treatment of trade secrets is separated from that of non-trade secret confidential business information.<sup>53</sup> Trade secrets are discussed in § 757;<sup>54</sup> confidential business information is discussed in § 759.<sup>55</sup> Notwithstanding the caveat that "[a]n exact definition of trade secret is not possible,"<sup>56</sup> § 757 of the First Restatement defines a trade secret in a fairly circumscribed way as "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 \*198 not know or use it."<sup>57</sup> In addition to this affirmative definition and a list of factors to be weighed by courts in determining whether information qualifies for trade secret protection,<sup>58</sup> § 757 provides a negative definition of trade secret, differentiating trade secret information from other types of confidential business information:

[A trade secret] differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as, for example the amount or other terms of a secret bid for a contract or the salary of certain employees, or the security investments made or contemplated, or the date fixed for the announcement of a new policy or for bringing out a new model or the like. A trade secret is a process or device for continuous use in the operation of the business.<sup>59</sup>

Although the complementary attributes of non-ephemerality and continuous use are not explicitly prescribed in the early common law decisions, they inhere in the quite narrow (i.e., formula-method-or-process) definitions of trade secrecy that had been adopted by courts across the country at the time the First Restatement was published. A trade secret within the meaning of these definitions is not just any kind of information that a business values and treats confidentially; it must be durable information on which the business runs. This requirement has sometimes been overlooked by courts and commentators,<sup>60</sup> but it represents a very important check on the self-serving tendency of business entities to hoard valuable information. The indulgence of this tendency could substantially inhibit socially desirable, fair competition. Insisting upon a distinction

between trade secret information and private-but-ordinary business information, as did the authors of the First Restatement and many courts before them, is an effective means of mitigating the significant social cost of recognizing property interests in information-- the potential for the obstruction of fair competition through information hoarding.

Until the promulgation of the UTSA in the early 1970s and its eventual adoption in most states,<sup>61</sup> the First Restatement was the sole authority to which \*199 most courts looked to define the scope of trade secret protection and the elements of the cause of action for wrongful disclosure.<sup>62</sup> Whereas the First Restatement incorporates substantive limits on protected subject matter--limits that are conceptually distinct from factual considerations concerning the competitive value and relative secrecy of the information sought to be protected--the UTSA does not. Under the UTSA, trade secret “means information, including a formula, pattern, compilation, program, device, method, technique or process” that derives independent economic value from not being generally known and that is the subject of reasonable efforts to maintain its secrecy.<sup>63</sup> “There is,” as one court has said, “virtually no category of information that cannot, as long as the information is protected from disclosure to the public, constitute a trade secret” within the meaning of the UTSA.<sup>64</sup> It is to this more open definition of trade secrets, not limited by the First Restatement’s requirements of continuous use and non-ephemerality, that proponents of secret prices appeal. And while it is convenient for them that the UTSA does not incorporate the Restatement’s requirement of continuous use, the story of how the UTSA came not to include the requirement has nothing to do with sales price information, nor does it reflect any intention on the part of the uniform statute’s drafters to expand the common law definition of trade secrets to include ephemeral information like sales prices.

That the UTSA can be read to embrace transaction-specific price information is, in actuality, an unintended consequence of the drafters’ decision to dispense with present continuous use as a necessary condition for trade secrecy.<sup>65</sup> The Commissioners explained their departure from § 757’s requirement of continuous use only in narrow terms of the reasonableness of opening up the definition of trade secrecy to “extend[] protection to a plaintiff who has not yet had an opportunity or acquired the means to put a trade secret to use.”<sup>66</sup> The change was also intended, according to the Commissioners, to bring within the scope of protection “information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will \*200 not work.”<sup>67</sup> Neither of these purposes--protecting useful information not yet being used and useless information whose ultimate lack of value was expensive to discover--embraces transaction-specific sales price information. In removing the requirement of continuous use, the UTSA’s drafters intended to bring within the scope of trade secrecy a very limited category of information that was not previously covered: information that has, or appeared at one time to have, the potential for continuous use in the operation of the business.<sup>68</sup> In light of the Commissioners’ Comments, it is clear that the elimination of the continuous use requirement was not intended to bring ephemeral information within the scope of trade secrecy or to provide legal cover for efforts by sellers to gain the upper hand in price negotiations by cloaking quotidian sales prices in the mantle of trade secrecy.

The UTSA’s drafting history has fallen by the wayside, however, as individual states have enacted their own versions of the uniform statute. Colorado courts, for example, have interpreted the omission to allow trade secret protection under the Colorado UTSA for a bid on a contract<sup>69</sup>--a type of information specifically identified in the First Restatement as falling outside the limits of protection.<sup>70</sup> Adopting a plain meaning interpretation of the Colorado UTSA, the court rejected a defendant’s argument, presumably premised on the Restatement, that a bid could not be a trade secret as a matter of law because it was not continuously used in the plaintiff’s business.<sup>71</sup> The court declined to “read a continuous use requirement into this statute when it does not contain such language nor any legislative intent to include this concept.”<sup>72</sup> Tennessee, for its part, has modified the UTSA’s definition of trade secret to expressly include “financial data” within its scope.<sup>73</sup> This category may well encompass sales prices, although the question has not yet been decided by any Tennessee court. Although the drafters of the UTSA did not mean to bring ephemeral business information within the scope of trade secrecy when they eliminated the requirement of continuous use from the statutory definition, such has been the unintended consequence of the modification, at least in some jurisdictions that have adopted the UTSA.

\*201 Even after the adoption of the UTSA in most states, however, the First Restatement’s definition has continued to be cited and relied on by courts tasked with delimiting the scope of trade secret protection.<sup>74</sup> The persistence of the definition from § 757 is remarkable considering the near-antiquity of the First Restatement, the statutory pre-emption (in most states) of any common law cause of action for trade secret misappropriation,<sup>75</sup> and the ostensibly superseding treatment of trade secret doctrine in the more recent (but seldom cited) Third Restatement of Unfair Competition.<sup>76</sup> The continuing vitality of § 757 suggests that the UTSA has defined the scope of trade secrecy so amorphously that it has not provided courts with an adequate analytical framework for deciding what is or is not a trade secret. Seeking clearer parameters than the laconic statute provides, courts have fallen back on the detailed guidance in § 757. This interpretive \*202 pathway through the UTSA by means of the First Restatement is not inconsistent with the stated purpose of the UTSA’s drafters to codify, not redefine, the

existing common law of trade secrets.<sup>77</sup> As an example, one federal court deciding a claim under the Pennsylvania Trade Secrets Act (PTSA) recently elected simply to stand on the definition from § 757.<sup>78</sup> Explaining the choice, the court said that “there is no indication that the statute effected a substantive shift in the definition of ‘trade secret’”—a conclusion “supported by post-PTSA cases that rely on common law in determining whether certain information rises to the level of a trade secret.”<sup>79</sup>

The First Restatement does not preclude the possibility that information relating to the sale of goods can be a trade secret, but the example of trade secret sales-related information offered in § 757—“a code for determining discounts, rebates or other concessions in a price list or catalogue”<sup>80</sup>—satisfies the complementary criteria of non-ephemerality and continuous use. Although transaction-specific sales information in the form of the price paid for a product could result from the application of a trade secret discount or rebate code, under the logic of § 757 such information cannot be considered a trade secret in its own right, because it relates to a single, ephemeral commercial event. Applying this principle to Guidant’s claims of price secrecy, the claim in Aspen for protection of Guidant’s strategic pricing process is supported by § 757, whereas the claim in ECRI for protection of actual prices paid is not. Actual prices paid fall under the rubric of “ordinary business information” that does not warrant trade secret protection. The First Restatement’s differentiation of protected, price-generative information from unprotected, price-paid information is captured in linguistically varied terms used by a wide range of courts that have afforded protection to durable price-related information, such as a pricing “architecture,”<sup>81</sup> “model,”<sup>82</sup> “strategy,”<sup>83</sup> “formula,”<sup>84</sup> or “mechanism.”<sup>85</sup> The distinction has been elided, however, by vague references in other decisions, often in dicta, to the protected status of “pricing information,”<sup>86</sup> “pricing data,”<sup>87</sup> or “price data and figures.”<sup>88</sup> Each of these vaguely defined categories could encompass prices paid.

**\*203** By distinguishing between trade secret information and confidential business information of a non-trade secret nature, the First Restatement describes a doctrinal framework that expressly excludes ordinary, ephemeral business information from the scope of trade secrecy.<sup>89</sup> This fact was recognized by the Ninth Circuit in *Clark v. Bunker*, in which the court singled out ephemeral information as the only category of information excluded from trade secret protection because of its “inherent qualities.”<sup>90</sup> In several other post-Restatement common law cases, the requirement of continuous use has similarly been invoked to exclude ephemeral information from the otherwise roomy embrace of trade secrecy.<sup>91</sup> In *Cal Francisco Investment Corp. v. Vrionis*, the court acknowledged that “[a]lthough the nature of a trade secret is somewhat nebulous, a characteristic common to those secrets which have found protection from disclosure and use by the courts is the need for their continued use.”<sup>92</sup> The court concluded that individual real estate listings were ephemeral in nature and unnecessary for the continued operation of the plaintiff-broker’s business: “[A]s in the sale of products[,] each sale of real estate is a distinct transaction.”<sup>93</sup> In *Lehman v. Dow Jones & Co., Inc.*, the process by which the plaintiff zeroed in on a particular corporate takeover target was held to be a trade secret, because “[i]nformation like this would be used in running the business,” but the identity of a specific target at a particular time was held not to be protected.<sup>94</sup> A comparable result was reached in *Bear, Stearns Funding, Inc. v. Interface Group-Nevada Inc.*,<sup>95</sup> in which the financial information of a corporate borrower whose loan was being offered for securitization was held not to be a trade **\*204** secret because it “relate[ed] only to an ephemeral (in this case, nonrecurring) event in the conduct of [the company’s] business.”<sup>96</sup>

In the commercial sales context, courts deciding common law trade secrets claims, most of which involved the enforcement of non-competes,<sup>97</sup> have declined to extend trade secret protection to price information—understood broadly as both compilations of wholesale prices and prices charged to individual customers—on the ground that, even if adequate efforts were undertaken to maintain the secrecy of such information, prices fluctuate over time in any industry and are therefore not the type of information eligible for trade secret protection.<sup>98</sup> In keeping with this logic, an employer’s stale price proposals have been held not to be protected from disclosure by a former employee, even though the methods for arriving at the proposals are protected.<sup>99</sup>

A few courts in UTSA jurisdictions have echoed this reasoning,<sup>100</sup> despite the fact that the UTSA, unlike the First Restatement, does not expressly exclude **\*205** ephemeral information from the scope of trade secrecy. For example, the Maryland Court of Special Appeals has held that pricing information for a printing company’s largest customer was not a trade secret because such information was “subject to change” and “subject to the market.”<sup>101</sup> Similarly, the Ohio Court of Appeals rejected an employer’s claim of trade secrecy for projected sales and costs because such information became obsolete once actual sales figures were obtained.<sup>102</sup> The Ohio court pointed out that by the time of the injunction hearing in the case, the purported trade secret sales information was already outdated.<sup>103</sup> Although neither court made reference to the Restatement’s per se exclusion of ephemeral information, both applied the Restatement factors in reaching their decisions, and both rested their decisions on the non-durability of the price information at issue.<sup>104</sup>

Another reason why courts, applying both the common law and the UTSA, have held that prices for goods are not eligible for trade secret protection is that prices are necessarily disclosed to every paying customer and are therefore manifestly readily ascertainable (i.e., not secret).<sup>105</sup> Courts in Illinois, following the lead of those in Pennsylvania, recognize that although “a unique formula used to calculate the price information which is not disclosed to a business’s customers” can be a trade secret, “price information which is disclosed by a business to any of its customers” cannot.<sup>106</sup> Although these courts do not take the position that prices \*206 are precluded from being regarded as trade secrets because of their intrinsic ephemerality, they do treat the disclosure of a price to a customer in the course of a sales transaction as an essentially public disclosure that is fundamentally inimical to secrecy. This is true in part because such disclosures often do not end with the customer; once disclosed to the customer by the seller, the price is likely to be disclosed again by the customer to the seller’s competitor as the customer seeks to negotiate the most favorable deal he or she can for the goods he or she wants.<sup>107</sup> This series of disclosures is what enables price competition and efficient, informed determinations of market price.

A feature apparently common to the cases involving the destruction of secrecy through the disclosure of prices to customers, however, is the absence of any express promise of confidentiality between the seller and the buyer that would prohibit the buyer from disclosing prices.<sup>108</sup> Such promises, increasingly common in contracts between medical device manufacturers and hospitals, were at the center of Guidant’s claims for trade secret device prices.<sup>109</sup> Binding a buyer to confidentiality does nothing to change the ephemeral nature of a sales price, and therefore nothing to overcome the *per se* exclusion of ephemeral information from \*207 trade secrecy under § 757; however, if that exclusion is held to have fallen away along with the UTSA’s omission of the requirement of present continuous use, the existence of a confidentiality agreement between buyer and seller becomes probative-- potentially highly so--of the trade secret status of a price. Indeed, a Wisconsin court has held, misconstruing authorities from Illinois and Pennsylvania that distinguish quite clearly between protected price-generative information and unprotected price-paid information, that the existence of a confidentiality agreement between a seller and its customers is a “special circumstance” that can bring actual prices charged for goods sold within the protection of the UTSA.<sup>110</sup>

Absent the related requirements of continuous use and non-ephemerality, there is no doctrinal bar to including prices paid within the scope of trade secret protection, and the question of whether any particular price can be considered a trade secret is transformed from a question of law to be answered (in the negative) by the court into one of fact to be answered (unpredictably) by a jury. The nature of the information is no longer dispositive; only its confidential treatment and competitive value--both intensely fact-sensitive-- matter. For proponents of trade secret sales prices, who have a strong interest in controlling price information in the hands of customers to prevent price competition, legal claims that seek to leverage the unintended consequences of the UTSA’s revision of the First Restatement could be regarded as a prudent investment in the prevention of price erosion.

It is neither legally nor logically necessary, however, for courts in UTSA jurisdictions to treat as a *fait accompli* the accidental evolution that has made trade secret claims for transaction-specific sales prices--excluded *per se* from the scope of common law trade secrecy--seem plausible. In deciding cases like Guidant’s, courts may consider not only the fact that the requirement of continuous use does not appear in the UTSA, but the reason why it does not appear there. Bearing in mind that the express intention of the UTSA’s drafters was merely to “codify[*y*] the basic principles of common law trade secret protection” and not to dramatically expand the scope of trade secrecy,<sup>111</sup> the definition of trade secret under the UTSA should be interpreted as coextensive with that under § 757, except to the very \*208 limited extent that the UTSA’s drafters sought to modify the requirements of § 757.<sup>112</sup> To read the UTSA’s omission of the requirement of present continuous use as synonymous with an embrace of all forms and types of ephemeral business information is to read the statute as repealing, rather than relaxing, an essential element of the common law definition of trade secrets. Such a reading not only undermines the drafters’ express intent, it transforms a legal regime grounded in the prevention of unfair competition between businesses into one that can be called upon to manipulate the balance of power between businesses and their customers in the marketplace for goods. The admitted reason for which device manufacturers are seeking trade secrecy for prices paid--to maintain bargaining leverage in relationships with customers--is completely foreign to the policy goals underlying trade secrecy: encouraging innovation and promoting ethical business conduct between competitors.

#### **IV. The Device Market, the Escalating Cost of Health Care, and the Push for Price Transparency**

Extending trade secret protection to prices paid for medical devices is unsound not only as a matter of intellectual property policy but also as a matter of health care policy. Understanding why requires some explanation of both the current state of health care spending in the United States and the economic context in which device manufacturers have historically operated.

I begin with some statistics: Health care costs in the United States were \$2.3 trillion in 2007--16 percent of the gross domestic product (GDP).<sup>113</sup> They increased at two times the rate of inflation and are projected to consume 20 percent of GDP by 2016.<sup>114</sup> Since 2000, health insurance premiums for those insured through employment-based plans have increased 100 percent, measured against cumulative inflation of 24 percent and cumulative wage growth of 21 percent during the same period.<sup>115</sup> Implantable medical devices, including those dedicated to heart rhythm management, account for a significant share of our now prodigious annual national \*209 health care expenditure.<sup>116</sup> For example, in 2003 alone approximately 125,000 defibrillators were implanted in patients in the United States at a total cost of some \$5 billion.<sup>117</sup> In comparative terms, this number of implants corresponds to a rate per million patients that is 26 times that of Japan and 14 times that of France.<sup>118</sup> Indeed, the volume of interventional cardiology procedures in the United States far outstrips that of Japan, France, Germany, and the United Kingdom in every category from pacemakers and defibrillators to coronary stents.<sup>119</sup> The rise in these costly procedures is contributing to dramatic annual increases in the cost of health care. One study conducted in 2002 found that drugs and medical devices together accounted for 22% of healthcare insurance premium increases in the U.S. from 2001 to 2002.<sup>120</sup>

Today's very advanced and very expensive technology of heart rhythm management is the result of decades of investment, invention, and innovation by a small handful of manufacturers collaborating with researchers and cardiologists.<sup>121</sup> The pacemaker, which was introduced in 1952 as an external appliance the size of a toaster oven, has been transformed through the incorporation of microprocessors into a tiny implant about the size of a quarter that packs the processing power of a mainframe computer.<sup>122</sup> Both smaller and smarter than their predecessors, the newest generation of pacemakers and defibrillators is controlled by tiny computers that can sense and respond automatically to changes in heart rhythms.<sup>123</sup>

The rapid pace of innovation in CRM technology and the ever-increasing sophistication of devices have come with a high price tag. The average price of a pacemaker, the least expensive class of devices, is about \$5,000.<sup>124</sup> Conventional implantable defibrillators cost \$22,000 on average.<sup>125</sup> At the high end of the scale, CRT-Ds, the defibrillator-like devices used to treat congestive heart failure, are priced between \$30,000 and \$35,000 apiece.<sup>126</sup> These prices reflect only the cost \*210 of the devices themselves and do not include the costs associated with implanting them, such as paying doctors and other hospital staff, booking procedure rooms, and paying for post-procedure care and monitoring.

Given the high price of devices and the increasing number of implants, it should come as no surprise that the business of cardiac rhythm management has been booming. Revenues in the United States for device manufacturers in 2003 were \$3.1 billion for pacemakers, \$2.5 billion for defibrillators, and \$1.6 billion for CRT-Ds.<sup>127</sup> And while it is true, as corporations are wont to say in their investment prospectuses, that past performance is no guarantee of future profits, device manufacturers and those who invest in them have a number of reasons to remain bullish.<sup>128</sup> Among these reasons are an aging population, the continued prevalence of heart and coronary artery disease, and the fact that modern medical practice in the United States has an almost limitless capacity to assimilate new technologies.<sup>129</sup>

One of the main reasons that CRM device manufacturers have fared so well economically is that price competition in the market for implantable medical devices has historically been virtually non-existent.<sup>130</sup> This is because medical devices belong to a category of specialty goods known as physician preference items (PPIs).<sup>131</sup> PPIs alone can account for as much as 60 percent of a hospital's annual supply expenditure.<sup>132</sup> Statistics from one New York health system revealed that although PPIs constituted only 3 percent of supply purchases, they consumed 40 percent of the system's total supply spending and had increased in price annually by 8 to 15 percent during the period covered by the study.<sup>133</sup>

PPIs are, as their name indicates, chosen by physicians who receive specialized training from device manufacturers and who tend, as a result of this training and intense cultivation by sales representatives, to be loyal to a particular manufacturer to the exclusion of others.<sup>134</sup> When a device manufacturer's sales \*211 representatives pitch new devices to an implanting physician, they sell on technology and features, not on price.<sup>135</sup> The traditional purchasing model has been for the physician to choose the device, heedless of cost, and for the hospital to pay for it, also heedless of cost.<sup>136</sup> With price considerations altogether removed from the equation, the physician tends to choose the latest offering from his or her preferred manufacturer, regardless of the potential availability of less costly alternatives.<sup>137</sup> It is not difficult to see how this model, which altogether divorces the hospital's cost considerations from the physician's choice, has operated to keep device prices high.<sup>138</sup>

The traditional PPI purchasing model has been under threat in recent years, however, as hospital administrators have attempted to control rising implant costs by seeking to align the choices of their physicians with institutional efforts to manage inventories more efficiently and to negotiate vendor contracts more aggressively.<sup>139</sup> The Medical Payment Advisory Commission (MedPAC), created to advise Congress on issues impacting Medicare, has recommended that hospitals work

collaboratively with their physicians to standardize their use of medical devices and to press for larger discounts from device manufacturers.<sup>140</sup> This advice was doubtless prompted in part by a 40 percent increase (from \$10 to \$14 billion) between 2003 and 2005 in Medicare's total payment to hospitals for implant procedures.<sup>141</sup>

**\*212** Alternative purchasing models are thus increasingly being explored and adopted by hospitals across the country to replace the traditional competitive bidding process.<sup>142</sup> In the traditional bidding process, one or two "preferred" vendors, to the exclusion of their competitors, are given substantial market share guarantees--sometimes as much as 90 percent for a single device type--in exchange for price discounts over the course of a fixed contract term.<sup>143</sup> The greater the market share promised, in general, the greater the discount or rebate on price.<sup>144</sup> This preferred vendor model, in which one or two of the three major CRM device manufacturers are effectively locked out during the contract period, is being supplanted by "price-to-play" arrangements.<sup>145</sup> In the price-to-play model, the hospital sets a "shelf price" (i.e., a price ceiling) for a particular device and challenges all manufacturers to meet or beat that price as a precondition for doing business at the hospital.<sup>146</sup> Volume commitments to particular vendors are eschewed, and the shelf price is determined by a hospital committee comprised of administrators and physicians based on a weighted average of the hospital's device costs for the preceding year and "benchmarking to assess best prices achieved at other like institutions."<sup>147</sup>

The practice of benchmarking, which Guidant contentiously characterized in its counterclaim against ECRI as "trafficking . . . confidential CRM pricing,"<sup>148</sup> functions to increase price transparency in the device market by increasing the amount of price information available to hospital buyers. Increased price **\*213** transparency in the market for medical services was a core component of the George W. Bush administration's push for consumer-directed health care, a model designed to increase the price sensitivity of patients through high-deductible health plans that shift responsibility for payment from insurers to patients, thus giving patients both a need to know and a reason to care *ex ante* how much the medical services they receive actually cost.<sup>149</sup> A report by the Congressional Research Service (CRS) prepared for members of Congress in 2007 offered the following explanation of the role of transparent prices in the operation of an efficient market:

Transparent prices play a key role in the efficient allocation of goods and services. . . . Financial economics researchers typically define markets as efficient when prices reflect all available information and when prices adjust swiftly as new information arrives. If buyers and sellers do not know what prices are, then some mutually agreeable trades will fail to occur, thus creating inefficiencies. If buyers can see and compare prices for the same good offered by different sellers, the buyers then save money by choosing the cheapest vendor. If goods are similar but not identical, buyers then can compare prices and qualities offered by different sellers and pick whichever offer suits them best. The buyers' ability to choose an offer that suits them best puts tremendous pressure on all sellers to lower prices, improve quality, or both. Without such competitive pressure firms that are less efficient or that are earning excess profits can remain in the market, and prices will be higher than they would otherwise be.<sup>150</sup>

Price transparency also facilitates what economists call "yardstick competition," a way for buyers to compare not only the different prices offered to them by competing sellers for the same or similar products, but the different prices offered to other buyers for those products.<sup>151</sup> Yardstick competition is both the type of competition that device manufacturers like Guidant are seeking to prevent through trade secret pricing and the type of competition that materials managers, the hospital administrators in charge of procurement, are seeking to enhance through benchmarking.

**\*214** When discussing the effects of increased price transparency in the market for medical devices, it is important to acknowledge and reckon with the significant ways in which the health care market as a whole differs from, and therefore may behave unlike, markets for standardized commodities.<sup>152</sup>

Several aspects of health markets, including natural differentials in the product due to differences in quality and patient characteristics and the widespread practice of price discrimination, limit the effects of price transparency. In addition, other important characteristics interfere with price signals and competitive pricing outcomes: the product is complicated, physicians rather than consumers tend to determine the product purchased, patients generally do not directly pick hospitals, many costs are covered by third parties, and patients have poor information about costs.<sup>153</sup>

As a result of these distinctive characteristics, "prices as signals are diluted and muted in the health care market as compared to many other markets," a phenomenon which suggests that "improvements in price transparency may be less effective in the health care market than in other markets."<sup>154</sup> Improvements in price transparency also create the potential for collusion in oligopolistic markets like the device market, to the extent that more transparent prices make cartels easier to enforce.<sup>155</sup> Collusion is far from a foregone conclusion, however, because the harm to competition caused by giving competitors better price information must be weighed against the enhancement to competition caused by putting the same information into the

hands of buyers.<sup>156</sup>

Notwithstanding the complicated nature of the market for health care, most empirical research on price transparency in other markets suggests that better price information leads in the aggregate to lower, more uniform prices.<sup>157</sup> Not all buyers, of course, stand to benefit from a trend toward more uniform prices in a market characterized, as the device market is, by price discrimination. Buyers for whom uniform prices are lower than the prices they pay under a regime of price discrimination stand to benefit, whereas buyers for whom uniform prices are higher stand to lose.<sup>158</sup> From a policy perspective, though, it is the aggregate, market-wide effect of increased price transparency rather than the effect on individual hospital buyers that is meaningful. As for the effect on individual hospitals, many materials managers feel quite strongly that the information deficit created by trade secrecy for device prices would undermine their efforts, encouraged by MedPAC and \*215 necessitated by already narrow margins on implant procedures, to contain rising device costs.<sup>159</sup>

Given that price benchmarking is increasingly being used by hospitals as a tool for cost management and a mechanism for shifting leverage in contract negotiations, it should not be surprising that Guidant has moved to include and enforce strict confidentiality provisions in its device contracts. Nor should it be surprising that Guidant has mobilized its lawyers to find a means by which it might effectively stop third parties like Aspen and ECRI from using or disseminating price information obtained when hospitals, acting out of self-interest, elect to breach their promises of confidentiality. What hospital buyers stand to discover through benchmarking, and what device manufacturers would rather they not know, is not so much that price discrimination exists in the market for medical devices. That's not news. The news is that the gap between the prices two hospitals pay for the same device can amount to a chasm.

A recent survey of a hundred hospitals revealed that prices to different hospitals for the same orthopedic device ranged from \$2,000 to \$9,000—a striking differential by any measure.<sup>160</sup> Such price differentials are not always explained, as one might suspect they would be, by differences in purchase volume or hospital size. A ten-hospital health system based in Illinois discovered as the result of an internal survey that the hospitals in the system with the highest procedure volume were actually those paying the highest prices for PPIs.<sup>161</sup>

By intervening legally to limit the flow of price information to hospital purchasing agents, who are experimenting with new sources of leverage and ways to bargain, Guidant has made an indirect play to quash the emerging redistribution of power in the PPI contracting process. The economic motivation for Guidant's legal campaign to privatize and thereby control information about the prices hospitals pay for devices is not difficult to discern. Health care economists and other industry watchers have predicted that the enormous financial success of device manufacturers over the last two decades will be unsustainable in the long run, leading device manufacturers to seek new ways to maintain their profits.<sup>162</sup>

Health care economist Lawton R. Burns attributes the delayed development of price pressure in the device market to the fact that “the cost of devices is often \*216 submerged in payments to hospitals.”<sup>163</sup> Burns warns that “[m]anufacturers should expect greater payer scrutiny of the prices for their products . . . as the technologies diffuse to the wider population and as reports surface about their actual cost.”<sup>164</sup> Science historian Kirk Jeffrey sounds a similar note: “Eventually the pacemaker, once a glamour product, will become a commodity: all brands will offer essentially identical features, all secrets of design and production will stand revealed. Prices will plummet. Of course, the manufacturers strive to postpone that day, and thus far they have succeeded handily.”<sup>165</sup>

The latest phase in “succeeding handily” has been resistance to the trend toward commodity pricing through the assertion of legal claims for trade secret prices—a way to keep the actual price of devices, and the sometimes profound extent to which those prices can vary from one buyer to the next, obscure. In pressing the cases against Aspen and ECRI, Guidant may be acting as the de facto standard bearer for the device industry as a whole.<sup>166</sup> With both suits privately settled and the legal status under the UTSA of actual prices paid for devices publicly unsettled, Guidant and its competitors may now be benefiting from a litigation-induced chilling effect on both formal and informal benchmarking practices. To the extent that this is true, the industry may be winning the war against price disclosure, even though Guidant did not score decisive wins in either of its court battles.

The publicity generated by the Guidant litigation may ultimately prove, however, to be a double-edged sword for manufacturers. Given the level of scrutiny the trade press has trained on the Aspen and ECRI cases, hospital administrators are now on notice of a fundamental tension between the alternative purchasing models they have embraced, which rely on

yardstick competition, and the broad promises of confidentiality that they and their peers have been making in their contracts with device manufacturers.<sup>167</sup> The author of a recent article in the trade magazine Materials Management in Healthcare offered the following advice to readers: “To counteract this trend [toward price secrecy], materials managers \*217 will have to work together. Sources agree that they should continue to push back by obtaining legal department backing to overturn confidentiality clauses.”<sup>168</sup> While it is unclear on what legal grounds confidentiality provisions in existing device contracts could be overturned, such provisions are open to renegotiation when the contracts in which they appear expire, and some hospital executives have openly committed to taking a harder line with respect to manufacturers’ demands for confidentiality.<sup>169</sup>

If hospital buyers in large numbers successfully resist confidentiality demands during contract negotiations, the factual basis for manufacturers’ claims that device prices are trade secrets will erode. Secrecy-in-fact is, after all, the sine qua non of any viable trade secret claim, under both the common law and the UTSA. And if the economic predictions of industry watchers are correct, the price pressure that device manufacturers have so far been successful in avoiding will finally be brought to bear as hospitals rely increasingly on benchmarking to learn what other buyers in the marketplace are actually paying. The existence of extremely divergent prices for the same device is a sign that consumers in the \*218 device market are poorly informed.<sup>170</sup> It is hard to imagine that any hospital administrator would agree to pay \$9000 for a device that he or she knows another hospital is getting for \$2000. While there is some risk that the lower profits caused by downward price pressure will lead to decreased incentives for manufacturers to invest in further research and development,<sup>171</sup> the greater social risk may be that the national health care system will soon collapse under the weight of uncontrollably rising costs.<sup>172</sup>

A second effect of the publicity surrounding the Guidant litigation was the introduction in the U.S. Senate of the Transparency in Medical Device Pricing Act of 2007 (TMDPA), a proposed amendment to the Social Security Act.<sup>173</sup> The bill, which is co-sponsored by Senator Arlen Specter of Pennsylvania and Senator Charles Grassley of Iowa, requires device manufacturers, as a condition of receiving payment from Medicare, Medicaid, and SCHIP, to submit to the Secretary of Health and Human Services, for publication on the website of the Centers for Medicare and Medicaid Services, quarterly data on average and median sales prices for all implantable medical devices.<sup>174</sup> In their floor statements, Senators Specter and Grassley presented the TMDPA as a legislative solution to the problem of price secrecy and a policy intervention on behalf of hospitals and patients.<sup>175</sup> Senator Grassley asserted that passage of the bill “would go a long way \*219 toward ensuring that free market forces actually work” in the device market--a market in which “hospitals are at the mercy of medical device makers who have the upper hand.”<sup>176</sup>

In reality, the bill in its current form falls far short of the goal of bringing true price transparency to the market for medical devices. If it is enacted, it will require manufacturers to give less detailed price information to the government than subscriber hospitals were submitting to ECRI’s online database at the time the Guidant litigation was initiated. In its online database, ECRI published low prices in addition to average prices by model for Guidant CRM devices, thereby allowing hospitals to find the floor of the market for any given device by seeing the price paid by the toughest bargainer with the most negotiating power. ECRI also reported prices paid by its subscribers on both a regional and a national basis,<sup>177</sup> thereby allowing hospitals to account for geographical price variations. With access to only national median and average prices, which is all the TMDPA requires, hospitals would be unable to determine either the range of prices charged for a particular device or the low price charged, and they would have no comparative information of any kind with respect to regional prices.

In addition to the fact that its disclosure requirements are strikingly modest, the TMDPA contains a vague exemption, pursuant to which “certain sales may be excluded in the case where the Secretary determines such exclusion is appropriate.”<sup>178</sup> The bill is silent as to what types of sales might qualify for exclusion, how such exclusions would be sought by manufacturers, and how determinations would be made at the agency level concerning the appropriateness of the exclusions sought.<sup>179</sup> If the legislation is enacted, to the extent that the median and average device prices published by the government will not, in fact, reflect all sales, the government’s information will be less accurate and therefore much less informative than the data that were being compiled and disseminated by service providers like ECRI before the Guidant litigation.

The timidity of the TMDPA may be intended to avoid a challenge by manufacturers that price disclosure requirements constitute a regulatory taking of trade secrets. But even if manufacturers like Guidant could establish the trade secret status under state law of the actual prices hospitals pay for devices, which they have not yet done in any jurisdiction, the Supreme Court’s ruling in *Ruckelshaus v. Monsanto*<sup>180</sup> strongly suggests that legislation containing more \*220 granular price disclosure requirements than those in the TMDPA would survive judicial scrutiny. In *Ruckelshaus*, the Court rejected a Fifth Amendment challenge by a pesticide manufacturer to amended provisions in the Federal Insecticide, Fungicide, and

Rodenticide Act (FIFRA) that require manufacturers seeking government registration of pesticides to disclose to the Environmental Protection Agency (EPA) health, safety, and environmental data.<sup>181</sup> The statute, in turn, authorizes the EPA to disclose this data to the public under certain circumstances.<sup>182</sup> Specifically, public disclosure is permitted if the Administrator of the EPA determines that it is “necessary in the public’s interest,”<sup>183</sup> notwithstanding an express provision in the statute barring the disclosure of trade secrets.<sup>184</sup>

The Court in *Ruckelshaus* agreed with the trial court that, to the extent the data at issue were protected under state trade secret law, Monsanto had a cognizable Fifth Amendment property interest in them.<sup>185</sup> The Court disagreed with the trial court, however, that the EPA’s public disclosure of the data as permitted by the statute would constitute a taking.<sup>186</sup> It held that “as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.”<sup>187</sup> As the Court saw it, the decision whether the economic value of obtaining registration was greater to Monsanto than the cost of having its data disclosed in the public’s interest was Monsanto’s to make.<sup>188</sup> Because the government offered something of value to applicants (i.e., registration and the concomitant right to sell in the U.S. market) in return for the potential public disclosure of their proprietary data, there was no uncompensated taking.<sup>189</sup> If Monsanto valued the benefits of secrecy more highly than those of registration, it was free to opt out of the U.S. market and focus on international sales.

\*221 The Court’s reasoning in *Ruckelshaus* seems to apply straightforwardly to legislation requiring a device manufacturer to disclose its allegedly trade secret prices to the government, for subsequent disclosure to the public, in exchange for the right to participate in and receive reimbursement from government-sponsored health programs. Assuming for the sake of argument that the prices paid for devices can be trade secrets, a statute requiring their disclosure would not run afoul of the Fifth Amendment as long as it (1) gives manufacturers notice that the reported data are subject to public disclosure in the interest of promoting the public’s interest (e.g., in affordable health care) and (2) offers manufacturers something of value in return for their disclosures (e.g., the advantage of participating in government health care programs like Medicare and Medicaid). A statute offering the benefit of government reimbursement for devices in exchange for public disclosure of the actual prices charged for those devices would present device manufacturers with a legitimate value proposition closely analogous to the one presented to pesticide manufacturers by FIFRA. Therefore, there would be no uncompensated taking.

If the TMDPA were amended to require more comprehensive and informative price disclosures than it currently does, and to eliminate the vague exemption for “certain sales,” it would genuinely advance the cause of price transparency in the health care market. In its current form, however, the bill fails even to preserve the informational status quo that existed when ECRI sought a declaratory judgment that it was not misappropriating Guidant’s trade secrets by publishing price information submitted to its online database by subscribing hospitals.

## V. Conclusion

Confronted with the development of unprecedented price pressure in the market for surgical implants, the Guidant Corporation has taken the lead among device manufacturers in asserting trade secrecy for sales prices. Its admitted motivation for doing so is not to prevent such information from falling into the hands of competitors, which is the traditional concern in trade secrets cases, but to prevent customers from accessing comparative price information that could increase their leverage in contract negotiations. As yet, there has been no determination by any court that the actual prices hospitals pay for CRM devices are trade secrets under the UTSA, but neither has there been any contrary determination. Given the unsettled state of the law in this area and Guidant’s demonstrated willingness to sue information providers, price opacity will likely reign in the market for medical devices unless hospitals in significant numbers begin to resist manufacturer demands of price confidentiality in the contracting process. Even if such resistance fails, however, courts presented in the future with “prices paid” trade secret claims under the UTSA—for medical device prices or, for that matter, for any sales prices—have a legitimate doctrinal basis for deciding that such claims are foreclosed a matter of law: Transaction-specific sales price information does not fall within the very narrowly expanded definition of trade \*222 secrets that was adopted by the architects of the UTSA when they set out to codify the existing common law.

Although the TMDPA has been offered as a legislative solution to the problem of price opacity in the medical device market, the bill in its current form would do little to increase price transparency, because it requires manufacturers to disclose only median and average national sales prices for each device. A more aggressively drafted bill that conditions governmental reimbursement for implants on the manufacturer’s disclosure to HHS, for subsequent disclosure to the public, of the full

range of prices charged to hospitals would go much further than the TMDPA to promote real price transparency. Such legislation, if challenged by device manufacturers as an unconstitutional taking, would likely survive scrutiny in light of the Supreme Court's ruling in *Ruckelshaus*.

While it is true that economists disagree about the probable effects of increased price transparency in the very complex market for health care, there is good evidence to suggest that putting accurate, comprehensible information about quality and price into the hands of consumers--be they hospitals or patients--is a necessary step toward improving the overall efficiency of the health care system. Considered from this perspective, trade secret prices are no more justifiable as a matter of health policy than they are as a matter of intellectual property policy.

## Footnotes

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<sup>2</sup> See, e.g., Press Release, U.S. Food & Drug Admin., Medtronic Announces a Nationwide, Voluntary Recall of Small Subset of Two Implantable Cardioverter-Defibrillator Models (Apr. 16, 2004), [http://www.fda.gov/oc/po/firmrecalls/medtronic04\\_04.html](http://www.fda.gov/oc/po/firmrecalls/medtronic04_04.html); Press Release, U.S. Food & Drug Admin., Medtronic Issues Notification Regarding Certain Implantable Defibrillator Models (Feb. 11, 2005), [http://www.fda.gov/oc/po/firmrecalls/medtronic02\\_05.html](http://www.fda.gov/oc/po/firmrecalls/medtronic02_05.html); Press Release, U.S. Food & Drug Admin., Guidant Initiates Worldwide Physician Commc'ns Regarding Important Safety Info. & Corrective Action About Certain Pacemakers (July 18, 2005), [http://www.fda.gov/oc/po/firmrecalls/guidant07\\_05.html](http://www.fda.gov/oc/po/firmrecalls/guidant07_05.html); Press Release, U.S. Food & Drug Admin., Boston Scientific Announces Physician Commc'ns Related to Prods. in Its CRM Group (June 26, 2006), [http://www.fda.gov/oc/po/firmrecalls/bostonscientific06\\_06.html](http://www.fda.gov/oc/po/firmrecalls/bostonscientific06_06.html). Although it appeared that device manufacturers would be forced to devote considerable resources over the coming years to trying and settling these lawsuits, the industry was handed a decisive victory by the Supreme Court in February 2008. See *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1006-11 (2008) (holding that state law causes of action alleging injuries resulting from defective medical devices are categorically pre-empted by the 1976 Medical Device Amendments to the Federal Food, Drug, and Cosmetic Act).

<sup>3</sup> Boston Scientific acquired Guidant in 2006. Because Guidant was the named party in the ECRI litigation, which was initiated before the acquisition, references throughout the rest of this Article will be to Guidant rather than Boston Scientific.

<sup>4</sup> See Barnaby J. Feder, Boston Scientific and Consultant Settle a Lawsuit, NYTimes.com, Nov. 17, 2007, <http://www.nytimes.com/2007/11/17/business/17device.html>.

<sup>5</sup> See Richard Epstein, The Constitutional Protection of Trade Secrets Under the Takings Clause, 71 U. Chi. L. Rev. 57, 57 (2004).

<sup>6</sup> See, e.g., James Boyle, The Second Enclosure Movement and the Construction of the Public Domain, 66 Law & Contemp. Probs. 33, 40 (2003) ("In the new vision of intellectual property, however, property should be extended everywhere--more is better. Expanding patentable and copyrightable subject matter, lengthening the copyright term, giving legal protection to 'digital barbed wire' even if it is used in part to protect against fair use: Each of these can be understood as a vote of no-confidence in the productive powers of the commons."). For an exception to this rule, see generally David S. Levine, Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure, 59 Fla. L. Rev. 135 (2007), which examines the recent and unprecedented intrusion of trade secrecy into aspects of government and public infrastructure, such as voting, where transparency has historically been taken for granted.

<sup>7</sup> See Kurt Kruger, The Medical Device Sector, in The Business of Healthcare Innovation 271, 286 (Lawton R. Burns ed., 2005) ("In contrast to the pharmaceutical sector, which is currently under heavy policy pressure over prices, the medical device sector is generally small enough to fly under the radar of political activist groups and policy makers. Expenditures on devices are also buried in the figures for hospital costs, and thus are not easily discerned or tracked.").

<sup>8</sup> The other two major manufacturers are Medtronic, Inc. and St. Jude Medical. See, e.g., Boston Scientific: Guidant to Rebound from Product Recall Setbacks, Pharmaceutical Bus. Rev. (Apr. 13, 2006),

[http://www.pharmaceutical-business-review.com/article\\_feature.asp?guid=C020DFE9-CDC8-4B8B-B87B-57980BE1FFAD#](http://www.pharmaceutical-business-review.com/article_feature.asp?guid=C020DFE9-CDC8-4B8B-B87B-57980BE1FFAD#).

<sup>8</sup> Pacemakers control heart rhythms that are either too slow (bradycardia) or too fast (tachycardia). See Kirk Jeffrey, *Machines in Our Hearts: The Cardiac Pacemaker, the Implantable Defibrillator, and American Health Care* 8 (2001). Defibrillators deliver a shock to the heart to halt tachycardia or to stop irregular electrical activity known as fibrillation. *Id.* CRT-Ds are used to treat congestive heart failure. *Id.* at 286.

<sup>9</sup> See *Cardiac Pacemakers, Inc. v. Aspen II Holding Co.*, 413 F. Supp. 2d 1016, 1019-20 (D. Minn. 2006); *Emergency Care Research Inst. v. Guidant Corp.*, No. 06-1898, 2006 WL 3541776, at \*1 (E.D. Pa. Dec. 5, 2006) (mem.); *Emergency Care Research Inst. v. Guidant Corp.*, No. 06-1898, 2007 WL 2702455, at \*1 (E.D. Pa. Sept. 12, 2007) (mem.).

<sup>10</sup> See *Cardiac Pacemakers, Inc.*, 413 F. Supp. 2d at 1019-20.

<sup>11</sup> *Id.* at 1020.

<sup>12</sup> *Id.*

<sup>13</sup> See *Emergency Care Research Inst.*, 2007 WL 2702455, at \*1-2. The author represented ECRI in this litigation.

<sup>14</sup> See *id.*, at \*2.

<sup>15</sup> Amended Complaint for a Declaratory Judgment ¶ 13, *Emergency Care Research Inst.*, 2007 WL 2702455 (No. 06-1898), 2006 WL 1967488.

<sup>16</sup> First Amended Answer & Counterclaims of Defendants ¶ 30, *Emergency Care Research Inst.*, 2007 WL 2702455 (No. 06-1898), 2006 WL 5294603.

<sup>17</sup> See *Emergency Care Research Inst. v. Guidant Corp.*, No. 06-1898, 2007 WL 2702455, at \*2 & n.2 (E.D. Pa. Sept. 12, 2007) (mem.). The reason for the broader claim against ECRI may be that ECRI, unlike Aspen, did not make a practice of reviewing hospitals' actual contracts with vendors and was therefore receiving from hospitals a much more limited quantum of information than Aspen was. See *id.* at \*2 ("When receiving submission data from ... subscribers, ECRI does not review the subscribers' contracts with vendors such as Guidant."); *Cardiac Pacemakers, Inc. v. Aspen II Holding Co.*, 413 F. Supp. 2d 1016, 1020 (D. Minn. 2006) ("Guidant maintains that Aspen is the only consulting firm that obtains Guidant's CRM contracts ....").

<sup>18</sup> See, e.g., Robert Keast et al., *Shelf Price Agreements: A Novel Approach to Competitive Bidding for Arrhythmia Therapy Devices*, *J. Cardiovascular Mgmt.*, Sept.-Oct. 2004, at 12, 13 ("The arrhythmia faculty [that assisted in conducting this study] ... used broad, informal benchmarking to assess best prices achieved at other like institutions."); Joseph Mantone, *Contracting Concerns; Disputes Threaten to Restrict Supply-Price Sharing*, *Modern Healthcare*, May 22, 2006, at 18 (observing that "[h]ospitals commonly share device prices with consultants or group purchasing organizations in an effort to determine whether they can lower their supply costs"); Eileen McGinnity, *Check the Fine Print: Are Your Medical Device Contracts Making It Hard to Price Shop?*, *HFMA Wants You to Know* (Healthcare Fin. Mgmt. Ass'n), June 14, 2006, at 1-2, available at [http://www.hfma.org/publications/know\\_newsletter/061406.htm](http://www.hfma.org/publications/know_newsletter/061406.htm), (discussing the prevalence of price benchmarking in the CRM device market). It is also apparently not uncommon for hospitals to disclose device prices to third-party firms conducting surveys. See, e.g., *Pacemakers Get Fancier, Pricier*, HMM (Hosp. Materials Mgmt.), Aug. 2005, at 1, 12-14 (publishing one of multiple newsletters for materials managers and group purchasing organizations that provides a survey of pacemaker prices by model and manufacturer).

The public availability of specific price information and the willingness of hospital employees to share it with third parties raise questions of fact about whether these prices are trade secrets within the meaning of the Uniform Trade Secrets Act, under which efforts to protect secrecy are critical. See *Unif. Trade Secrets Act* §1(4) (1985). Holding these factual questions in abeyance, this Article considers trade secret protection for individual device prices as a matter of law and policy.

19 See Larry Burnett, *Rise in Heart Failure Means Increased Prices for CRMs*, *Materials Mgmt. Health Care*, Jan. 2007, at 41, 42 (citing rising device costs and stagnant Medicare reimbursements as trends making it “imperative that hospitals look at internal and external services for cost and utilization benchmarking”).

20 See Matthew Weinstock, *Accessing Prices, Hosps. & Health Networks*, June 2006, at 16, 18.

21 *Id.* (quoting a portion of a written statement by Boston Scientific spokesman Paul Donovan).

22 See, e.g., *id.* at 18 (stating that “no one really knows how these cases will impact business operations, but there is concern that manufacturers will ... tighten the reins on how much--and with whom--pricing information is shared”); Mantone, *supra* note 18, at 18 (“The lawsuits are drawing attention from hospital materials managers, who worry the outcomes could restrict hospitals from sharing supply prices with any third party, even affiliated ones.”); McGinnity, *supra* note 18, (discussing the prevalence and value of price benchmarking, and cautioning that secret pricing “could make it more and more difficult for your hospital--and the hospital industry as a whole--to gain control over rising medical device costs”).

23 See Weinstock, *supra* note 20, at 16 (“The Guidant contract stipulated that third parties were not allowed [to] see any contract information without prior written permission from the manufacturer.”); McGinnity, *supra* note 18, (“These confidentiality clauses vary by vendor but tend to include a range of restrictions, especially regarding the hospital’s ability to share contract terms such as pricing.”). As a factual matter, ECRI disputed Guidant’s claim that all hospitals that buy from Guidant have agreed in their contracts to confidentiality provisions. See *Emergency Care Research Inst. v. Guidant Corp.*, No. 06-1898, 2007 WL 2702455, at \*2 (E.D. Pa. Sept. 12, 2007) (mem.).

24 This is true inasmuch as the Uniform Trade Secrets Act (UTSA) requires proof that the owner of an alleged trade secret made reasonable efforts to protect its secrecy. See *Unif. Trade Secrets Act* §1(4) (1985). The relevant provisions of the UTSA are discussed at length below.

25 See *Cardiac Pacemakers, Inc. v. Aspen II Holding Co.*, 413 F. Supp. 2d 1016, 1028 (D. Minn. 2006); *Emergency Care Research Inst.*, 2007 WL 2702455, at \*5.

26 *Cardiac Pacemakers, Inc.*, 413 F. Supp. 2d at 1028.

27 *Emergency Care Research Inst.*, 2007 WL 2702455, at \*5 (denying ECRI’s motion for summary judgment on Guidant’s misappropriation of trade secrets claim). The court denied the motion because “[t]he factual record at this stage of the case is unclear as to: (1) the extent of the confidentiality agreements [between Guidant and its hospital customers hospital]; (2) the extent to which Guidant’s prices are known in the healthcare industry; (3) the extent to which Guidant’s prices are readily ascertainable by proper means; and (4) the competitive value of the prices to Guidant.” *Id.*

28 See generally *Applied Indus. Materials Corp. v. Brantjes*, 891 F. Supp. 432, 437-38 (N.D. Ill. 1994) (citing *SI Handling Sys. v. Heisley*, 753 F.2d 1244, 1260 (3d Cir. 1985)) (distinguishing between prices (not protected) and formulae used in pricing (protected)).

29 See *Unif. Trade Secrets Act* prefatory note (1985) (stating that the purpose of the Act is to “codif[y] the basic principles of common law trade secret protection”).

30 See, e.g., Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 *Cath. U. L. Rev.* 365, 368-75 (1989) (distinguishing information from property protected under patent and copyright law and arguing that the law does not characterize information as property, even when its disclosure is unlawful).

31 Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 *Cal. L. Rev.* 241, 244 (1998).

<sup>32</sup> Peabody v. Norfolk, 98 Mass. 452 (1868).

<sup>33</sup> Id. at 460.

<sup>34</sup> Id. at 461.

<sup>35</sup> “There is no doubt whatever, that when a party who has a secret in trade employs persons under a contract express or implied, ... those persons cannot gain the knowledge of the secret and then set it up against their employer.” Id. at 459 (quoting *Morison v. Moat*, 9 Hare, 241 (1851) (Eng.)).

<sup>36</sup> Id. at 458. Like Peabody, Morison involved the disclosure and use of secret information relating to a manufacturing process, namely the process for compounding a non-patent medicine. Id. at 459.

<sup>37</sup> See, e.g., *Salomon v. Hertz*, 2 A. 379, 380 (N.J. Ch. 1886) (discussing “secret and peculiar methods and processes for making Cordovan leather”); *Cincinnati Bell Foundry Co. v. Dodds*, 10 Ohio Dec. Reprint 154, 154 (Ohio Super. Ct. 1887) (discussing “a secret process for the manufacture of bells”); *Tabor v. Hoffman*, 23 N.E. 12, 12-13 (N.Y. 1889) (discussing patterns for manufacturing moulds from which metal parts of a rotary pump were cast); *O. & W. Thum Co. v. Tloczynski*, 72 N.W. 140, 140 (Mich. 1897) (discussing secret “processes and machinery” for manufacturing sticky fly paper); *C. F. Simmons Medicine Co. v. Simmons*, 81 F. 163, 163 (C.C.E.D. Ark. 1897) (discussing a process for compounding “Simmons’ Liver Medicine”); *Westervelt v. Nat’l Paper & Supply Co.*, 57 N.E. 552, 552 (Ind. 1900) (discussing a secret design for a machine for making paper bags); *Stewart v. Hook*, 45 S.E. 369, 369 (Ga. 1903) (discussing “secret formulas and receipts for the manufacture and compounding of medicines for the cure of the opium and morphine habit”); *Taylor Iron & Steel Co. v. Nichols*, 61 A. 946, 946 (N.J. Ch. 1905) (discussing a “process or formula” for making steel of superior quality); *Germo Mfg. Co. v. Combs*, 240 S.W. 872, 873 (Mo. Ct. App. 1922) (discussing a secret formula for compounding “cholorine,” for “the treatment of diseases of fowls and as a tonic for hogs”).

<sup>38</sup> 2 Joseph Story & Isaac F. Redfield, *Commentaries on Equity Jurisprudence* §952 (Boston, Little, Brown & Co. 1870) (1835). This section from J. Story’s treatise is quoted, for example, in *Peabody*, 98 Mass. at 459, *Eastman Co. v. Reichenbach*, 20 N.Y.S. 110, 115 (N.Y. Sup. Ct. 1892), and *Stevens & Co. v. Stiles*, 71 A. 802, 805 (R.I. 1909).

<sup>39</sup> Story, *supra* note 38, §952 (J. Story cites Morison in a footnote to this section).

<sup>40</sup> See cases cited *supra* at note 37; see also *Am. Stay Co. v. Delaney*, 97 N.E. 911, 912 (Mass. 1912) (discussing “secret processes and formulas” for manufacturing leather welting); *Vulcan Detinning Co. v. Assmann*, 173 N.Y.S. 334, 335 (N.Y. App. Div. 1918) (discussing “secret process of chlorine detinning [of steel]”); *Stuckes v. Nat’l Candy Co.*, 138 S.W. 352, 353 (Mo. Ct. App. 1911) (discussing “formula, process and method” for manufacturing hard boiled candy); *Pomeroy Ink Co. v. Pomeroy*, 78 A. 698, 698 (N.J. Ch. 1910) (discussing “formulas and formula notes” for manufacturing inks, mucilage, and sealing wax); *Dr. Miles Med. Co. v. Jaynes Drug Co.*, 149 F. 838, 839 (C.C.D. Mass. 1906) (discussing “secret formulas for making proprietary medicines”); *Nat’l Tube Co. v. E. Tube Co.*, 12 Ohio Dec. 100, 101 (Ohio Ct. Com. Pl. 1901) (discussing “wooden patterns for castings of various parts of machinery used for the manufacture of tubes and pipes”); *Fralich v. Despar*, 30 A. 521, 521 (Pa. 1894) (discussing “secrets of manufacturing and stilling of different kinds of oils”); *Baldwin v. Von Micheroux*, 25 N.Y.S. 857, 857 (N.Y. Sup. Ct. 1893) (discussing “a certain secret, but unpatented, process for manufacturing tobacco flavors”).

<sup>41</sup> *Morrison v. Woodbury*, 185 P. 735, 736 (Kan. 1919) (discussing books containing information about customers’ fire and tornado insurance policies, including rates, effective dates, and “other valuable information”).

<sup>42</sup> *Simmons Hardware Co. v. Waibel*, 47 N.W. 814, 814 (S.D. 1891) (discussing a secret code of letters, figures, and characters showing the cost and selling price of [plaintiff’s] goods in copies of its catalogue given to its traveling salesmen).

<sup>43</sup> *Bd. of Trade of City of Chi. v. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (1905) (holding that “the plaintiff’s collection of quotations is entitled to the protection of the law. It stands like a trade secret.”); *Chamber of Commerce v. Wells*, 111 N.W. 157,

159 (Minn. 1907) (“Such quotations are in the nature of trade secrets, and entitled to protection as property, ... precisely as other property rights are protected by the law.”).

<sup>44</sup> Dairy Dale Co. v. Azevedo, 295 P. 10, 10(Cal. 1931).

<sup>45</sup> See, e.g., Victor Chem. Works v. Iliff, 132 N.E. 806, 811(Ill. 1921); Am. Cleaners & Dyers v. Foreman, 252 Ill. App. 122, 127 (Ill. App. 1929); Stevens-Davis Co. v. Mather & Co., 230 Ill. App. 45, 55(Ill. App. Ct. 1923); Case v. Thomas,<sup>5</sup> Ohio Law Abs. 308, 308 (Ohio Ct. App. 1927); Cameron Mach. Co. v. Samuel M. Langston Co., 115 A. 212, 214(N.J. Ch. 1921).

<sup>46</sup> 22 Cyclopedie of Law and Procedure §842 (William Mack & Howard P. Nash eds., 1906).

<sup>47</sup> Progress Laundry Co. v. Hamilton, 270 S.W. 834, 836-37 (Ky. App. 1925).

<sup>48</sup> *Id.* at 835. Trade secret protection for customer lists came to be recognized in a minority of jurisdictions in the years after *Progress Laundry* was decided. See, e.g., *Dairy Dale Co.*, 295 P. at 10 (“[T]he names, addresses, and requirements of an employer’s customers on [an employer’s milk distribution] route, which constitute part of the good will of the business, are trade secrets; and equity will restrain their disclosure by an employee.”). See also *Notes on Recent Cases*, 15 Geo. L. J. 469, 469 (1927) (“Do lists of customers constitute trade secrets or confidential communications? The general rule is that they do not ....”). The First Restatement of Torts includes lists of customers among its examples of trade secrets. *Restatement (First) of Torts* §757 cmt. B (1939).

<sup>49</sup> *Progress Laundry Co.*, 270 S.W. at 835.

<sup>50</sup> *Id.*

<sup>51</sup> *In re Bolster*, 110 P. 547, 548 (Wash. 1910).

<sup>52</sup> *Id.* This distinction has been upheld in more recently decided cases involving assertions of trade secrecy in the context of discovery disputes during patent litigation. See, e.g., *Tailored Lighting, Inc. v. Osram Sylvania Prods., Inc.*, 236 F.R.D. 146, 148(W.D.N.Y. 2006) (explaining that courts afford greater protection to proprietary technical information than to ordinary business information); *Uniroyal Chem. Co. Inc. v. Syngenta Crop Prot.*, 224 F.R.D. 53, 57(D. Conn. 2004) (same); *Safe Flight Instrument Corp. v. Sundstrand Data Control Inc.*, 682 F.Supp. 20, 22(D. Del. 1988) (same).

<sup>53</sup> *Restatement (First) of Torts* §§757, 759 (1939).

<sup>54</sup> *Id.* §757.

<sup>55</sup> *Id.* §759.

<sup>56</sup> *Id.* §757, cmt. b; see also *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 566 A.2d 1214, 1228 (Pa. Super. Ct. 1989) (“As this general definition indicates, the concept of a trade secret is somewhat nebulous.”); *Kornylak Corp. v. Alpha Technical Servs., Inc.*, No. CA85-03-018, 1986 WL 2178, at \*3 (Ohio Ct. App. Feb. 18, 1986) (acknowledging that “the concept of a trade secret is at best a nebulous one”); *Abbott Labs. v. Norse Chem. Corp.*, 147 N.W.2d 529, 533(Wis. 1967) (“By its very nature, the trade secrecy doctrine, under the heading of unfair competition, deals with an area that is nebulous as to the guidelines to be applied.”); *Sarkes Tarzian, Inc. v. Audio Devices, Inc.*, 166 F. Supp. 250, 257(S.D. Cal. 1958) (“What is a trade secret is difficult to define.”).

<sup>57</sup> *Restatement (First) of Torts* §757 cmt. b (1939).

58 Id. Some factors ... are (1) the extent to which the information is known outside of [the plaintiff's] business; (2) the extent to which it is known by employees and others involved in [the plaintiff's] business; (3) the extent of measures taken by [the plaintiff] to guard the secrecy of the information; (4) the value of the information to [the plaintiff] and to his [or her] competitors; (5) the amount of effort or money expended by [the plaintiff] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

59 Id.

60 See Bone, *supra* note 31, at 249-50.

61 See Roger M. Milgrim, *Milgrim on Trade Secrets* §1.01[2][b] (2008) (listing 44 states and the District of Columbia as having adopted the UTSA). As of 2008, only four states--Massachusetts, New Jersey, New York, and Texas--have not enacted some form of statutory trade secret law. See *id.* §1.01 [3]. North and South Carolina both have Trade Secret Acts, which Milgrim categorizes as not based on the UTSA. *Id.*

62 *Id.* (characterizing the Restatement as the only uniformly-recognized definition of trade secrets prior to the wide adoption of the UTSA); see also Bone, *supra* note 31, at 247 (acknowledging the wide influence of the Restatement's formulation).

63 *Unif. Trade Secrets Act* §1(4) (1985).

64 *US W. Commc'ns, Inc. v. Office of Consumer Advocate*, 498 N.W.2d 711, 714 (Iowa 1993) (quoting Thomas J. Collin, *Determining Whether Information Is a Trade Secret Under Ohio Law*, 19 U. Tol. L. Rev. 543, 545 (1988)).

65 *Unif. Trade Secrets Act* §1 cmt. (1985) (discussing the rationale for eliminating the requirement of continuous use).

66 *Id.*

67 *Id.* (emphasis in original).

68 *Id.* §1(4)(i).

69 See *Ovation Plumbing, Inc. v. Furton*, 33 P.3d 1221, 1223 (Colo. Ct. App. 2001).

70 See Restatement (First) of Torts §757 cmt b. (stating that a trade secret is “not simply information as to single or ephemeral events in the conduct of the business, as, for example, the amount or other terms of a secret bid for a contract”).

71 *Ovation Plumbing, Inc.*, 33 P.3d at 1224.

72 *Id.*

73 See Tenn. Code Ann. §47-25-1702 (2006) (defining trade secret to include “information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan”).

<sup>74</sup> See, e.g., *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 722 (7th Cir. 2003) (“Although the Act explicitly defines a trade secret ..., Illinois courts frequently refer to six common law factors (which are derived from §757 of the Restatement (First) of Torts) in determining whether a trade secret exists....”); *Amerisource Bergen Drug Corp. v. Am. Associated Druggists, Inc.*, No. 05-5927, 2008 WL 248933, at \*18-19 (E.D. Pa. Jan. 29, 2008) (applying the UTSA but citing Restatement §757 “sub-factors” for determining trade secret status); *Enter. Leasing Co. v. Ehmke*, 3 P.3d 1064, 1069 n.6 (Ariz. 1999) (invoking the Restatement factors for “additional guidance” even though they are not required by the UTSA); *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912, 918 (Ind. 1993) (stating that, post-UTSA, “courts have invoked the common law predecessor to the UTSA, The Restatement of Torts, §757 (1939), to assist in the definitional task”); *Minuteman, Inc. v. Alexander*, 434 N.W.2d 773, 778 (Wis. 1989) (holding that “although all six elements of the Restatement’s test are no longer required, the Restatement requirements still provide helpful guidance in deciding whether certain materials are trade secrets under our new definition”).

<sup>75</sup> See supra note 74 and accompanying text.

<sup>76</sup> Restatement (Third) of Unfair Competition §§39-45 (1993). Whereas the UTSA and §757 are often read together by courts as complementary sources of definitional authority, the sections of the Restatement (Third) of Unfair Competition (1995) that deal with trade secrets are seldom invoked. See, e.g., Milgrim on Trade Secrets §1.01[2] n.7 (listing numerous cases from UTSA jurisdictions in which the courts relied on §757, but only one case in which the court relied on the Restatement (Third) of Unfair Competition, which it did because the former had been “supplanted” by the latter) (citing *Briefing.com v. Jones*, 126 P.3d 928, 931-32 (Wyo. 2006)). Wyoming adopted the UTSA in 2006. See Wyo. Stat. Ann. §40-24-101 et seq. (2007). Texas, which has still not adopted the UTSA, has case law citing the Restatement (Third) of Unfair Competition with approval. See *In re Bass*, 113 S.W.3d 735, 740 (Tex. 2003) (“In determining which position is correct, we begin by noting again that the Restatement (Third) of Unfair Competition regards the test as relevant but not dispositive, as ‘[it] is not possible to state precise criteria for determining the existence of a trade secret.’”) (citing Restatement (Third) of Unfair Competition §39 cmt. d). Although it is true that cases citing the Restatement (Third) of Unfair Competition for a definition of trade secret are rare, there are a few. See, e.g., *Cemen Tech, Inc. v. Three D Indus.*, L.L.C., 753 N.W.2d 1, 9-10 (Iowa 2008) (relying on the Restatement (Third) of Unfair Competition as “consistent with” the UTSA and Iowa code); *Cognis Corp. v. Chemcentral Corp.*, 430 F. Supp. 2d 806, 812 (D. Ill. 2006) (stating that the Restatement (Third) of Unfair Competition is “often relied on by the Seventh Circuit in analyzing trade secret claims”); *Amvac Chem. Corp. v. Termilind, Ltd.*, No. 96-1580-HA, 1999 WL 1279664, at \*7 (D. Or. Aug. 3, 1999) (applying the Oregon UTSA and citing the Restatement (Third) of Unfair Competition in the application).

<sup>77</sup> Unif. Trade Secrets Act §1 cmt. (1985).

<sup>78</sup> See *Brett Senior & Assocs., P.C. v. Fitzgerald*, No. 06-1412, 2007 WL 2043377, at \*6 & n.10 (E.D. Pa. July 13, 2007).

<sup>79</sup> *Id.* at \*6 n.10.

<sup>80</sup> Restatement (First) of Torts §757, cmt. b (1939).

<sup>81</sup> *PepsiCo, Inc. v. Redmond*, No. 94 C 6838, 1996 WL 3965, at \*10 (N.D. Ill. Jan. 2, 1996).

<sup>82</sup> *Nicor Energy v. Dillon*, No. 03 C 1169, 2003 WL 21698422, at \*4 (N.D. Ill. July 23, 2003).

<sup>83</sup> *AK Steel Corp. v. Colton*, No. 01-74279, 2001 WL 1636957, at \*3 (E.D. Mich. Dec. 3, 2001).

<sup>84</sup> *Drouillard v. Keister Williams Newspaper Servs., Inc.*, 423 S.E.2d 324, 327 (N.C. Ct. App. 1992).

<sup>85</sup> *Fisher Bioservices, Inc. v. Bilcare, Inc.*, No. 06-567, 2006 WL 1517382, at \*16 (E.D. Pa. May 31, 2006).

86 Optic Graphics, Inc. v. Agee, 591 A.2d 578, 580 (Md. Ct. Spec. App. 1991); Abbott-Interfast Corp. v. Harkabus, 619 N.E.2d 1337, 1344 (Ill. App. Ct. 1993).

87 Volume Shoe Corp. v. Jolosky, No. 62,744, 1989 Kan. App. LEXIS 247, at \*10 (Kan. Ct. App. Apr. 7, 1989).

88 Interbake Foods, L.L.C. v. Tomasiello, 461 F. Supp. 2d 943, 964 (N.D. Iowa 2006) (citing US W. Commc'ns, Inc. v. Office of Consumer Advocate, 498 N.W.2d 711, 714 (Iowa 1993)).

89 Restatement (First) of Torts §757 cmt. b (1939) (“[A trade secret] differs from other secret information in a business (see §759) in that it is not simply information as to single or ephemeral events in the conduct of the business ....”).

90 Clark v. Bunker, 453 F.2d 1006, 1009 (9th Cir. 1972) (applying California common law). Applying §757, the court upheld protection for “all of the forms, information, and techniques for formulating, promoting, financing, and selling contracts for ‘prepaid’ funeral services,” because they were “in the continuous operation of a mortician’s business.” Id.

91 See, e.g., Cal Francisco Inv. Corp. v. Vrionis, 92 Cal. Rptr. 201, 204 (Cal. App. 1971); Lehman v. Dow Jones & Co., Inc., 783 F.2d 285, 298 (2d Cir. 1986); Bear, Stearns Funding, Inc. v. Interface Group-Nev., Inc., 361 F. Supp. 2d 283, 305 (S.D.N.Y. 2005).

92 Cal Francisco Inv. Corp., 92 Cal. Rptr. at 204.

93 Id. at 205.

94 Lehman, 783 F.2d at 298 (applying New York common law).

95 Bear, Stearns Funding Inc., 361 F. Supp. 2d at 305.

96 Id.; see also EarthWeb, Inc. v. Schlack, 71 F. Supp. 2d 299, 315 (S.D.N.Y. 1999) (holding that an employee’s knowledge of his employer’s future acquisition plans “while confidential, is generally not considered a trade secret”); Emtec, Inc. v. Condor Tech. Solutions, Inc., No. 97-6652, 1998 WL 834097, at \*8 (E.D. Pa. Nov. 30, 1998) (holding that the identity of two corporate takeover targets “is not the type of information meant to be protected as a trade secret” because “this is not information that will be routinely used in Plaintiff’s business”).

97 Trade secret disputes involving allegedly secret sales information, including compilations of wholesale prices and customer-specific information on product prices and sales volumes, typically arise when an employer seeks to enforce a non-compete or a confidentiality agreement against a former employee, usually a sales representative, who has left the plaintiff’s employ to work for a competitor. See, e.g., Silipos, Inc. v. Bickel, No. 06-02205, 2006 WL 2265055, at \*1 (S.D.N.Y. Aug. 8, 2006) (noting that defendant had been plaintiff’s executive vice president); Marietta Corp. v. Fairhurst, 754 N.Y.S.2d 62, 64 (N.Y. App. Div. 2003) (noting that defendant had been plaintiff’s vice president for sales); Ivy Mar Co. v. C.R. Seasons Ltd., 907 F. Supp. 547, 552 (E.D.N.Y. 1995) (noting that defendants had been plaintiff’s sales representatives); Economation, Inc. v. Automated Conveyor Sys., Inc., 694 F. Supp. 553, 555 (S.D. Ind. 1988) (same); Means Servs., Inc. v. Rental Unif. Servs. of Normal-Bloomington, Inc., 639 F. Supp. 208, 210 (C.D. Ill. 1986) (same); Hayden’s Sport Ctr., Inc. v. Johnson, 441 N.E.2d 927, 928 (Ill. App. 1982) (same).

98 See Ivy Mar Co., 907 F. Supp. at 558 (“Price decisions are made on current competitive information which fluctuates over time in any industry....Accordingly, that information is not likely to be accorded trade secret status.”) (citation omitted); Hayden’s Sport Ctr., Inc., 441 N.E.2d at 931 (holding that a book containing, *inter alia*, prices charged to customers is not a trade secret, because “prices change quickly”). But see Cemen Tech, Inc. v. Three D Indus., L.L.C., 753 N.W.2d 1, 10 (Iowa 2008) (stating that “neither Iowa Code section 550.2(4) nor section 1(4) of the Uniform Trade Secrets Act include any requirement relating to the duration of the information’s economic value” (quotation omitted)); Nu-chem Labs., Inc. v. Dynamic Labs., Inc., No. 96-CV-5886, 2001 WL 35981560, at \*17 (E.D.N.Y. Mar. 30, 2001) (holding that prices paid by customers and printed on itemized invoices are trade

secrets).

<sup>99</sup> See Johnson Controls, Inc. v. A.P.T. Critical Sys., Inc., 323 F. Supp. 2d 525, 537-38 (S.D.N.Y. 2004) (holding that preventing the misappropriation of trade secrets was not an independent ground for specifically enforcing a non-compete provision of an employment contract because any contract bid information the former employees possessed was stale and available to competitors).

<sup>100</sup> See, e.g., Optic Graphics, Inc. v. Agee, 591 A.2d 578, 586 (Md. Ct. Spec. App. 1991); Jacono v. Invacare Corp., No. 86605, 2006 Ohio App. LEXIS 1501, at \*15 (Ohio Ct. App. Mar. 30, 2006).

<sup>101</sup> Optic Graphics, Inc., 591 A.2d at 586.

<sup>102</sup> Jacono, 2006 Ohio App. LEXIS 1501, at \*15.

<sup>103</sup> *Id.*

<sup>104</sup> See *id.* at \*10-11, \*15 (applying the six factors from §757 and concluding that outdated data could not be a trade secret); Optic Graphics, Inc., 591 A.2d at 584, 587 (stating that the Maryland UTSA definition of a trade secret is based on the Restatement's definition and affirming the trial court determination that the pricing information at issue was not a trade secret, in part because it was subject to change).

<sup>105</sup> See Brett Senior & Assocs. v. Fitzgerald, No. 06-1412, 2007 WL 2043377, at \*7 (E.D. Pa. July 13, 2007) ("The price charged was also available from the clients themselves. Several courts have recognized that prices charged are not protectible because they can be obtained by the customer."); Degussa Admixtures, Inc. v. Burnett, 471 F. Supp. 2d 848, 856 (W.D. Mich. 2007) (finding that "prices are substantially available in the public domain, as customers frequently reveal what they are paying to the competition"), aff'd, 277 F. App'x 530 (6th Cir. 2008); Applied Indus. Materials Corp. v. Brantjes, 891 F. Supp. 432, 437-38 (N.D. Ill. 1994) (applying the Illinois Trade Secrets Act and stating that "the Illinois appellate courts that have addressed the issue have consistently held that price information disclosed by a business to any of its customers ... does not constitute trade secret information protected by the Act"); W. Water Mgmt., Inc. v. Brown, No. CA 3-88-1936-G, 1989 U.S. Dist. LEXIS 12321, at \*8 (N.D. Tex. Jan. 30, 1989) ("Customer and price information known to the industry, or which is readily ascertainable, or which has been disclosed to customers, is not a trade secret."); Economation, Inc. v. Automated Conveyor Sys., Inc., 694 F. Supp. 553, 556 (S.D. Ind. 1988) (stating that "once a customer has allegedly confidential information, the seller's competitor can obtain the relevant information from the customer").

<sup>106</sup> Applied Indus. Materials, 891 F. Supp. at 437-38 (citing *SI Handling Sys. v. Heisley*, 753 F.2d 1244, 1260 (3d Cir. 1985)) (following the application of the Pennsylvania common law of trade secrets by distinguishing between prices (not protected) and formulae used in pricing (protected)); see also *Amerisourcebergen Drug Corp. v. Am. Associated Druggists, Inc.*, No. 05-5927, 2008 WL 248933, at \*24 (E.D. Pa. Jan. 29, 2008) (applying the Pennsylvania Uniform Trade Secrets Act and noting that "[s]everal courts have recognized that prices charged are not protectable because they can be obtained by the customer"); *Brett Senior & Assocs.*, 2007 WL 2043377, at \*7 (same); *PepsiCo, Inc. v. Redmond*, No. 94 C 6838, 1996 WL 3965, at \*12 (N.D. Ill. Jan. 2, 1996) (applying the Illinois Trade Secrets Act and distinguishing between "the specific prices that PCNA charges to individual customers" (not protected) and "the entire pricing plan outlined in [PCNA's] Pricing Architecture" (protected)); *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 566 A.2d 1214, 1230 (Pa. Super. Ct. 1989) (citing *SI Handling* for the proposition that "prices, i.e., the numbers themselves, may not be secret").

<sup>107</sup> See, e.g., *Degussa Admixtures, Inc.*, 471 F. Supp. 2d at 856 n.4 (finding that "customers were not precluded from disclosing ... prices to competitors and ... frequently did so"); *Economation, Inc.*, 694 F. Supp. at 556 ("The courts have determined that the information is readily ascertainable because once a customer has allegedly confidential information, the seller's competitor can obtain the relevant information from the customer."); *Apollo Stationery Co., Inc. v. Pilmar*, 173 N.Y.S.2d 854, 857 (N.Y. 1958) (pointing out that the "mere offer" by the plaintiff's former salesman to undercut the plaintiff's prices "could have elicited from the customers themselves all [of the allegedly secret price] information contained in the [allegedly misappropriated index] cards").

<sup>108</sup> See, e.g., Unisource Worldwide, Inc. v. Carrara, 244 F. Supp. 2d 977, 987 (C.D. Ill. 2003) (“Unisource did not require its customers to sign any confidentiality agreements or otherwise restrict the customers’ freedom to disclose [ultimate price] information.”); Amerisourcebergen Drug Corp., 2008 WL 248933, at \*22 (noting testimony of plaintiff’s employee that “the cost of goods is the customer’s. You know, if they choose to share that, I-I can’t prohibit them from doing that, as far as I know.”).

<sup>109</sup> See Cardiac Pacemakers, Inc. v. Aspen II Holding Co., 413 F. Supp. 2d 1016, 1020 (D. Minn. 2006) (quoting the confidentiality clause contained in Guidant’s contracts); Emergency Care Research Inst. v. Guidant Corp., No. 06-1898, 2007 WL 2702455, at \*2 (E.D. Pa. Sept. 12, 2007) (“Guidant ... maintains that nearly all Guidant sales contracts include a confidentiality provision prohibiting its CRM customers from disclosing the terms of their respective contracts.”); see also *supra* note 23 and accompanying text.

<sup>110</sup> See Burbank Grease Servs., LLC v. Sokolowski, 693 N.W.2d 89, 96-97 (Wis. Ct. App. 2005), aff’d in part, rev’d in part, 717 N.W.2d 781 (Wis. 2006) (holding that an actual price can be a trade secret if it is “based on complicated or unique formulas that the customer does not know about”) The court in Burbank Grease manifestly misconstrued the Pennsylvania and Illinois cases on which it relied. See *supra* text accompanying note 106. The rule in Pennsylvania and Illinois is that pricing formulae can be trade secrets, but the actual prices that result from the application of such formulae cannot. See *supra* note 106 and accompanying text. The fact that a price is derived from “complicated or unique formulas” does not, under the rule in Pennsylvania and Illinois, make it any more eligible for trade secret protection than a price that is derived from a simple or common formula. See *supra* note 106 and accompanying text. Whereas price-generative information is protected under the Pennsylvania and Illinois rulings, prices are not. See *supra* note 106 and accompanying text.

<sup>111</sup> Unif. Trade Secrets Act prefatory note (1985).

<sup>112</sup> See *id.*

<sup>113</sup> National Coalition on Health Care, Facts on Health Care Costs 1, available at [http://www.nchc.org/facts/cost\\_fact\\_sheet\\_2008.pdf](http://www.nchc.org/facts/cost_fact_sheet_2008.pdf) [hereinafter NCHC]. By way of comparison to other developed countries, health care spending consumed 10.9 percent of the GDP in Switzerland, 10.7 percent in Germany, 9.7 percent in Canada and 9.5 percent in France, according to the Organization for Economic Cooperation and Development. *Id.* See also Clark C. Havighurst & Barack D. Richman, *Distributive Injustice(s) In American Health Care*, 69 Law & Contemp. Prob. 7, 12 (2006) (citing a study estimating that health care expenditures were projected to reach \$2.16 trillion in 2006--16.5 percent of GDP).

<sup>114</sup> NCHC, *supra* note 113, at 1.

<sup>115</sup> NCHC, *supra* note 113, at 2.

<sup>116</sup> Lawton R. Burns, *The Business of Healthcare Innovation in the Wharton School Curriculum*, in *The Business of Healthcare Innovation* 1, 11 (Lawton R. Burns ed., 2005).

<sup>117</sup> See Kruger, *supra* note 6, at 283.

<sup>118</sup> See Kruger, *supra* note 6, at 284.

<sup>119</sup> See Kruger, *supra* note 6, at 284 (comparing implant usage rates for defibrillators, pacemakers, coronary stents, beating heart surgery, spinal implants, and insulin pumps).

<sup>120</sup> Havighurst & Richman, *supra* note 113, at 19 n.30 (citing a 2002 study by PriceWaterhouseCoopers).

<sup>121</sup> See Jeffrey, *supra* note 8, at 4-5.

<sup>122</sup> See Jeffrey, *supra* note 8, at 4-5.

<sup>123</sup> See Kruger, *supra* note 6, at 298.

<sup>124</sup> Kruger, *supra* note 6, at 308. The average per capita health insurance expenditure in the United States in 2007 was \$7,600. See NCHC, *supra* note 113, at 1.

<sup>125</sup> Kruger, *supra* note 6, at 308.

<sup>126</sup> Kruger, *supra* note 6, at 308.

<sup>127</sup> Kruger, *supra* note 6, at 308.

<sup>128</sup> See Kruger, *supra* note 6, at 285 (marveling that the medical technology field is “largely free” of the laws of supply and demand because “the demand for medical technology is exceedingly inelastic ... or is simply not subject to these principles”).

<sup>129</sup> See Kruger, *supra* note 6, at 285.

<sup>130</sup> See Kruger, *supra* note 6, at 308 (“Several factors contribute to positive pricing trends. For one, products are not selected on the basis of price.... Because of this, companies do not tend to compete on price.”).

<sup>131</sup> Kathleen Montgomery & Eugene S. Schneller, Hospitals’ Strategies for Orchestrating Selection of Physician Preference Items, 85 *Milbank Q.* 307, 308 (2007).

<sup>132</sup> *Id.* at 308.

<sup>133</sup> Paula DeJohn, Seeing Is Believing: Materials Stance on Price Transparency, *Materials Mgmt. in Health Care*, Feb. 2008, at 24, 27.

<sup>134</sup> See Burnett, *supra* note 19, at 41 (stating that “physician preference generally trumps all other considerations when it comes to device selection” and that “physician training in specific vendor products, working relationships and clinical expertise of vendor representatives and a physician’s history with particular devices further confound a hospital’s ability” to negotiate aggressively with vendors).

<sup>135</sup> See Montgomery & Schneller, *supra* note 131, at 308 (stating that “[s]urgeons’ decisions [about which device to use] are frequently based on factors not related to cost”).

<sup>136</sup> See Kruger, *supra* note 6, at 285 (observing that “the principal decision maker, the cardiologist, does not pay for the procedure and in many cases has virtually no comprehension of the product costs involved”).

<sup>137</sup> Jeffrey, *supra* note 8, at 276, explains how device manufacturers have successfully used the constant introduction of new technology to avoid cutting prices:  
In the rhythm-management industry, manufacturers have fought for market share not by cutting prices but by investing heavily in new products and promoting them heavily. Hospitals wanted price concessions and did get some, but each pacemaker/ICD

manufacturer sought to differentiate its products ... and to hold the line on prices by adding new features. It had become gospel in all the companies by 1980 that, at least in the U.S. market, failure to "improve the product" continually would ruin a firm's pricing strategy, undermine its reputation, and erode its market share.

<sup>138</sup> See Montgomery & Schneller, *supra* note 131, at 308 (pointing out the existence of "a disconnect between the hospital's cost containment goals and physicians' preferences"); see also Kruger, *supra* note 6, at 287 ("Companies that market products on a performance basis, unshackled from cost-based pricing, can enjoy high gross margins and above-average profits.").

<sup>139</sup> See Montgomery & Schneller, *supra* note 131, at 328-31.

<sup>140</sup> Montgomery & Schneller, *supra* note 131, at 309-10.

<sup>141</sup> Montgomery & Schneller, *supra* note 131, at 309-10. These numbers also include orthopedic (e.g., hip and knee) implants. Montgomery & Schneller, *supra* note 131, at 308.

<sup>142</sup> See, e.g., Keast et al., *supra* note 18.

<sup>143</sup> See, e.g., Keast et al., *supra* note 18, at 27 (describing the traditional approach to contracting for CRM devices used by the University of Michigan Health System until 2003 when a new model approach was developed).

<sup>144</sup> See, e.g., Keast et al., *supra* note 18, at 27 (describing the correlation between market share commitments and device prices).

<sup>145</sup> See Keast et al., *supra* note 18, at 27-29 (describing the new approach to negotiating contracts adopted by the University of Michigan Health System and the results of that approach); see also Montgomery & Schneller, *supra* note 131, at 318 (describing a reverse auction model "in which prequalified vendors are offered a short time to bid on a carefully defined product, with committed volumes going to multiple low bidders").

<sup>146</sup> Keast, et al., *supra* note 18, at 27.

<sup>147</sup> Keast, et al., *supra* note 18, at 28. In 2001, the University of Utah Hospitals and Clinics ("UUHC") embarked on a five-year performance improvement initiative designed to gain control of costs in the supply chain. See Jonathan J. Clark, *Eyes on the Supplies: Results of a Massive Performance Improvement Initiative*, *Healthcare Financial Management*, Apr. 2006, at 74. In the final phase of the initiative, the organization made a priority of "renegotiating contracts with manufacturers based on benchmarking analyses." *Id.* at 79. Administrators relied on benchmarking "to identify opportunities for quick, significant, and sustainable savings in the procurement area that are achievable through product selection changes and contract renegotiations." *Id.* at 82.

<sup>148</sup> First Amended Answer & Counterclaims of Defendants ¶ 4, *Emergency Care Research Inst. v. Guidant Corp.*, No. 06-1898, 2007 WL 2702455 (E.D. Pa. Sept. 12, 2007) (mem.), 2006 WL 5294603.

<sup>149</sup> In 2006, President George W. Bush issued an executive order requiring federal agencies responsible for the administration of health care programs, including Medicare, to disclose to program beneficiaries the prices the agencies pay participating providers for procedures and to participate in the development of information about overall costs of services for common episodes of care and the treatment of common chronic diseases. See Exec. Order No. 13,410, 71 Fed. Reg. 51,089 (Aug. 22, 2006). For more information on the push for consumer-directed health care and prospects for its success in the current information and payment environment, see Paul B. Ginsburg, *Shopping for Price in Medical Care*, 26 *Health Affairs* Web Exclusive 208 (2007) and Uwe W. Reinhardt, *The Pricing of U.S. Hospital Services: Chaos Behind a Veil of Secrecy*, 25 *Health Affairs* 57 (2006).

<sup>150</sup> D. Andrew Austin & Jane G. Gravelle, Congressional Research Service (Rep. No. RL34101), *Does Price Transparency Improve*

Market Efficiency: Implications of Empirical Evidence in Other Markets for the Health Sector 4 (2007).

<sup>151</sup> See Margaret K. Kyle & David B. Ridley, Would Greater Transparency and Uniformity of Health Care Prices Benefit Poor Patients?, 26 *Health Affairs* 1384, 1385 (2007) (defining “yardstick competition”).

<sup>152</sup> See Austin & Gravelle, *supra* note 150, at 4.

<sup>153</sup> Austin & Gravelle, *supra* note 150, at 12.

<sup>154</sup> Austin & Gravelle, *supra* note 150, at 12.

<sup>155</sup> Kyle & Ridley, *supra* note 151, at 1388.

<sup>156</sup> Austin & Gravelle, *supra* note 150, at 47.

<sup>157</sup> See Austin & Gravelle, *supra* note 150, at 46-47.

<sup>158</sup> See Kyle & Ridley, *supra* note 151, at 1385.

<sup>159</sup> See, e.g., Mantone, *supra* note 18, at 18 (stating that the Aspen and ECRI lawsuits “are drawing attention from hospital materials managers, who worry the outcomes could restrict hospitals from sharing supply prices with any third party, even affiliated ones”); DeJohn, *supra* note 133, at 27 (quoting a materials manager who views Aspen’s settlement with Guidant as a “red [flag]” to hospitals that rely on benchmarking (modification in original)).

<sup>160</sup> Montgomery & Schneller, *supra* note 131, at 310.

<sup>161</sup> DeJohn, *supra* note 133, at 25.

<sup>162</sup> See Kruger, *supra* note 6, at 285.

<sup>163</sup> Lawton R. Burns & Stephen M. Sammut, Healthcare Innovation Across Sectors: Convergences and Divergences, in *The Business of Healthcare Innovation* 348, 361 (Lawton R. Burns ed., 2005).

<sup>164</sup> *Id.*

<sup>165</sup> Jeffrey, *supra* note 8, at 10.

<sup>166</sup> Guidant alleged in its Answer to ECRI’s complaint that “CRM pricing confidentiality is standard throughout the CRM industry, and that Medtronic and St. Jude[, the two other major U.S. CRM device manufacturers,] include similar confidentiality provisions in their contracts with customers.” First Amended Answer & Counterclaims of Defendants ¶ 2, *Emergency Care Research Inst. v. Guidant Corp.*, No. 06-1898, 2007 WL 2702455 (E.D. Pa. Sept. 12, 2007) (mem.), 2006 WL 5294603.

<sup>167</sup> See, e.g., DeJohn, *supra* note 133, at 24 (“With vendors increasingly resisting sharing price data, hospitals face a dilemma: They are caught between legal obligations that come with the contracts they sign and demands by hospital administrators and patients to

keep costs down.”).

<sup>168</sup> DeJohn, *supra* note 133, at 26 sidebar.

<sup>169</sup> A senior hospital executive, asked at a roundtable discussion about overcoming barriers to communication between hospitals and patients, cited confidentiality clauses in vendor agreements as a problem that needs to be addressed:

In some of the contracts we have with suppliers, there are confidentiality clauses that limit our ability to communicate the cost of certain types of devices. In the past couple of years, a lawsuit was filed by a device company in relation to the confidentiality clauses. A ruling upheld the secrecy of information, such that we are prohibited from telling a patient the price paid for supplies.

We are trying to overcome this situation by making sure that we don’t have these confidentiality clauses in our contracts, or, if there is a confidentiality clause, that it allows us to release the information to patients and other necessary business partners.

Provider View--and Strategies--for Price Transparency, HFMA Executive Roundtable (Healthcare Fin. Mgmt. Ass’n), May 2007, at 2.

In the same vein, the director of materials management at an Indiana-based health system had the following to say about non-disclosure provisions presented by manufacturers during contract negotiations:

I have always had a problem in signing a non-disclosure statement .... I would now resist more vehemently on the basis of the goal of the government to make healthcare costs more transparent....

Another thought being conveyed to several GPO [group purchasing organization] memberships is that we should retain the right to share pricing information with anyone with whom we have a formal relationship. This would include other hospitals within the system, physicians, GPOs, consultants, advisors, alliances and any other third-party entities .... I believe we have substantial reasons and support for not signing non-disclosure statements.

Rick Dana Barlow, Inking the Ultimate RFP: To Overcome Legalese Hurdles, Simply Be Realistic and Expose the Fine Print, Healthcare Purchasing News, July 2006, at 10, 10-11.

<sup>170</sup> See Austin & Gravelle, *supra* note 150, at 12 (“If consumers are poorly informed, or hindered from taking their most advantageous option, prices might not converge to efficient levels, if they converge at all.”).

<sup>171</sup> See Kyle & Ridley, *supra* note 151, at 1385 (“If uniform pricing reduces firms’ profits, it reduces their incentives to invest in risky R&D projects. At the margin, some projects whose social benefits justify the costs of development will not be undertaken.”).

<sup>172</sup> The number of uninsured Americans is steadily increasing: “47 million people were uninsured in 2006, an increase of 8.6 million--more than 18%--since 2000.... [A]n estimated 16 million Americans are classified as underinsured and are paying high out-of-pocket costs for their care.” The Commonwealth Fund, Health Policy Reform: Beyond the 2008 Elections, Colum. Journalism R., Mar./Apr. 2008 Supp., at 1, available at [http://www.commonwealthfund.org/usr\\_doc/CJR\\_insert\\_final.pdf?section=4039](http://www.commonwealthfund.org/usr_doc/CJR_insert_final.pdf?section=4039). There are predictions that the “steady erosion of coverage brought on by monotonically decreasing affordability” will lead to 56 million uninsured by 2013. Paul Hughes-Cromwick, Sarah Root, & Charles Roehrig, Consumer-Driven Healthcare: Information, Incentives, Enrollment, and Implications for National Health Expenditures, *Bus. Econ.*, Apr. 2007, at 43, 44. According to a report recently issued by the Bush administration, Medicare’s hospital insurance trust fund will become insolvent in 2019 and will pay more in benefits than it receives in taxes and other dedicated revenue sources in 2008. Robert Pear, Outlook Remains Bleak for Two Programs, *NYTimes.com*, Mar. 26, 2008, <http://www.nytimes.com/2008/03/26/us/26benefit.html>. The question now may not be whether, but rather how and when, the system as it is currently structured will collapse. Hughes-Cromwick, Root, & Roehrig, *supra*, at 44.

<sup>173</sup> See Transparency in Medical Device Pricing Act of 2007, S. 2221, 110th Cong. (1st Sess. 2007).

<sup>174</sup> *Id.* at 2.

<sup>175</sup> See Press Release, Office of Senator Charles Grassley, Grassley, Specter Introduce Transparency in Medical Device Pricing Act (Oct. 23, 2007), available at [http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord\\_id=cf5fa31e-1321-0e36-bae5-3d7d394f5bc6&Region\\_id=&Issue\\_id=](http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=cf5fa31e-1321-0e36-bae5-3d7d394f5bc6&Region_id=&Issue_id=).

<sup>176</sup> *Id.*

<sup>177</sup> Emergency Care Research Inst. v. Guidant Corp., No. 06-1898, 2007 WL 2702455, at \*5 (E.D. Pa. Sept. 12, 2007) (mem.).

<sup>178</sup> S. 2221, at 4-5.

<sup>179</sup> See *id.*

<sup>180</sup> *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984).

<sup>181</sup> See *id.* at 1007 (holding that submitting data in exchange for registration after the amendments in question took effect was a voluntary disclosure).

<sup>182</sup> *Id.* at 990.

<sup>183</sup> *Id.* at 990.

<sup>184</sup> *Id.* at 995-96.

<sup>185</sup> *Id.* at 1003-04.

<sup>186</sup> *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1007 (1984).

<sup>187</sup> *Id.*

<sup>188</sup> See *id.* at 1007 & n.11 (noting Monsanto's option to rely on international sales if the burden of domestic disclosure could not be borne).

<sup>189</sup> *Id.* at 1007 (noting the economic advantages afforded to Monsanto in return for its submission of proprietary data).