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Intellectual Property

Naked Price & Pharmaceutical Trade Secret Overreach

Robin Feldman[1]

Introduction

The rising cost of prescription drugs in the United States presents a critical challenge in modern public policy. As prices rise sharply across all medications,[2] personal and public budgets are straining to absorb the impact. On the whole, these pricing trajectories threaten to roll back decades of improvement in access to health care for those at all income levels.[3] Appropriately, the problem is receiving growing attention from lawmakers, regulators, and the media. Absent from this flurry of attention, however, as well as from the bulk of the broader literature, is the role that certain intellectual-property regimes are playing in keeping drug prices high.

Specifically, industry actors assert trade-secrecy protection in order to resist consumer-friendly efforts by regulatory bodies to require transparency in drug pricing. On one side, middle players in the drug-distribution chain called pharmacy benefit managers (PBMs) insist that their pricing arrangements with pharmaceutical manufacturers constitute "trade secrets." On the other side, state regulators seek disclosure of such negotiated drug prices—or "naked prices"—to expose industry structures that drive up pricing and harm the public, arguing that such arrangements should not receive trade-secret protection.

At the core of this standoff are the following questions: Are naked prices intellectual property? If so, do they warrant sufficient protection to create an immunity to public disclosure when the public interest is strong? In other words, if naked price is intellectual property, is it only a "thin" right?

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[1] Excerpted and adapted from Robin Feldman & Charles Tait Graves, *Naked Price and Pharmaceutical Trade Secret Overreach*, 22 YALE J. L. & TECH. 61 (2020).

[2] *See* U.S. DEP'T HEALTH & HUM. SERV., OFF. OF INSPECTOR GEN., OEI-03-15-0080, INCREASES FOR BRAND-NAME DRUGS IN PART D (2018).

[3] *See* ROBIN FELDMAN, DRUGS, MONEY & SECRET HANDSHAKES: THE UNSTOPPABLE GROWTH OF PRESCRIPTION DRUG PRICES 9–10 (2019).

This Chapter challenges the notion that naked prices constitute trade secrets and offers grounds for rejecting claims that "naked prices" in the pharmaceutical supply chain warrant strong protection from disclosure. The Chapter borrows from copyright law to advance a new concept of "thin" trade-secret protection that can be overcome by appropriate regulatory challenges.

The Problem: PBM Pricing & Trade Secrecy Assertions

Perverse incentives throughout the drug supply chain are crucial drivers of the soaring prices borne by payers. Central to the drug supply chain are PBMs, the middle players between drug companies and insurance plans (including both private insurers and Medicare).[4] On behalf of insurance plans and patients, PBMs negotiate the prices of drugs with the companies. PBMs also help the plans set formularies, which determine whether and under what terms patients will have access to a particular drug. In an ideal world, this system would allow insurance plans and patients to pay the lowest cost possible for brand-name drugs. In reality, the deals between PBMs and brand companies frequently operate to channel patients into more expensive drugs, with adverse long-term and short-term effects on the system.

In simplified form, PBMs stand between their clients (the health plans) and drug companies. Although a health plan knows what *it* pays when a patient buys a particular drug at the pharmacy, the true price paid—at the end of the day and after all rebates have been applied—is hidden. Somewhere down the line, the PBM will send the health plan a rebate check that aggregates rebates for many drug transactions. Along the way, PBMs pocket a large portion of the rebate dollars, although the health plans are not permitted to know the size of the rebates or the portions retained. In fact, the true net price—or "naked price"—and the terms of the agreements between PBMs and drug companies are so highly guarded that even the health plan's auditors are not given full access to the agreements.

One might think that the health plans and their patients, let alone government auditors, would have the right to know the net prices they are paying for each drug and to access the terms of

[4] For in an in-depth analysis of PBMs and perverse incentives in the drug supply and pricing chain, *see generally id.*

agreements made on their behalf. So, just how is it that these terms are so deeply hidden? PBMs and drug companies claim that naked price is a trade secret. They have repeatedly and aggressively claimed trade-secrecy protection to shelter this system, and its impact on rising prices, from both private and public view.[5]

These assertions present a real risk that trade-secret law will be tugged from its moorings, a risk exemplified by the case of the regulatory-disclosure debates. Indeed, the problem of naked prices highlights a broader trend: increasingly, companies are attempting to assert trade-secrecy claims outside of civil litigation in order to block regulatory oversight or public inquiry into potentially unsavory business practices. Thus, there is reason to fear that an already-broad trade-secret doctrine can be stretched even further, harming the public interest.

Yet claiming price, rebate, and profit-margin information as a trade secret is odd, even at first blush. This sort of information hardly sounds like intellectual property. Price is not an idea, and it certainly is not the product of innovation. The pricing in a PBM agreement is not information developed by a company to operate its business. Rather, it is a mere deal point negotiated between two separate entities. In addition, the very targets of regulation—artificially inflated prices—are claimed as intellectual property to avoid disclosure. Thus, trade-secret law is being deployed as an offensive weapon to avoid regulation and to avoid responsibility for the public harm created by the supposed "trade secret" itself. These aims are quite different from the goal of allowing a business to protect the fruits of ideas and innovations that will ultimately benefit the public.

Is Naked Price Really a Trade Secret?

On the surface, the elements of proving that a trade secret exists in civil litigation are straightforward but general: the information cannot be generally known to others who could use it, it must be secured with reasonable restrictions, it must have economic value to competitors as a result of being secret, and it

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[5] *See, e.g.*, Compl. at ¶¶ 18, 25, 27–30, 38, 79–85, CaremarkPCS Health, LLC v. Sears, No. 18-cv-5943 (Ohio Ct. Com. Pl. July 16, 2018); Order Granting Pet'r Amgen Inc.'s Mot. for a Prelim. Inj., Amgen Inc. v. Cal. Corr. Health Serv., No. 18-stcp-03147 (Cal. Super. Ct. Mar. 11, 2019).

cannot be readily ascertainable in the sense that it can easily be cobbled together with minimal time and effort.

Many cases in civil lawsuits have addressed trade-secrecy claims over various types of pricing information,[6] but none appears to have squarely posed the methodological question of whether pricing information is the type of secret that should receive protection. Similarly, in cases related to Freedom of Information Act (FOIA) disclosures, courts have generally avoided a full-on analysis of whether pricing information, in context, is truly protectable information, much less a trade secret.[7] The courts thus have left open the question whether pricing information, especially in the context of agreements between major PBMs and pharmaceutical companies, is a trade secret in the first place, particularly when weighed against a strong public interest.

There is something awkward about claiming pricing information—whether a raw price, a profit margin, or related details—as one company's intellectual property. Certainly, litigants claim financial information as a trade secret, and companies submit information to state and federal regulators under seal. But price competition is often open, not hidden. It is not something traditionally seen as "property" that is off-limits to competitors. In fact, in a market economy, open price competition is the norm.

Indeed, the idea that pricing information should qualify for trade-secret protection does not fit the traditional justification for intellectual-property laws: to encourage and incentivize spending and research to develop useful commercial information. Companies need no incentive to buy low and sell high, for that is the ordinary function of the market. And a price is hardly the same

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[6] *E.g.*, Progressive Prod., Inc. v. Schwartz, 258 P.3d 969, 978 (Kan. 2011) (affirming a finding that pricing information was not a trade secret, in a lawsuit against former employees, where facts showed that customers could freely communicate "with each other about how much they were paying for certain work").

[7] *E.g.*, Essex Electro Eng'g, Inc. v. U.S. Sec'y of the Army, 686 F. Supp. 2d 91, 93–94 (D.D.C. 2010) (protecting unit prices in an Army contract against FOIA disclosure based on a showing of substantial, if "highly speculative," competitive harm).

thing as what ordinarily qualifies as a trade secret: the underlying design, development, or product being bought and sold.

Trade-Secret Law: Stepping Back from the Brink

Contemporary intellectual property theory provides useful guidance in demonstrating why naked price is not a protectable trade secret. The reasons why are straightforward. A price is not an idea. It is a negotiated point representing value to be exchanged. It is a point on a line between two adverse parties, not an act of creation. A price does not spur future development or additional thinking: it is not inchoate. Even were the process for determining pricing terms somehow tantamount to creation, the simple naked price is a numerical output, not itself something creative. Further, price is arrived at through adverse negotiation, unknown until settled by mutual agreement. As such, it is not equivalent to the development of the ideas instantiated in the pharmaceutical products being sold.

In fact, the entire notion of price as a creation crumbles apart when considering who the creators are. Price emerges during negotiations between the two parties to an agreement. If price were a valid joint creation of those parties, then neither party could reveal the secret without the permission of the other. Thus, the drug company would not be able to use the same price (or even the same terms) with another PBM or another health plan without the original PBM's permission because the price would belong to the two of them jointly.[8]

Further, price is created in an adversarial process. An adversarial process is decidedly different from the normal context of joint creation. And if the creation belongs jointly to the PBM and the drug company, the PBM may be violating its fiduciary duty to the health plan as the agent and brokers for those plans by creating intellectual property that will be owned jointly with a party who is supposed to be on the other side of the table from the

[8] *See* JAMES POOLEY, TRADE SECRETS § 3.04 & § 5.01[1][c] n.10 (2017) ("Courts have held that one joint owner's use of a secret without the permission of the other states a trade secret claim, and that one joint owner's disclosure to a knowing third party without the other's permission also states a claim against both the discloser and the recipient.").

health plan—and that cannot be shared with the health plan without the drug company's consent.[9] Together, all of these issues illustrate the logical absurdity of the notion that price is some type of a creation that should be subject to intellectual-property protection of any kind.

Even if one were to conclude that negotiated price points between PBMs and pharmaceutical manufacturers might constitute a trade secret, however, there would be no protection against regulatory disclosure. Neither federal nor state trade-secrecy laws provide an immunity to the owner of a trade secret against regulatory disclosure, and nothing purports to preempt regulatory or administrative statutes.[10]

In short, trade-secret law does not categorically bar regulatory disclosure. Any regulatory activity should lead instead to the balancing of the public interest with the harm in disclosure. Legislatures are capable of making reasoned decisions regarding this calculus—especially as to business entities who seek to characterize the very product of their market capture (artificially high pricing) as intellectual property.[11] Indeed, the case of companies engaging in exploitation of the citizenry, who are effectively captive buyers of high-priced pharmaceuticals, appears to be a model instance where regulators should put the brakes on overbroad use of trade-secrecy assertions.

Thin Trade Secrets

Companies seeking to avoid regulatory disclosure of pharmaceutical pricing implicitly propose a hard line: once information qualifies as a trade secret, it is automatically fully protected from disclosure. The trade-secret statutes, however, do

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[9] For discussions of perverse incentives in which the PBM middle players may be tempted to act in the interests of the drug companies rather than in the interests of the PBMs' own client, the health plan, *see generally* FELDMAN, *supra* note 3.

[10] *See, e.g.*, CAL. CIV. CODE § 3426.7(a) ("[The Uniform Act] does not supersede . . . any statute otherwise regulating trade secrets.").

[11] *See* N. States Power Co. v. N.D. Pub. Serv. Comm'n, 502 N.W.2d 240, 247 (N.D. 1993) (finding that price information constituted a trade secret but nonetheless was subject to regulatory disclosure because of the public interest in knowing the rates charged in natural-gas agreements).

not support this conclusion. Rather, trade secrecy mirrors its sister intellectual-property doctrines in their nuanced and delicate balancing of interests.

Thus, courts should consider borrowing from copyright to develop trade secret's own version of thinness.[12] Thin trade secrecy would exist when the independent economic value or creative aspect of the secret is scant.[13] Unlike secret formulae and manufacturing techniques, thin trade secrets would exist near the margins of protection. With only weak justification of protection, the tug of countervailing public-policy interests would have particular force against using that protection to prevent disclosure. To prevent entities from claiming a private interest in the guise of public policy, thin protection should apply primarily when trade secrecy conflicts with public policy in other doctrinal areas. In those circumstances, the doctrine of thin trade secrecy creates space for navigating the boundaries and accommodating opposing interests.

Even if a court were to find that negotiated price points between PBMs and pharmaceutical manufacturers qualify as a trade secret, justification for protecting them from disclosure is very weak. At most, such pricing information would be a thin and untraditional right, not core intellectual property. Any protection afforded such a thin trade secret should yield to the public interest in regulatory disclosure.

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[12] For a useful analogy in a litigation context, see Joseph P. Fishman & Deepa Varadarajan, *Similar Secrets*, 167 U. PA. L. REV. 1051 (2019) (recommending a materiality filter for civil cases involving allegations of wrongful commercial use, based in part on an analogy to copyright's thinness doctrine, to screen out claims unless the trade secret and the defendant's product bear an especially high degree of similarity to each other). *Cf.* Deepa Varadarajan, *Trade Secret Fair Use*, 83 FORDHAM L. REV. 1401 (2014) (urging the incorporation of the concept of fair use into the law of trade secrets).

[13] One potential hook for a theory of "thin" trade secret protection exists in the statutory text, in the requirement that a trade secret have independent economic value. *See* 18 U.S.C. § 1839 (3)(b); CAL. CIV. CODE 3426.1(d)(1) (UTSA example). Such value is a sliding scale—some trade secrets are more valuable than others—and thus scant value may be one way to approach the further development of this concept.

Conclusion

It would be ironic indeed if the very thing regulators seek to combat—artificially high pharmaceutical pricing abetted by opaque deals between PBMs and manufacturers—could itself be claimed as a form of intellectual property for the purpose of preventing regulatory disclosure. Healthy skepticism about such IP claims is in order when the motive behind the claim is to avoid regulation and transparency in the strong public interest. The special context of pricing in PBM agreements is not a viable candidate for trade secrecy. Even if it were, such thin trade secrecy should not be a shield against regulatory disclosure.