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Naked Price and Pharmaceutical Trade Secret Overreach

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NAKED PRICE AND PHARMACEUTICAL TRADE SECRET OVERREACH

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Trade secret has drifted from a quiet backwater doctrine to a pervasive force in intellectual property. As always, the risk of distortion is great when a legal arena is developing and expanding rapidly. Nowhere do the theoretical tensions of trade secret law appear in such stark relief as in the modern pharmaceutical debates, where the heart of the theoretical question involves whether pricing is a proper subject for trade secrecy claims.

We aim to bring trade secret into greater harmony with broad concepts that reach across all intellectual property regimes. As with other areas of intellectual property law, trade secret law is not a mere contest of private commercial interests. Rather, it embeds substantial dedication to the public interest, reflecting utilitarian balancing of key societal interests. In this context, we develop the concept of "thin" trade secret, looking to the analogous concepts in other intellectual property regimes. Such approaches embody the recognition that intellectual property rights are not solid monoliths, presenting an impenetrable wall through which no party but the rights holder may pass. Rather, they are brilliantly nimble and subtle systems, deftly threading their way among various societal goals.

This Article offers the potential of anchoring trade secret more firmly to its theoretical base, as well as bringing trade secret closer to the family of other intellectual property regimes. Although squabbling, chaotic, and somewhat dispersed, all members of this time-honored family can learn from each other, sharing their battle-worn wisdom with the newest, young upstart.

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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—from new, life-saving treatments for Hepatitis C[1] and HIV[2] to ordinary medications for more common ailments such as heart disease and diabetes[3]—personal and public budgets are straining to absorb the impact. New cancer treatments coming online at the million-dollar-per-patient mark[4] only worsen the stress on the health care system. On the whole, these pricing trajectories threaten to roll back decades of improvement in access to health care for those at all income levels.[5]

The problem is receiving growing attention from lawmakers, regulators, and the media.[6] Absent from this flurry of attention, as well as from the bulk of the broader literature, is the role that certain intellectual property regimes are playing.[7]

Specifically, to shield pricing arrangements in the pharmaceutical supply chain from scrutiny by regulators alone as well as from public scrutiny resulting from some forms of regulatory transparency, companies have turned to bold claims that prices, in and of themselves, are trade secrets and thus immune from regulatory disclosure. This Article challenges that notion to promote pricing transparency for the ultimate benefit of consumers. To critique these industry claims on intellectual property grounds, we

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[1] *See* Brandy Henry, *Drug Pricing & Challenges to Hepatitis C Treatment Access*, 14 J. HEALTH BIOMED LAW 265, 266 (2018).

[2] *See* Shefali Luthra & Anna Gorman, *Out-of-Pocket Costs Put HIV Prevention Drug Out of Reach for Many at Risk*, KAISER HEALTH NEWS (July 3, 2018), https://khn.org/news/out-of-pocket-costs-put-hiv-prevention-drug-out-of-reach-for-many-at-risk.

[3] *See* U.S. DEP'T OF HEALTH & HUM. SERV., OFFICE OF INSPECTOR GEN., OEI-03-15-0080, INCREASES IN REIMBURSEMENT FOR BRAND-NAME DRUGS IN PART D (2018) [hereinafter HHS INSPECTOR GENERAL]; *see also* CTR. FOR MEDICARE & MEDICAID SERV., DRUG SPENDING INFORMATION PRODUCTS FACT SHEET (2018); Ned Pagliarulo, *To Shame Drugmakers, CMS Publicizes Price Hikes*, BIOPHARMA DIVE (May 16, 2018), https://www.biopharmadive.com/news/to-shame-drugmakers-cms-publicizes-price-hikes/523693.

[4] *See* Jonathan D. Rockoff, *The Million-Dollar Cancer Treatment: Who Will Pay?*, WALL ST. J. (April 26, 2018), https://www.wsj.com/articles/the-million-dollar-cancer-treatment-no-one-knows-how-to-pay-for-1524740401.

[5] *See* ROBIN FELDMAN, DRUGS, MONEY, & SECRET HANDSHAKES: THE UNSTOPPABLE GROWTH OF PRESCRIPTION DRUG PRICES 9–10 (Cambridge Univ. Press 2019) (describing the impact of rising drug prices on those who have private insurance, public insurance, and the uninsured).

[6] *See infra* note 47 and accompanying text.

[7] *See infra* text accompanying notes 106–122 (containing a literature review).

discuss the underdeveloped state of theory in trade secret law. Ultimately, we offer grounds for rejecting claims that "naked prices" in the pharmaceutical supply chain are trade secrets based on contemporary conceptions of trade secret—and we borrow from copyright law to advance a new concept of "thin" trade secret protection amenable to appropriate regulatory challenges.

That companies have turned to trade secret claims as a weapon against state regulators comes as no surprise. Trade secret law encompasses the rules governing business information that, to receive protection, must be nonpublic, of competitive value, guarded with reasonably security measures, and not readily ascertainable. By all accounts, trade secret law is an increasingly important area of intellectual property law. This is so not only in civil litigation and in espionage-related trade secret indictments, but also in a surprising number of areas outside the traditional litigation context including public infrastructure, medical device data, and access to technologies used by the prosecution in ordinary criminal cases.[8] As scholars have noted, trade secret has drifted from a quiet backwater doctrine to "the most pervasive form of intellectual property in the modern economy."[9] The rise of trade secret in modern jurisprudence has been driven by a multitude of factors. In 2016, President Obama signed the Defend Trade Secrets Act (the "Federal Act" or DTSA), a comprehensive law that, for the first time, provided a federal civil cause of action for trade secret misappropriation.[10] Even before passage of the Federal Act, companies increasingly looked for shelter under the wings of state trade secret laws as Supreme Court decisions limited the protections available under patent law.[11] More broadly, the rise in trade secret is fueled by the explosive growth in the technology sector—and in the everyday use and reliance in the workplace on scientific and

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[8] *See infra* notes 48–53 and accompanying text.

[9] *See* Peter S. Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CALIF. L. REV. 1, 3 (2017); *see also* Deepa Varadarajan, *The Uses of IP Misuse*, 68 EMORY L.J. 741, 783 (2019) (describing the modern rise of trade secret and quoting Menell).

[10] The Defend Trade Secrets Act of 2016 was embedded into the existing Economic Espionage Act of 1995. *See* 18 U.S.C. §§ 1831–39.

[11] *See generally* David S. Almeling, Darin W. Snyder, Michael Sapiznikow, Whitney E. McCollum & Jill Winder, *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 GONZAGA L. REV. 291 (2010); David S. Almeling, Darin W. Snyder, Michael Sapiznikow, Whitney E. McCollum & Jill Winder, *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 GONZAGA L. REV. 57 (2011); Robin Feldman, *Intellectual Property Wrongs*, 18 STAN. J.L. BUS. & FIN. 250 (2013).

technical information that is not public, but also may not be patented or copyrightable.[12]

At the same time, uncertainty about the nature of trade secret law makes it an inviting area to exploit. Trade secret law exists as both state law and federal law, and it also crops up in administrative disputes. In part because of this sprawl, legal theory in the trade secret arena does not always unfold in a coherent and consistent manner.[13]

But as corporate claims of trade secret rights grow, there is a gathering chorus of criticism regarding the effect of such claims on the public interest.[14] Just as trade secret law itself is not always uniform across jurisdictions and individual rulings, however, scholars and commentators do not always speak in the same voice when focusing on seemingly unrelated areas of trade secret disputes. To help bridge these gaps, we offer theories of trade secret law to critique secrecy assertions in the pharmaceutical pricing context, but that have wider and general application.

Part of the problem is mundane—those working in different areas of law have yet to compare notes about these emerging issues, and to seek common ground to approach related public policy problems. But the problem is one of theory as well in this still-underdeveloped area. Philosophical confusion over the nature of trade secret law—as a property theory, based on whether a defined item of information qualifies as intellectual property, or as a relational theory, based on looser notions that someone agreed to hold broad areas of "confidential information" in trust, with less attention to whether information meets criteria for protection—creates theoretical uncertainty. Choosing one starting point or the other can lead to

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[12] *See supra* note 11.

[13] To be sure, the gradual adoption of the Uniform Trade Secrets Act (UTSA) and the DTSA's enactment in 2016 reflect significant gains in coherence. As Sharon Sandeen has shown in her work on the drafting history of the UTSA, these statutory regimes offer a largely consistent framework – a marked improvement over prior common law regimes. *See* Sharon Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 HAMLINE L.R. 493 (2010); *see also* Sharon Sandeen & Christopher B. Seaman, *Toward a Federal Jurisprudence of Trade Secret Law*, 32 BERKELEY TECH. L.J. 829 (2017) (noting that emerging DTSA case law tends to rely on existing UTSA case law). However, trade secret law still has a long way to go. Patent law, for example, gained coherence only gradually through the adoption of patent-specific local court rules, the creation of *Markman* hearings and the Patent Trials and Appeal Board (PTAB), and important Federal Circuit and Supreme Court decisions on issues such as software patents and presumptions in requests for injunctive relief.

[14] *See infra* notes 45–52 and accompanying text.

substantially different, if inadvertent, real-world outcomes. In this Article, we explore historical reasons for this divergence. We also suggest that harmonizing the philosophical background of these debates and adopting a strong conception that trade secret rights must be established as specific, discrete items of property will best promote the public interest within the parameters of these now-dominant statutory definitions of trade secret rights. This move is not simply one of abstract theory, but one that would also change the manner in which these courtroom disputes have been litigated, and thus have a lasting and immediate impact on regulatory outcomes.

We focus on industry assertions of trade secrecy deployed to resist consumer-friendly efforts by regulatory bodies to require transparency in drug pricing as the vehicle for this analysis. Nowhere do the theoretical tensions of trade secret law appear in such stark relief as in the modern pharmaceutical debates. In these battles, one can see the confusion in modern trade secret law, along with the potential for trampling and distorting core theoretical concepts in this arena. And as always, the risk of distortion is great when an area of law is developing and expanding rapidly. If society fails to impose some measure of logic and order, a dangerous overreach of trade secret claims may be upon us.

We will refer to negotiated drug prices in the pharmaceutical context as “naked price” and will frame the issues at the heart of these debates in the following manner. First, are naked prices intellectual property? Second, if so, do they constitute sufficient intellectual property to create an immunity to public disclosure when the public interest is strong? In other words, if naked price is an appropriate form of intellectual property, is it a “thin” right?

The issues are playing out on a broad, national platform. 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 information to expose industry structures that drive up pricing and harm the public, arguing that such arrangements should not receive trade secret protection. We discuss recent examples in Nevada, California, and Ohio, as well as the broader history of pricing in civil trade secret and Freedom of Information Act disputes. As we will demonstrate, it is not clear that courts, regulators, or legislatures have sufficiently focused on whether such pricing actually can be claimed as a trade secret, or whether such claims have firm support in the theoretical foundations of trade secret law.

That clash – and the theoretical question of whether pricing, at least in this context, is a proper subject for trade secrecy claims at all – is the primary focus of this Article. Indeed, this essay traces the emergence of naked price as a claimed trade secret. It suggests that such claims, at least in the context of PBM pharmaceutical pricing arrangements, are not well-grounded in the theory of trade secret law. Building upon the pioneering insights of earlier commentators, we offer a theory of why this type of pricing should not receive trade secret protection – or, if it does, why such protection should be thin and undeserving of immunity from regulation in the public interest. In summary, we propose the following:

- Industry claims that naked price constitutes a protectable trade secret in the PBM pharmaceutical context pose a threat to consumers, and more broadly reflect a worrying trend towards overreach in trade secret law;
- A property-centered theory of trade secret law poses the best approach for challenging such assertions;
- A new concept of "thin" trade secret rights, inspired by analogous concepts in copyright law, can be applied to naked price. Thus, even if PBM pricing arrangements made it across the line for trade secret status, such protection would not pose an impassable barrier to appropriate regulatory disclosure.
- By harmonizing different strands of recent commentary about overreaching trade secret claims in a host of areas outside the typical trade secret litigation context, it is possible to create common theoretical approaches to similar public policy problems.

Prior literature, examining trade secret protection in the context of medical device pricing, focusses on an element of the 1939 Restatement of Torts which predates the passage of modern federal and state legislation. In contrast, we analyze the modern landscape under the recently enacted Defend Trade Secrets Act and the modern state Uniform Trade Secrets Act (UTSA), diving into the underlying theory of trade secrecy to make sense of this intersection of intellectual property and regulatory disclosure. We conclude that naked price information is not a good candidate for trade secret status, especially when proffered to inhibit regulatory disclosure in the pharmaceutical pricing context where the public interest is strong.

This Article demonstrates how existing trade secret doctrines provide the tools that courts and regulators can use when grappling with industry claims that PBM pricing constitutes trade secrets. Borrowing from the world of civil trade secret litigation, we point to requirements that a trade secret claimant specifically identify each separate asserted trade secret with particularity, that artificial combination trade secret claims be disaggregated, and that sweeping claims that entire fields or subject areas constitute trade secrets be challenged. Courts and regulators need not give credence to conclusory declarations of trade secrecy and ghostwritten affidavits from the industry.

Ultimately, our specific proposals regarding PBM pricing and our more general philosophical statements regarding the normative grounding of trade secret claims stem from the observation that the statutes which grant trade secret rights are not absolutes. They reflect utilitarian economic legislation designed to balance the respective interests of employers, employees, business partners, and the public by creating limited rights to incentivize investment in research and laboratory infrastructure. Trade secrets are not some objective, metaphysical rights found in nature. Indeed, both the Federal Act and the state Uniform Trade Secrets Acts are riddled with limitations and exceptions, from the right of others to independently develop the exact same information and to discern the trade secret through reverse engineering, to the simple loss of rights if the owner fails to use appropriate security measures. This is not an impregnable fortress against regulatory disclosure. Moreover, neither the Federal Act nor the state Uniform Trade Secret Acts were intended to radically enlarge trade secret protection – they seek uniformity and clarity while offering a generally balanced regime.[15]

[15] Compared to the prior Restatement approach, the Federal Act and state statutes both strengthened and weakened the scope of trade secret protection on different points, leading to a general balance rather than a radical departure in either direction. The statutes, however, arguably offer a somewhat narrower regime. For example, the statutes enlarged trade secret protection by rejecting the notion that information must remain in continuous use to qualify for trade secrecy, and the Federal Act increased protection for overseas activity. *E.g.*, 18 U.S.C. § 1837. But they also weakened protection by (in the case of most state statutes) preempting broader, conflicting tort claims, and (in the case of the Federal Act) creating a regime for disclosure by whistleblowers. *E.g.*, 18 U.S.C. § 1833(b). In addition, the Federal Act and almost all state statutes enacted a provision providing for an award of attorneys' fees to the defense in cases of "bad faith" – a disincentive for a plaintiff to pursue weak claims for anticompetitive or malicious purposes. *E.g.*, 18 U.S.C. § 1836(b)(3)(D). As the commentary to the Uniform Trade Secrets Act notes, a primary goal of the statutes was "substitution of unitary definitions of trade secret and trade secret misappropriation, and a single statute of limitations for the various property, quasi-contractual, and violation of fiduciary relationship theories of noncontractual liability utilized at common law." UNIFORM TRADE SECRETS ACT, commissioner's prefatory note, at 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1980).

As with other areas of intellectual property law, then, trade secret law is not a mere contest of private commercial interests. Rather, it embeds a substantial dedication to the public interest by maintaining a robust public domain excepting only that information which meets the criteria of trade secrecy. But these themes are underdeveloped, especially outside the civil litigation context. We aim to bring trade secret into greater harmony with broad concepts that reach across all of the intellectual property regimes, learning from society's experience in each. Similarly, in developing the concept of "thin" trade secret protection, we look to the analogous concept of thin protection for certain categories of work in copyright. We also look to the emerging theory of trade secret misuse, which itself builds on doctrines in patent and copyright. In each of these contexts, this Article offers the potential of anchoring trade secret more firmly to its theoretical base, as well as bringing trade secret closer to the family of other intellectual property regimes. Although squabbling, chaotic, and somewhat dispersed, all members of this time-honored family can learn from each other, sharing their battle-worn wisdom regarding this still-developing area.

I. THE PROBLEM: PBM PRICING AND TRADE SECRECY ASSERTIONS

Prescription drug prices in the United States are rising at an uncomfortable pace. New drugs on the market continue to break ground, not just for their therapeutic value, but for their higher and higher price points. For example, Novartis raised eyebrows in 2017 by introducing its leukemia drug Kymriah at a price point of $475,000.[16] Within two years, however, that ground-breaking price was left in the dust by the $2.125 million price tag of Novartis' new drug Zolgensma,[17] which treats pediatric spinal atrophy and by Spark Therapeutics' Luxturna, which treats a rare form of blindness and costs a hefty $850,000 for a one-time treatment.[18]

As the health care system struggles to swallow these bitter pills, medicines for ordinary conditions are causing their fair share of pain. According to the U.S. Department of Health and Human Services,

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[16] *See* Paul Kleutghen et al., *Drugs Don't Work if People Can't Afford Them: The High Price of Tisagenlecleucel*, HEALTH AFF. (2018), https://www.healthaffairs.org/do/10.1377/hblog20180205.292531/full.

[17] *See* Adam Feuerstein, *At $2.1 Million, Newly Approved Novartis Gene Therapy Will Be World's Most Expensive Drug*, STAT+ (May 24, 2019), https://www.statnews.com/2019/05/24/hold-novartis-zolgensma-approval.

[18] *See* Meg Tirrell, *A U.S. Drugmaker Offers to Cure Rare Blindness for $850,000*, CNBC (Jan. 3, 2018), https://www.cnbc.com/2018/01/03/spark-therapeutics-luxturna-gene-therapy-will-cost-about-850000.html.

the most costly drugs for Medicare patients in recent years were for common conditions, such as diabetes, heart disease, and asthma.[19] These drugs also experienced the sharpest price hikes as well.[20] Although drug companies provide substantial rebates and discounts on their medications in certain circumstances, net price increases continue to climb,[21] pushing real spending ever higher. On the whole, between 2011 and 2015, Medicare spending for branded drugs rose 62%.[22] The increase during this period appears to be attributable in large part to rising prices on existing medications.[23] Prices in the United States are far above prices in other developed countries.[24]

The economic implications are troubling on many levels. For individual budgets, both studies and anecdotes demonstrate that some patients are choosing to forgo medication or to engage in rationing in response to cost pressures.[25] For government budgets,

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[19] *See* HHS INSPECTOR GENERAL, *supra* note 3.

[20] *See id.*

[21] *See* FELDMAN, *supra* note 5, at 9–11 (describing rising real prices and noting that many people do pay for the high list price, either due to lack of insurance, to meet a deductible, or as the basis of co-insurance); Workshop Slides, Fed. Trade Comm'n, Understanding Competition in Prescription Drug Markets: Entry and Supply Chain Dynamics 107 (2017), www.ftc.gov/news-events/events-calendar/2017/11/understanding-competition-prescription-drug-markets-entry-supply (estimating that net prices increased 4.5% in 2014); Dylan Scott, *Inside the Impossibly Byzantine World of Prescription Drug Prices*, STAT (Dec. 21, 2015), www.statnews.com/2015/12/21/prescription-drug-prices-confusion. (pharmaceutical trade group report at FTC roundtable estimating that list prices increased 3.5% in 2014). These increases far outpace inflation, which ranged from less than 1% to 2% during the relevant period. *See Current U.S. Inflation Rates: 2008 to 2018*, U.S. INFLATION CALCULATOR (2018), www.usinflationcalculator.com/inflation/current-inflation-rates.

[22] HHS INSPECTOR GENERAL, *supra* note 3, at 4 (documenting the rise in total spending despite the fact that rebates increased from $58 billion to $102 billion during the period).

[23] *See* Medicare Payment Advisory Comm'n, Report to the Congress: Medicare Payment Policy 408 (2017) (concluding that rising prices on branded medications are overwhelming the savings from generics).

[24] *See* Simon F. Haeder, *Why the US Has Higher Drug Prices Than Other Countries*, THE CONVERSATION (Feb. 7, 2019), https://theconversation.com/why-the-us-has-higher-drug-prices-than-other-countries-111256; Robert Langreth, *Drug Prices*, BLOOMBERG, (Feb. 5, 2019), https://www.bloomberg.com/quicktake/drug-prices.

[25] *See* NAT'L ACADS. OF SCI., ENG'G, AND MED., MAKING MEDICINES AFFORDABLE: A NATIONAL IMPERATIVE 110, 116 (Norman R. Augustine, Guru Madhavan & Sharyl J. Nass, eds., 2017) (explaining that patient "sticker shock" at the pharmacy leads them to forgo filling the prescription or extend their medication by reducing dosages); *see also* Robyn Tamblyn et al., *The Incidence and Determinants of Primary Nonadherence with Prescribed Medication in Primary Care: A Cohort Study*, 160 ANN. INTERN. MED. 441–50 (2014) (study

the increasing costs are placing great strain on state and federal coffers, as officials struggle to find the necessary resources. In the words of Andy Slavitt, the former Acting Administrator of the Centers for Medicare and Medicaid Services, these prices are simply "unsustainable."[26]

One would expect market forces to mitigate the rising costs. Unfortunately, perverse incentives, along with externalities and information asymmetries, operate to blunt the natural competitive forces society might otherwise enjoy.[27] To begin with, the normal valuation process that help buyers choose among different types of expenditures—buying a suit as opposed to dinner at a restaurant—become distorted in the health care setting. My life and my health may be of infinite value to me, particularly when someone else is footing the bill. In that manner, both the valuation and the true cost of the goods are lost, given the nature of the goods and our third-party payor system.[28]

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showing that patients with higher co-pays, recent hospitalizations, other severe health problems, or combinations of these factors were less likely to fill their prescriptions); PRESIDENT'S CANCER PANEL, PROMOTING VALUE, AFFORDABILITY, AND INNOVATION IN CANCER DRUG TREATMENT. A REPORT TO THE PRESIDENT OF THE UNITED STATES FROM THE PRESIDENT'S CANCER PANEL 17 (Mar. 2018), https://prescancerpanel.cancer.gov/report/drugvalue/pdf/PresCancerPanel_DrugValue_Mar2018.pdf (detailing that higher out-of-pocket costs makes it less likely for patients to adhere to recommended treatment regimens or undergo financial hardship); *Financial Toxicity and Cancer Treatment (PDQ®)–Health Professional Version*, NAT'L CANCER INST., https://www.cancer.gov/about-cancer/managing-care/track-care-costs/financial-toxicity-hp-pdq_(last visited May 3, 2018) (study on financial burden of cancer treatments noting how high costs have resulted in cancer patients selling property and other assets, incurring medical debt, reducing spending on necessities, changing housing, and declaring bankruptcy).

26 *See* Ed Silverman, *CMS Official Says Drug Costs Are "Unsustainable" and There Are Too Many Bad Actors*, STAT (Nov. 7, 2016), https://www.statnews.com/pharmalot/2016/11/07/medicare-medicaid-drug-prices.

27 *See* Robin Feldman, *Perverse Incentives: Why Everyone Prefers High Drug Prices—Except for Those Who Pay the Bills*, HARV. J. ON LEGIS. (forthcoming) (describing perverse incentives and strategic behaviors in this highly regulated industry), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3162432; Fiona Scott Morton & Lysle T. Boller, *Enabling Competition in the Pharmaceutical Markets* 2 (Hutchins Ctr. On Fiscal & Monetary Pol'y at Brookings, Working Paper No. 30, 2017) (explaining that externalities and information asymmetries prevent consumers from optimal substitution because they do not bear full costs and lack medical expertise or reliable information to identify therapeutic equivalents).

28 *See* FELDMAN, *supra* note 5, at 7, 88–93 (describing buying distortions in health care and the problems with value-based pricing in that context).

Other perverse incentives flow from the structure of industry, with its central players the Pharmacy Benefit Managers (PBMs). PBMs are middle players between drug companies and insurance plans—including both private insurers and Medicare. 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 patients will have access to a particular drug and the terms of that access. 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 resulting long-term and short-term effects on the system.

Although a full discussion of the PBMs and the drug supply chain is beyond the scope of this Article,[29] certain aspects are important for understanding the role that assertions of trade secrecy are playing in this space. 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 is hidden. Somewhere down the line, the health plan will receive a rebate check from the PBM that includes rebates for this, and many other, drug transactions. Along the way, PBMs pocket a large portion of the rebate dollars—as much as $166 billion each year[30] by one estimate—although the health plans are not permitted to know the size of the rebates or the portions retained. In fact, the true net price, and the terms of the agreements between PBMs and drug companies are highly guarded secrets; even the health plan's auditors are not given full access to the agreements.[31] Moreover, given that PBMs help create their clients' formularies, PBMs and drug companies can strike deals that may not be in the patient's long-term interests. Recent case allegations and press reports have described patients who are forced to pay more for generics than for brand name drugs and patients completely blocked from access to generic versions of a drug. For example, a complaint filed in 2017 alleges that Allergan's rebate scheme for its blockbuster dry-eye drug Restasis blocked access for competing

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

[30] *See* Peter Pitts, *The White House's About-Face on Drug Rebates Is a Loss for Public Health*, STAT (July 11, 2019), https://www.statnews.com/2019/07/11/drug-rebates-white-house-decision.

[31] *See* Robin Feldman, *Secrets, Conspiracies, and Rx Money—Here's Why Drug Prices Are Out of Control*, MEDPAGE TODAY (May 6, 2019) https://www.medpagetoday.com/publichealthpolicy/generalprofessionalissues/79644; *see also* FELDMAN, *supra* note 5, at 2–3 n.16.

generics.[32] One Medicare plan administrator quoted in the complaint explained that with the particular scheme, a new entrant could give its drug away for free and still would not be able to gain a foothold in the market.[33] Similarly, a recent case alleges that Johnson and Johnson launched a rebate scheme for its rheumatoid arthritis drug Remicade that induced hospitals and health plans to essentially exclude the lower-priced biosimilar.[34] One physician called practices such as these "Alice-in-Wonderland" in the drug world.[35] Moreover, these deals can maximize the payments that the PBMs are able to keep, while keeping patients away from cheaper generic drugs.

In addition, although PBMs represent the health plan as its clients, the PBMs receive various large payments directly from the drug companies. As well as the rebate portions mentioned above, PBMs also receive various fees from drug companies, such as "data management fees" and "administrative fees."[36] With the formulary power of PBMs, these fees have the potential to encourage PBMs to drive patients toward the companies that are offering more attractive terms to them as a middle player, regardless of whether those terms benefit patients in either the short or long-term. Again, these fees are hidden from the health plan, from regulators, and from the public.[37]

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[32] Complaint at 6, 21–23, Shire US, Inc. v. Allergan, Inc., 375 F. Supp. 3d 538 (D.N.J. 2019) (No. 17-7716).

[33] *See id.* at 23–24 (Shire, the manufacturer of a competing drug called Xiidra, states in the complaint that "Shire…has been told by Part D plans that even if Shire gave Xiidra to Part D plans 'for free,' it could not make up for the plans' loss of rebates across Allergan's Part D product portfolio.")

[34] *See* Complaint at 1, Pfizer Inc. v. Johnson & Johnson, 333 F. Supp. 3d 494 (E.D. Pa. 2018) (No. 17-cv-4180); *see also* FELDMAN, *supra* note 5, at 26 n. 43 (case settled for $61.5 million alleging that when Sanofi faced competition on its pediatric meningitis vaccine Menactra, the company charged 34% higher prices unless buyers purchased all of Sanofi's vaccines exclusively).

[35] Charles Ornstein & Katie Thomas, *Take the Generic, Patients Are Told. Until They Are Not.*, N.Y. TIMES (Aug. 6, 2017), https://www.nytimes.com/2017/08/06/health/prescription-drugs-brand-name-generic.html (documenting patients who were forced to pay more for generic Adderall).

[36] *See, e.g.,* Complaint at 6, Boss v. CVS Corp., No. 17-01823, (D.N.J., Mar. 17, 2017) (arguing that payments other than rebates are provided under a variety of labels, including discounts, credits, concession fees, etc.); *see also* Linda Cahn, *Don't Get Trapped By PBMs' Rebate Labeling Games,* MANAGED CARE (Jan. 1, 2009), https://www.managedcaremag.com/archives/2009/1/don-t-get-trapped-pbms-rebate-labeling-games.

[37] PBMs that are public companies are required to provide SEC filings with aggregate numbers related to their revenue. PBMs have resisted efforts by the SEC to provide even modest amounts of additional information. *See* FELDMAN, *supra* note 5, at 98.

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 agreements made on their behalf. So, just how is it that these terms are so deeply hidden? PBMs and drug companies claim that net price is a trade secret. It is under the cloak of trade secrecy that this system, and its impact on rising prices, remains sheltered from view.

Lack of transparency prevents regulators from ferreting out information and evaluating the behavior they are charged with regulating. State and federal regulators govern the pharmaceutical supply chain in myriad ways. Below are a sample of those regulations, although a full description is well beyond the Article's scope. At the federal level, various agencies work in conjunction to regulate the supply chain. The Centers for Medicare and Medicaid Services (CMS) oversees the delivery of pharmaceuticals in those systems in hospitals and at pharmacies. Considering retail sales alone, Medicaid and Medicare Part D payments account for 40% of prescription drug spending.[38] CMS also issues guidance documents and proposes rules to explain how laws will be implemented, clarify existing guidance, and address policy issues such as cost transparency and spread pricing by pharmacy benefit managers.[39] The FDA plays a crucial role in establishing pathways for drug approval and regulating consumer disclosure. Since the enactment of the Pure Food and Drugs Act of 1906, Congress has tasked the FDA with ensuring the safety and efficacy of pharmaceutical products. Various statutes such as the Food, Drug and Cosmetic Act in 1938 and the 1962 Amendments to the FDC Act have given the FDA the requisite authority to control labeling and advertising as well as the development and approval processes for pharmaceuticals.

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[38] *See* Juliette Cubanski, Matthew Rae, Katherine Young & Anthony Damico, *How Does Prescription Drug Spending and Use Compare Across Large Employer Plans, Medicare Part D, and Medicaid,* KAISER FAM. FOUND. (May 20, 2019), https://www.kff.org/medicare/issue-brief/how-does-prescription-drug-spending-and-use-compare-across-large-employer-plans-medicare-part-d-and-medicaid.

[39] *See* Press Release, Cntrs. for Medicare & Medicaid Servs., CMS Takes Bold Action to Implement Key Elements of President Trump's Executive Order to Empower Patients with Price Transparency and Increase Competition to Lower Costs for Medicare Beneficiaries (July 29, 2019), https://www.cms.gov/newsroom/press-releases/cms-takes-bold-action-implement-key-elements-president-trumps-executive-order-empower-patients-price; Press Release, Cntrs. for Medicare & Medicaid Servs., CMS Issues New Guidance Addressing Spread Pricing in Medicaid, Ensures Pharmacy Benefit Managers Are Not Up-Charging Taxpayers (May 15, 2019), https://www.cms.gov/newsroom/press-releases/cms-issues-new-guidance-addressing-spread-pricing-medicaid-ensures-pharmacy-benefit-managers-are-not.

The FDA also participates in the rulemaking process and publishes regulations and guidances on existing rules and arising issues.[40] The FTC and DOJ oversee mergers and challenge anticompetitive behavior such as pay-for-delay tactics. Pay-for-delay agreements, also known as reverse settlement agreements, involve brand-name drug companies paying their generic competitors to delay market entry, effectively blocking generic competition for brand-name drugs.[41] The USPTO is another major player within pharmaceutical regulation. Innovation in the pharmaceutical industry is incentivized by patent protection benefits, and the USPTO decides whether a pharmaceutical invention is sufficiently innovative to deserve patent protection.

At the state level, state attorneys general have the power to challenge anticompetitive behaviors under state antitrust laws and to allow in-state mergers to go forward only on the condition of conduct remedies supervised by the state. Such state antitrust regimes may be broader than and differ from the federal regime.[42] State consumer protection statutes regulate the information provided to consumers and unfair business practices. Regulation of insurance, which includes regulation of the health insurance industry has been largely a matter of state law since the congressional Kefauver amendment. Medicaid is a federal program administered by the states, which provides additional state regulation of pharmaceuticals. More broadly, every state has its own laws and regulations guiding

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[40] *See generally Guidances*, U.S. FOOD & DRUG ADMIN. (May 24, 2018), https://www.fda.gov/industry/fda-basics-industry/guidances ("Guidance documents describe FDA's interpretation of our policy on a regulatory issue (21 CFR 10.115(b)). These documents usually discuss more specific products or issues that relate to the design, production, labeling, promotion, manufacturing, and testing of regulated products.").

[41] *See* ROBIN FELDMAN & EVAN FRONDORF, DRUG WARS: HOW BIG PHARMA RAISES PRICES AND KEEPS GENERICS OFF THE MARKET 34 (2017) (outlining the basic contours of pay-for-delay settlements).

[42] *See, e.g.*, California Cartwright Act, CAL. BUS. & PROF. CODE §§ 16700–16758 (1907) (barring price-fixing and market-allocation agreements among competitors by way of a more detailed list of transgressions than the Sherman Act's general prohibitions against "restraints of trade;" allowing purchasers to sue and recover "regardless of whether such injured person dealt directly or indirectly with the defendant" whereas federal antitrust law does not allow recovery by an indirect purchaser);California Unfair Practices Act, CAL. BUS. & PROF. CODE §§ 17000–17101 (1941) (allowing suits by private parties to be brought in the state courts; prohibiting sales below cost undertaken with a purpose to injure competitors, price discrimination between different localities undertaken with an intent to injure competitors, and secret rebates given to some purchasers but not to others and that are injurious to competition; unlike its federal counterpart, the Robinson-Patman Act, the California Unfair Practices Act is not limited to price discrimination on commodities but also extends to services and intangibles and may include intellectual property.).

pharmacy standards and requirements; these rules govern issues such as compounding, manufacturing, enforcement, licensing, and transparency.[43]

It is important to note that while government at both the federal and state levels plays a crucial role, government cannot be expected to do everything. As described below, intellectual property theory rests against a backdrop of faith in the importance of competition and the efficiency of open markets.[44] Despite extensive regulation in the health care system, society continues to depend on fair, open, and competitive markets—markets that cannot function effectively without a sufficient flow of information. Moreover, in the increasing complexity of modern society, other actors play important roles in fostering the flow of information that allows government regulators to respond to market imperfection and manipulation, as well as shining light on areas of the market that may be ripe for competition and disruption. In short, an efficient and well-functioning pharmaceutical market thrives on the sunlight of information; it would wither in the dark.

Public outcry over rising prices in the United States, particularly in contrast to comparable countries across the globe, has prompted numerous legislative and regulatory attempts to reform the system. More than 40 states have introduced legislation to address rising pharmaceutical pricing, with many of those bills directed at transparency in drug pricing. Transparency has been an issue for Congress and federal regulators as well, with the introduction of transparency bills and regulations.[45]

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[43] *See State Regulation of Compounding Pharmacies*, NAT'L CONFERENCE OF STATE LEGISLATURES (Oct. 1, 2014), https://www.ncsl.org/research/health/regulating-compounding-pharmacies.aspx; SUMEET SINGH & SAMUEL M. SMITH, DEFINITIVE GUIDE TO STATE REGULATION OF THE PHARMACEUTICAL SUPPLY CHAIN 3 (Five Rivers RX 2018).

[44] *See infra* text accompanying notes 182–187.

[45] *E.g.,* Drug Price Transparency Act, H.R. 2087, 116th Cong. (2019); Prescription Drug Price Transparency Act, H.R. 1035, 116th Cong. (2019); *see also* Patient Right to Know Drug Prices Act, S. 2554, 115th Cong. (2018) (enacted) (prohibiting gag clauses, which were contractual clauses that prevented pharmacists from letting patients know that it would be cheaper to pay for a drug out-of-pocket); 84 Fed. Reg. 2340–2363 (Feb. 6, 2019) (proposed rebate rule later withdrawn that also would have required that PBMs disclose to their clients (the insurance plans) the services rendered to each drug company they negotiated with on behalf of the insurance plan); *see also* Merck & Co. v. U.S. Dep't of Health and Human Servs., No. 19-cv-01738 (APM), 2019 WL 2931591 (D.D.C. July 8, 2019) (overturning Health and Human Services regulation requiring that drug companies include list prices in their advertisements; overturned on the grounds that the agency lacked Congressional authority for the regulation).

As state actors have sought to regulate or even investigate pharmaceutical pricing and practices, they have run into claims of trade secrecy. For example, Caremark is one of three major Pharmacy Benefit Managers that control 85% of the market. When the State of Ohio investigated in 2018 how PBMs spent state and federal funds, a third party prepared a report for the state which included details of such spending. Caremark then objected to publication of the report, filed a lawsuit seeking to suppress the report. In shrill language, the Pharmacy Benefit Manager argued that pricing information regarding prescription drugs in its contracts with entities that manage Medicaid for patients constituted "proprietary" "trade secrets," such that publication would be "devastating," with "severe financial harm" to its business.[46] Trying to have it both ways, Caremark represented that the report it did not want the public to read found that "allegations against Caremark were not true" with respect to "preferential pricing."[47] Along the same lines, a California court enjoined the state from publishing information about a pharmaceutical company's planned drug price increases before those prices would go into effect on the ground that for purposes of the order, the information constituted trade secrets.[48]

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[46] *See* Complaint at ¶¶ 18, 25, 27–30, 38, 79–85, CaremarkPCS Health, LLC v. Sears, No. 18-cv-5943 (Ohio Ct. Com. Pl. July 16, 2018) [Hereinafter, "Caremark Complaint"]. The State of Ohio responded to Caremark's request for temporary injunctive relief to suppress publication by arguing that Caremark could not assert trade secret projection because it failed to undertake reasonable security measures regarding the information at issue. *See* Memorandum for Defendant Against Plaintiff's Motion for a Temporary Restraining Order, *CaremarkPCS*, No. 18-cv-5943 (Ohio Ct. Com. Pl. 2018), <https://issuu.com/thecolumbusdispatch/docs/combinepdf__4_>. Although the complaint focused on contracts between the Caremark PBM and various health plans, it is possible that the material at issue included information about agreements between the PBM and pharmaceutical manufacturers. The complaint refers ambiguously to "pricing structures, fees, and details about Caremark's bidding and contracting process" and to "contract, pricing, fee, and rebate information." *See* Caremark Complaint at ¶¶ 46, 62. Those terms could refer solely to Caremark's bidding and contracting with its PBM clients; alternatively, they could include bidding and contracting with suppliers such as pharmaceutical manufacturers. The judge granted the temporary injunction, and the case is pending (scheduled for trial March 9, 2020).

[47] *See* Caremark Complaint at ¶ 61.

[48] *See* Order Granting Petitioner Amgen Inc.'s Motion for a Preliminary Injunction, Amgen Inc. v. Cal. Corr. Health Serv., No. 18-stcp-03147 (Cal. Super. Ct. Mar. 11, 2019). For a discussion of how California might structure its transparency regulations to avoid a charge of trade secret misappropriation, see Katherine L. Gudiksen, Samuel M. Chang & Jaime S. King, *The Secret of Health Care Prices: Why Transparency Is in the Public Interest*, CAL. HEALTH CARE FOUND. (July 16, 2019), https://www.chcf.org/publication/secret-health-care-prices.

Another assertion of trade secrecy arose in a Nevada case in 2017. The state of Nevada passed a statute aiming at curtailing rising diabetes drug prices requiring manufacturers and Pharmacy Benefit Managers to disclose cost and pricing information for diabetes drugs to the state, with some information to be publicly available. In response, the pharmaceutical industry trade association, known by the acronym "PhRMA," sought injunctive relief to prevent implementation of the statute. The industry made stark predictions that the statute "undermin[es] innovation and competition in the American pharmaceutical industry," "violates the Takings Clause of the Fifth Amendment" by depriving affected manufacturers of trade-secret protection," and "strips pharmaceutical manufacturers of trade secret protection for confidential, completely sensitive, proprietary information regarding the production, cost, pricing, marketing, and advertising of their patented diabetes medicines."[49]

To support those arguments, a group of pharmaceutical executives filed separate affidavits duly repeating that the "factors considered in setting and adjusting the prices of our products and the percentage of our profits that derive from diabetes drugs are confidential and proprietary," and that "[o]ur customers and competitors would gain a competitive advantage over [each company] if they were to obtain" such information,[50] and thus the companies would be endangered should the State of Nevada require disclosure of pricing information for diabetes treatments. The affidavits contained almost verbatim language.

These court submissions by the industry beg the question of whether one can make something a trade secret simply by repeatedly, and aggressively asserting, that it is so, when no specific legislative enactment (as of yet) precludes taking such a position. Thankfully, trade secret law has long been aware of this "it is, because I say so" problem. In the traditional context of employer/employee trade secret litigation, companies sometimes have sought to establish

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[49] *See* Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction at 1–2, 15–19, Pharm. Research and Mfrs. of Am. v. Sandoval, No. 2:17-cv-02315-JCM-CWH (D. Nev. Sept. 13, 2017). The motion was denied, and the plaintiffs ultimately voluntarily dismissed the case due to what was vaguely portrayed as changed circumstances. See Order Denying Plaintiff's Motion for Preliminary Injunction, *Sandoval*, No. 2:17-cv-02315-JCM-CWH (D. Nev. Oct. 17, 2017), ECF No. 61; Plaintiffs' Unopposed Motion for Voluntary Dismissal Without Prejudice, *Sandoval*, No. 2:17-cv-02315-JCM-CWH (D. Nev. June 28, 2018), ECF No. 96.

[50] *See* Plaintiff's Motion for Temporary Restraining Order, Declarations of C. Marsh (Boehringer Ingelheim), S. Albers (Novo Nordisk), P. Davish (Merck), D. Asay (Lilly), J. Borneman (Sanofi), *Sandoval*, No. 2:17-cv-02315-JCM-CWH (D. Nev. Sept. 13, 2017), ECF No. 26.

trade secrecy by pointing to broadly-worded employment agreements which declare, in conclusory language, that a swath of the company's information and products constitute confidential information. Courts have rejected such assertions. Whether an item of information meets the objective elements required to demonstrate that a trade secret exists is not the same thing as whether the company labeled something as a trade secret.[51] Stating in a contract that information is confidential may provide evidence that a company employed security measures to protect potential trade secrets. Protecting one's information, however, is merely one aspect of the test for trade secrecy, and it is by no means dispositive on its own.[52]

II. EXPANDING ASSERTIONS OF TRADE SECRECY AND THE PUBLIC INTEREST

To set the stage for our discussion of trade secrecy and PBM pricing, we start by placing trade secret law in its IP context. Trade secrets are the broadest category of intellectual property law and encompass the most diverse forms of information. That is so because a trade secret can constitute many types of business information, and because no formal registration or government approval is necessary for rights to accrue. A claimant with a valid trade secret need only establish secrecy, the use of reasonable security measures, and economic value to others driven by secrecy.[53]

Although trade secret law differs significantly from patent law and copyright law, it is more closely related to both than may commonly be recognized. As to patent law, every patentable invention begins its life upon conception and reduction to practice as a trade secret, and it is only when the owner elects to file a patent application (which will eventually be published) that trade secret rights make

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[51] *See, e.g.*, Sun Media Sys., Inc. v. KDSM, LLC, 564 F. Supp. 2d 946, 964–965 (S.D. Iowa 2008) ("Plaintiff cannot, however, use the confidentiality clause in the KDSM contract to turn items into trade secrets that simply are not trade secrets under applicable law."); JAMES POOLEY, TRADE SECRETS § 3.04 (2017) ("[O]ne may not create a trade secret by merely characterizing something as such in a contract.").

[52] *E.g.*, 18 U.S.C. § 1839(3) (one element of the test for trade secrecy is whether "the owner thereof has taken reasonable measures to keep such information secret[.]").

[53] *See id*. (defining trade secrecy). Like almost all state versions of the Uniform Act, the Federal Act has a four-element test: the item of information must not be generally known to the relevant persons, it cannot be readily ascertainable, it must have independent economic value to competitors as a result of secrecy, and it must be the software of reasonable steps to secure confidentiality.

way for patent rights. As to copyright law, some forms of information— particularly software source code—can be the subject of copyright protection and trade secret protection at the same time. Copyright law protects the expression, while trade secret law protects the ideas instantiated in code that meets the requirements of trade secrecy. As a result, it would be a mistake to treat trade secret law as a remote branch of intellectual property law, unconnected to the public policy concerns that have been prevalent in the patent and copyright literature for many years.

That said, trade secret law stands in particular contrast to patent law in the pantheon of intellectual property rights. With patents, for example, society allows suppression of competition for a limited period of time in exchange for publicly disclosing the invention.[54] The mighty patent packs a short but powerful punch. It blocks out all competition, even from those who invent independently, for a shorter period of time and only in exchange for sharing the information with society at large. With trade secret, however, there is no quid pro quo to society of disclosure of the invention; and the secret potentially can last forever. And in contrast to patent law, a competitor company that creates the same thing independently can use it freely under trade secret law.[55] With this fundamental tenet, trade secret strays far from the notion of providing the possibility of a monopoly,[56] and as a result, trade secret is not designed to suppress competition in the same manner as patent. Moreover, once enough people in the given industry or market know the secret, or even reasonably could ascertain it with a minimum of time and labor, protection ends. Thus, trade secret is far less focused on allowing the suppression of competition with an iron fist than the more familiar patent law context. Trade secret law instead primarily focuses on those in privity with the putative rights-holder—those who had access to the plaintiff's intellectual property under a confidentiality restriction. As with copyright,[57] trade secret is less of an all-powerful right. The potential for longer periods of protection is balanced by the fact that such rights are subject to many more

[54] U.S. CONST. art. I, § 8, cl. 8.

[55] *E.g.*, 18 U.S.C. § 1839(6)(B) (noting that independent development, which means developing the same or similar information as another's trade secret through independent effort, is not "improper means" and thus does not constitute trade secret misappropriation).

[56] For a discussion of the fact that patent law provides an opportunity for a monopoly, rather than an assurance of a monopoly, see ROBIN FELDMAN, RETHINKING PATENT LAW 23–39 (2012).

[57] *See, e.g., infra* text accompanying notes 160–171 (discussing fair use exception to copyright).

exceptions reflecting contexts in which other societal interests are at play.

The fact that a company would suffer competitive harm if information were released does not mean, in and of itself, that release of the information would implicate trade secret rights. That distinction is critically important in trade secret law. For example, if an employee quits, starts a competing business, and uses his or her general skills, knowledge, and training gained from that job to attract the former employer's customers and thereby harm the former employer, that harm is not evidence that the employer had trade secrets, or that the employee misused trade secrets. While the former employer suffered competitive harm, the information the former employee used to inflict that harm—skills, knowledge, and training that do not constitute trade secrets[58]—is not something that can be propertized, nor is the harm something for which one can seek legal redress. Similarly, that a pharmaceutical manufacturer might suffer harm if pricing information were disclosed does not, in and of itself, serve to establish an intellectual property right.

And of course, the basis of this analysis rings true throughout intellectual property law. Suffering competitive harm does not establish that intellectual property exists. Rather, the establishment of the intellectual property right must come first. The fact that competitors could beat a company is generally a cause for celebration in a competitive economy, rather than a legal cause of action. Intellectual property rights are limited exceptions to that general rule. And in the utilitarian context of United States intellectual property law, those rights are granted for the purpose of advancing society as a whole, not the individual creator. Despite strains of moral rights theory in the intellectual property traditions of nations such as France, the United States' intellectual property regime remains unabashedly utilitarian.[59]

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[58] *See generally* Kurt M. Saunders & Nina Golden, *Skill or Secret? – The Line Between Trade Secrets and Employee General Skills and Knowledge*, 15 N.Y.U. J. L. & BUS. 61 (2018) (analyzing factors courts have used over the years to separate protectable trade secrets from unprotectable general skills, knowledge, training, and experience).

[59] Although certain treaty obligations give a nod to French notions of moral rights that ground in some areas of intellectual property, the U.S. intellectual property legal tradition remains firmly rooted in utilitarianism. For a discussion of these issues, although with a more general discussion of utilitarianism and consequentialism, see FELDMAN, *supra* note 56, at 76–79 (citing *Graham v. John Deere*, 383 U.S. 1, 9 (1966) for the proposition that "[t]he patent monopoly was not designed to secure the inventor his natural right in his discoveries. Rather, it was a reward, an inducement, to bring forth new knowledge").

These foundations, therefore, provide the underpinning of trade secret law. Despite these moorings, trade secret law faces real risk that it will be pulled in overreaching directions, a problem exemplified by the case of the regulatory disclosure debates. And indeed, the problem addressed in this Article is just one instance of a wider issue: increasingly, companies are attempting to assert trade secrecy claims outside the commonplace civil litigation context in order to block regulatory oversight or public inquiry into potentially unsavory business practices. To what degree can trade secret claims be asserted to shield such practices, weighed against harm to consumers, patients, voters, government agencies, and others? This discussion should not occur in isolation—that is, it cannot be focused solely on pharmaceutical pricing information in PBM agreements. Rather, the pharmaceutical pricing debates reveal emerging doctrinal and theoretical tensions, and resolution of the issue can provide overarching theoretical points of value for more widespread concerns regarding overbroad, overreaching assertions of trade secrecy rights.

Although overbroad trade secrecy assertions are not new, the problem now extends far beyond traditional civil litigation disputes between former employers and departing employees—the customary domain of trade secret law. Recent scholarship has highlighted problems in a variety of doctrinal arenas including that trade secrecy claims have been raised to block criminal defendants from examining the technologies used to convict them[60] and the need to protect whistleblowers from assertions of misappropriation.[61] In a similar vein, companies have claimed that data about the ethnicity and gender of their workforce is corporate intellectual property,[62] there is a risk that medical device

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[60] *See* Rebecca Wexler, *Life, Liberty, and Trade Secrets: Intellectual Property in the Criminal Justice System*, 70 STAN. L. REV. 1343 (2018) (magisterial commentary describing many ways in which technologies used by the prosecution are withheld from defense counsel based on trade secrecy blocking tactics asserted as an evidentiary privilege).

[61] *See* Peter Menell, *Tailoring a Public Policy Exception to Trade Secret Protection*, 105 CALIF. L. REV. 1 (2017) (describing an immunity for certain methods of whistleblowing adopted by Congress from the author for the Defend Trade Secrets Act); Peter Menell, *The Defend Trade Secrets Act Whistleblower Immunity Provision: A Legislative History*, 1 BUS., ENT. & TAX L. REV. 398 (2017) (same).

[62] *See* Jamillah Bowman Williams, *Why Companies Shouldn't Be Allowed to Treat Their Diversity Numbers as Trade Secrets*, HARV. BUS. REV. (Feb. 15, 2019), https://hbr.org/2019/02/why-companies-shouldnt-be-allowed-to-treat-their-diversity-numbers-as-trade-secrets (describing public policy reasons why diversity data should be made available, noting that the "tactic" of asserting trade secrecy "seems to be aimed more at avoiding bad publicity than remaining competitive"); Jamillah Bowman Williams, *Diversity as a Trade Secret*, 107 GEO.

manufacturers may claim trade secret rights in data collected from patients implanted with such devices,[63] and government actors and suppliers have claimed trade secrets in source code used for "automated decisionmaking" and public infrastructure, creating the potential to insulate public-decisions making from the normal scrutiny of a democratic process.[64] These problems highlight the risks of an extraordinary expansion of trade secret claims, and the resulting tensions for doctrinal analysis, theoretical consistency, and public policy. And as trade secret issues emerge in ever-expanding contexts where the focus appears to be on a different set of issues entirely, the temptation to glide swiftly over the underlying intellectual property issues may be great. In those circumstances, the logic and doctrinal consistency of trade secret can easily be trampled.

Such commentaries will doubtless increase in the years to come, along with the rapid expansion of trade secret and related disputes in our information-based economy.[65] In addressing the public

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L.J. 1684 (2019) (sustained analysis of policy problems and threats to employee mobility and opportunity when companies assert that employee diversity data constitutes the company's trade secrets, with models for potential resolution: "[t]here is an inherent conflict between the values of trade secrecy doctrine and the broader goals of equal opportunity.").

[63] *See* Elizabeth A. Rowe, *Sharing Data*, 104 IOWA L. REV. 288, 299 (2018) (describing how manufacturers of implanted medical devices can seek to control data obtained from patients under trade secret, copyright, and other legal theories).

[64] *See* Sonia K. Katyal, *The Paradox of Source Code Secrecy*, 104 CORNELL L. REV. 1183 (2019) (discussing how treatment of source code as a trade secret creates negative ramifications for transparency when government entities use software to automate decisions; proposing numerous solutions such as limited access by specific reviewers and incentives for "open code initiatives"); David S. Levine, *The People's Trade Secrets*, 18 MICH. TELECOMM. TECH. L. REV. 61, 98–100 (2018) (examining government bodies which themselves claim trade secret rights in information ranging from school exams to—pertinent to this article—prices paid by the U.S. Air Force to a military contractor); David S. Levine, *The Impact of Trade Secrecy on Public Transparency*, *in* THE LAW AND THEORY OF TRADE SECRECY (Rochelle C. Dreyfuss & Katherine J. Strandburg eds., 2011) (describing how public sector infrastructure so often uses private technologies, leading to trade secrecy assertions to inhibit public access; describing voting machines and breathalyzers as examples).

[65] A timely example, as yet unexplored at a theoretical level, is the use of confidentiality agreements in settlements over allegations of sexual abuse and harassment. *See* Elizabeth A. Harris, *Despite #MeToo Glare, Efforts to Ban Secret Settlements Stop Short*, N.Y. TIMES (June 14, 2019), https://www.nytimes.com/2019/06/14/arts/metoo-movement-nda.html (exploring legislative efforts, most prominently in New Jersey, to curtail the practice of buying silence about sexual misconduct through confidentiality agreements). As Lemley and Shapiro note, there are also many other areas in which confidentiality claims may also be subject to critical analysis, such as patent license terms agreed to by companies which have made FRAND (Fair, Reasonable, and Non-Discriminatory) commitments to a standards organization, as well as efforts to prevent price comparisons by competitors. *See* Mark Lemley

interest when weighed against corporate assertions of trade secrecy, we should not address each problem by itself, without a broader frame of reference. Rather, we should strive for approaches that work for the consistent benefit of the public interest across the board. Our Article aims for that goal.

III. TRADE SECRECY AND PRICING INFORMATION: CIVIL LITIGATION, REGULATORY DISCLOSURE, AND PROSPECTS FOR REFORM

As discussed above, trade secret law is a broad category of intellectual property law, and one without the registration or examination processes seen in copyright and patent law—processes which tend to constrain what can be asserted as potentially protectable. Thus, there is a real risk that an already-broad doctrine can be stretched even further, at risk to the public interest.

Claiming price, rebate, and profit margin information as a trade secret—especially in the narrow and highly-regulated context in which PBMs operate—seems curious, even on a visceral level. First, this sort of information hardly sounds like intellectual property. It 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 entities. Second, the very targets of regulation—artificially inflated prices—are claimed as intellectual property to avoid disclosure. Thus, trade secret law is being asserted as an offensive weapon to avoid regulation, and to avoid responsibility for the public harm created by the supposed "trade secret" itself. That, in itself, should raise initial suspicion, given the distance between these goals and the notion of allowing a business to protect the fruits of ideas and innovations cabined under limiting definitions while carrying on its business functions.

It sounds curious because this is not what the policies underlying trade secret law are about. Certainly, litigants claim financial information as a trade secret, and companies submit information to state and federal regulators under seal. But price competition is quite often open, not hidden—not something traditionally seen as "property" that is off-limits to competitors.

In fact, the notion that the mere price of something is a secret might come as a surprise to some who have focused on the need to offer

& Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*, 28 BERKELEY TECH. L.J. 1135, 1141-45 (2013).

competitive pricing in a well-working market. As the Fifth Circuit commented in 1970, in the context of noting that one should not define industrial espionage too broadly, "for our industrial process to remain healthy, there must be breathing room for observing a competing industrialist. A competitor can and must shop his competition for pricing and examine his products. . . ."[66]

Perhaps because the concept sounds so discordant, few appear to have even asked the question: is cost or pricing information alone, without details necessary to ascertain the underlying formulas or manufacturing process information, really a trade secret? Even if it were, would it really be the type of trade secret that creates a barrier to regulatory disclosure that serves a strong public interest? Yet sweeping past that question avoids issues at the core of trade secret jurisprudence. The following section will examine the issue in the context of legislative and judicial precedent in trade secret law.

A. Pricing Information and Trade Secret Law: Case Law in Civil Litigation

Although many cases in civil lawsuits have addressed trade secrecy claims over various types of pricing information, none appear to have squarely posed the methodological question of whether pricing information (in general, or as to specific industries or types of transactions) is the type of thing that should receive trade secret protection.

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 secrecy, and it cannot be readily

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[66] *See* E.I. DuPont de Nemours & Co. v. Christopher, 431 F.2d 1012 (5th Cir. 1970). In a variation of the argument, some companies assert that trade secret law protects prices because prices give the company an advantage over *customers,* rather than competitors. The assertion is that preventing one customer from knowing what another customer has paid gives the company an economic advantage over customer. *See* Caremark Complaint at ¶ 37 (claiming that disclosure of the information "would give Caremark's potential customers an advantage over Caremark in subsequent contract negotiations); *see also* Annemarie Bridy, *Trade Secret Prices and High-Tech Devices: How Medical Device Manufacturers Are Seeking to Sustain Profits by Propertizing Prices*, 17 TEX. INTELL. PROP. L.J. 187, 192 (2009) (describing statements by Guidant company spokesperson in the context of medical device litigation and commenting that Guidant's theory "if ultimately accepted by courts, could have profound implications not only for the health care market . . . but for every market in which the prices paid for goods are subject to contractual negotiations between sellers and buyers.").

ascertainable in the sense that it can easily be cobbled together within a minimum of time and effort (apart from California, where ready ascertainability is a defense to a trade secret claim, not an affirmative element to establish a valid claim).[67] Astute readers will notice that these four elements largely ask the same question, albeit in different forms.

Under that general rubric—as well as under the pre-UTSA, six-factor test from the 1939 Restatement of Torts that is obsolete everywhere today except New York—courts have sometimes treated pricing information as a trade secret, albeit without theoretical analysis,[68] and sometimes rejected such claims. Where courts have denied claims that pricing information constituted trade secrets, the rulings often turn on factual issues, such as whether the information at issue is available from the other side of the transaction, or whether it is otherwise available in the given market or industry.[69] For example, a Kansas case rejected a trade secret

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[67] *See*, *e.g*., 18 U.S.C. § 1839(3)(A–B).

[68] *E.g*., Freedom Med. Inc. v. Whitman, 343 F. Supp. 3d 509, 520 (E.D. Pa. 2018) (granting preliminary injunction in part against former employee and finding that while "pure pricing information is not protectable because that information is known to the consumer," pricing formulae derived from a range of data such as materials, labor, overhead, and profit, are protectable as combination or compilation secrets because that "full compilation of pricing information is not available from public sources"); MicroStrategy, Inc. v. Bus. Objects, S.A., 331 F. Supp. 2d 396, 423–24 (E.D. Va. 2004) (split ruling finding in favor of former employee against former employees on trade secret claim; finding that a document containing a "schedule of discounts" was a trade secret where it was not a "standard price list" and was instead an internal document used "to develop price quotes for customers"); Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1455 (2002) (finding that "cost and pricing information"—"pricing, profit margins, costs of production, pricing concessions, promotional discounts, advertising allowances, volume rebates, marketing concessions, payment terms, and rebate incentives"— qualified as trade secrets and not generalized industry information because it was "unique" to the former employer); Frantz v. Johnson, 999 P.2d 351, 359 (Nev. 2000) (affirming misappropriation finding against former employee and others; although "not every customer and pricing list will be protected as a trade secret," the "customer and pricing information" at issue was "extremely confidential, its secrecy was guarded, and it was not readily available to others" given the highly specialized nature of the industry); Sigma Chem. Co. v. Harris, 794 F.2d 371, 373–74 (8th Cir, 1986) (affirming judgment enforcing non-competition covenant against former employee where, among other things, "price" information "was not in the public domain"); SI Handling Sys., Inc. v. Heisley, 753 F.2d 1244, 1257, 1260 (8th Cir. 1985) (vacating preliminary injunction against former employee; affirming some but not all findings of trade secrecy; rejecting notion that prices of plaintiff's merchandise constituted trade secrets because suppliers "have every incentive" to disclose it "to their customers," but finding that pricing information that "subsumed" items "relating to materials, labor, overhead, and profit margin" was protectable).

[69] *E.g*., CDC Restoration & Constr., LC v. Tradesmen Contractors, LLC, 274 P.3d 317, 324 (Utah Ct. App. 2012) (affirming fact-based finding, in lawsuit

claim in pricing information where buyers were able to freely share information about how much they paid for services from the seller.[70]

against former employees, that pricing information was not a trade secret because the plaintiff failed to show that the information was "unique or especially inventive, such that it could not be readily duplicated by others in the industry."); Progressive Prod., Inc. v. Schwartz, 258 P.3d 969, 978 (Kan. 2011) (affirming finding that pricing information was not a trade secret, in lawsuit against former employees, where facts showed that customers could freely communication "with each other about how much they were paying for certain work."); Stenstrom Petroleum Serv. Grp., Inc. v. Mesch, 874 N.E.2d 959, 974 (Ill. App. Ct. 2007) (in lawsuit against former employee, denying motion for preliminary injunction where former employer claimed pricing information such as a profit margin was a trade secret where former employee showed that a pricing spreadsheet could be reproduced in mere hours as calculations of costs, labor, and the price of materials: "[i]n order to prove that a pricing formula constitutes a trade secret, a plaintiff must establish that the value of the pricing formula lies in the fact that it is not generally known to others who could benefit by using it or that it could not be acquired through general skills and knowledge."); Custard Ins. Adjusters, Inc. v. Nardi, No. CV980061967S, 2000 Conn. Super. LEXIS 1003, *139 (Apr. 20, 2000) (issuing injunction against former employee to enforce non-competition covenant but rejecting trade secret allegation; "pricing information" can qualify for trade secret protection, but whether that is so depends on facts; where plaintiff's witness testified that pricing is "important and highly confidential," court asked "[b]ut why is this so? In this highly competitive industry why would not pricing information be readily available from prospective customers? One would think they would be falling over each other letting the adjustment companies know the pricing of competitors to get the best deal for themselves[.]"); Applied Indus. Materials Corp. v. Brantjes, 891 F. Supp. 432, 439 (N.D. Ill. 1994) (denying motion for preliminary injunction against former shareholder where, among other things, the factual context showed that a price list was not a trade secret where the price information at issue was widely shared); Nat'l Risk Mgmt., Inc. v. Bramwell, 819 F. Supp. 417, 432 (E.D. Pa. 1993) (entering post-trial judgment against plaintiffs on trade secret claim where it asserted that a flat 25% discount figure, and funding details on how to meet that number, were not protectable trade secrets, finding that how the 25% number was "first determined" would be of "no value" to others, and that the other information was "freely given out to prospective clients."); Optic Graphics, Inc. v. Agee, 591 A.2d 578, 586 (Md. 1991) (while pricing information can be protectable as a trade secret, affirming finding that such information as asserted against a former employee was not a trade secret because, in context, it was "subject to change," "subject to market forces," and "subject to the type of machinery" used and other variables, and thus was not "meaningful"); Tyson Metal Prod., Inc. v. McCann, 546 A.2d 119, 121 (Pa. 1988) (reversing injunction where, among other things, asserted trade secrets in compiled price list were not protectable because competitors could "contact a mutual customer and ask why its bid was rejected in favor of" the plaintiff); Agric. Labor Relations Bd. v. Richard A. Glass, Co., 175 Cal. App. 3d 703, 715 (1985) (in evidentiary dispute in labor relations proceeding, reversing administrative ruling barring discovery; holding that party did not sustain its burden of showing that cost and price information claimed as trade secrets should be withheld from discovery, because the assertions were "conclusory and unsupported by evidentiary data. There is no allegation that this information is not a matter of common knowledge among the citrus growers or readily obtainable on the open market.")

[70] *See Schwartz*, 258 P.3d at 978.

And an Illinois court rejected such a claim where the profit margin information at issue was easily reproducible.[71]

At the same time, albeit without much analysis, some courts also appear to have questioned whether pricing information is properly treated a trade secret.[72] Leading treatises likewise indicate some degree of hesitation, without specific focus on the questions raised here.[73]

That courts in the midst of civil lawsuits have not spent much time analyzing the question of whether pricing information should constitute a trade secret is not a surprise. Trial courts tend to consider the arguments that litigants raise, rather than to engage in *sua sponte* analysis of theoretical issues. In lawsuits between

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[71] *See Mesch*, 874 N.E.2d at 974.

[72] *E.g.*, Advantor Sys. Corp. v. DRS Tech. Servs., 678 Fed. Appx. 839, 854 (11th Cir. 2017) (affirming summary judgment for defense in part; claimed trade secret in "lump-sum price quote" from a "subcontractor proposal" was not a trade secret because it lacked independent economic value outside of its specific context of being offered in a negotiation); Loparex, LLC v. MPI Release Tech., LLC, 2011 U.S. Dist. LEXIS 32371, *20 n.7 (S.D. Ind. Mar. 25, 2011) (granting defense motion for summary judgment based on plaintiff's generic descriptions of alleged trade secrets; also finding that a profit margin was not something that could be a trade secret); Square D Co. v. Van Handel, 2005 U.S. Dist. LEXIS 21480, *23 (E.D. Wis. Aug. 25, 2005) (in a lawsuit against a former employee, finding that under Wisconsin law "it is unlikely that a company's pricing information will be found entitled to trade secret protection except in extraordinary cases"; noting that customers are free to disclose such information for to foster competition among suppliers, and finding that treating price information as a trade secret would amount to a virtual non-competition covenant restricting sales employees who join a competing firm: "Price lists are not, as a matter of law, protected as trade secrets."); IKON Office Sols., Inc. v. Am. Office Prods., Inc., 178 F. Supp. 2d 1154, 1169–1170 (D. Or. 2001) (granting summary judgment to former employees on trade secret claim that included conclusory allegation that "pricing information" was a trade secret; court expressed a concern that claiming general business information as trade secrets could lead to the equivalent of a permanent non-competition covenant); Amarr Co., Inc. v. Depew, 1996 Tenn. App. LEXIS 660, at *17 (Tenn. Ct. App. Oct. 16, 1996) (reversing judgment against former employee; in factual context where "price lists were readily available to any purchaser who was comparing prices between competitors, and the price lists were tracked by all competitors," the court noted that "[w]e also do not see how a profit and loss statement can be a 'trade secret' that gives an unfair advantage.").

[73] *See* POOLEY, *supra* note 51, at § 4.02[2], 4–14 & n.17 ("Pricing information may include historical cost data used in formulating bids . . . . However, it is the *data* that is protectable; typically *methods* of pricing and estimating are not."); ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 1.09[8][b] (2018) (as to cost and pricing, "[a]lthough there are somewhat more cases recognizing that such information may constitute a trade secret, there are also a substantial number of cases that decide the other way. This does not imply that authority is divided. Rather, it simply suggests that facts presented in some cases have been sufficiently secret to permit relief and, in other cases, not.").

companies, litigators may be unlikely to tackle that sort of question, either because it is too complex and risky when a fact-based defense may suffice, or because law firms may be loath to take positions that corporate clients may oppose. Moreover, the type of public interest at stake in regulatory disclosure cases is generally not at issue in a civil lawsuit, so that absent factor does not spur a more thoroughgoing approach. Moreover, only a few such cases reached appellate or state supreme courts, and it does not appear that litigants in such courts presented more theoretical questions for review. Thus, the question is ripe for the type of in-depth theoretical analysis that appellate courts can provide when fully presented with the issue.

B. Case Law in Government Disclosure Cases under FOIA and the Trade Secrets Act

An entirely different body of case law has involved allegations that pricing information constitutes protectable information. Once again, the decisions yield mixed results. However, this body of law does not focus on whether pricing is, in fact, a trade secret in the manner defined by the Federal Act and the state Uniform Acts, because it centers on a different statute with older language.

This line of cases comes from efforts by litigants to use the Freedom of Information Act (FOIA) and the related Trade Secrets Act[74] to obtain information about bid pricing and contract pricing between private companies and government entities—or to block its release.[75] In some cases, disappointed bidders or would-be competitors are the parties seeking the disclosure of such information.

As noted, this is a different statute, and a different context, than is seen in disputes between state regulators and industry where the definition of a trade secret is governed by the Federal Act and the state Uniform Trade Secret Act. We offer this case law and literature review concerning disputes over pricing information under

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[74] The Trade Secrets Act is not the DTSA, but an older, narrower federal statute governing release of information somewhat akin to the FOIA, but also with civil penalties and imprisonment as potential penalties for government employees who engage in unauthorized release of trade secrets. *See* 18 U.S.C. § 1905.

[75] On the general subject of adjudicating potential government disclosures of trade secrets through FOIA and other types of publication, the most thorough treatment is Elizabeth Rowe, *Striking a Balance: When Should Trade-Secret Law Shield Disclosures to the Government?*, 96 IOWA L. REV. 791, 794 (2011) (focusing on "refusal to submit" situations where companies avoid submission of data to government entities, outlining various federal statutes and agencies in play, and advocating an approach analogous to the discovery of trade secrets in civil, non-misappropriation lawsuits where a party seeks such evidence and faces objections from the information-holder).

the FOIA, however, because it is part of the historical backdrop, and because it further demonstrates the inconsistent ways courts have analyzed pricing information. This discussion comes with a major caveat: The FOIA is an older, 1960s-era statute and its text refers to both "trade secrets" and "confidential" information. Courts considering FOIA actions have focused on the latter in rulings on pricing information. However, that language is inconsistent with the contemporary UTSA/DTSA framework, which does not envision a two-tier regime of "trade secret" and "confidential" business information. It is also confusing given recent debates in the civil litigation context, discussed in detail below, regarding Uniform Trade Secrets Act preemption of state law tort claims said to protect "confidential" information. Thus, while conceptions of "confidential" information are of dubious logical validity in current theory and pose clear dangers to public policy in broader trade secret contexts, that is nevertheless the statutory framework in which the FOIA disputes over pricing information have been litigated. We therefore do not offer the logic of FOIA decisions as a model for the proposals we offer regarding naked price and trade secrecy in the PBM pharmaceutical pricing arena. We merely present this history for completeness, for potential analogies, and for its shortcomings.

Indeed, a reader of civil trade secret disputes will immediately notice a major difference between this FOIA line of cases addressing statutory language from 1966 about confidentiality and civil litigation rulings which analyze whether a trade secret exists. For several decades, and until a June 2019 Supreme Court ruling altered the analysis, courts evaluating potential FOIA disclosures applied the following two-part test: information an entity is required to submit to the government "will be considered confidential only if disclosure would be likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[76] As discussed below, many FOIA rulings focused entirely on the second factor. Under neither factor is a reviewing court tasked with focusing on whether any given item of information is, in fact, a trade secret. Indeed, as discussed, below, even the recent Supreme Court ruling was not confronted with that question and did not approach it.

As we will describe below, these cases demonstrate that, in a potentially analogous regulatory disclosure context, courts have

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[76] *E.g.*, McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 304-05 (D.C. Cir. 1999) (applying 5 U.S.C. § 552(b)(4) and stating that FOIA does not apply to "trade secrets and commercial or financial information obtained from a person and privileged or confidential.").

avoided a full-on analysis of whether pricing information, in context, truly constitutes a trade secret, in large part because they focus on different statutory text and not the definition of a trade secret for FOIA purposes. Indeed, compared to civil trade secret litigation, these cases have mostly avoided any analysis of trade secrecy from an intellectual property perspective, and have instead rendered rulings based on how strong the contractor's arguments are regarding the competitive harm it would suffer should the pricing information be publicly disclosed. That focus substantially increases the chance that a court denies disclosure, without separating harm that results from a loss of valid intellectual property from the harm that occurs naturally in the business world as rivals use unprotectable information to compete with one another.

Two studies have shown that courts reviewing such requests have, in part, shifted ground towards nondisclosure. In a comprehensive 2002 article, Gregory McClure demonstrated that, in the 1980s and 90s, courts generally leaned toward disclosure of such pricing information,[77] with one court notably stating that "the idea that a price charged to the government for specific goods or services could be a 'trade secret' appears passing strange to us[.]"[78] In particular, the D.C. and Ninth Circuits have issued rulings permitting the release of pricing information over objections from companies which had won bids or contracts.[79] In one 1997 decision, for

[77] *See* Gregory H. McClure, *The Treatment of Contract Prices Under the Trade Secrets Act and the Freedom of Information Act Exemption 4: Are Contract Prices Really Trade Secrets?*, 31 PUB. CONT. L.J. 185, 196–216 (2002) (comprehensive article collecting case law and advocating disclosure of pricing information; "[t]he vast majority of cases have held that unit prices are releasable, whether under the trade secret or competitive harm tests[.]).

[78] McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162, 1167 (D.C. Cir. 1995) (remanding to trial court to require further information from the Air Force regarding a pricing disclosure sought under the FOIA).

[79] *E.g.*, Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 38 (D.D.C. 1997) (granting motion for summary judgment by the Navy to release information from military contracts that included allegedly confidential "cost and fee information, including material, labor, and overhead costs, as well as target costs, target profits, and fixed fees," and other unit pricing data; rejecting contractor's argument that it would suffer competitive harm, because the contractor will continue bidding for future contracts; "[contractor] might prefer that less be known about its operations, and that the reasons for its operations for it past successes remain a mystery to be solved by the competitors on their own. But it has not shown [Navy] or this Court, on the basis of this record, that it will in fact be unable to duplicate those successes unless [Navy] acquiesces in keeping the competition in the dark."); GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994) (reversing agency and requiring release of "percentage and dollar amounts" paid to government subcontractors, reasoning that "we believe the FOIA's strong presumption in favor of disclosure trumps the contractors' right to privacy. Those seeking to prevent the disclosure of certain information under FOIA have the

example, the district court for the District of Columbia sharply criticized the motion that a military contractor should be able to withhold pricing information from its competitors: "[contractor] might prefer that less be known about its operations, and that the reasons for its past successes remain a mystery to be solved by the competitors on their own. But it has not shown [the Navy] or this Court, on the basis of this record, that it will in fact be unable to duplicate those successes unless [the Navy] acquiesces in keeping the competition in the dark."[80]

However, these decisions did not directly analyze whether the pricing information at issue was, in fact, a trade secret, and largely did not attempt to define the meaning of confidentiality under the FOIA either. Following the FOIA two-part test described above, they instead focused on the distinct question of whether disclosure of the information at issue would harm the party opposing publication in marketplace competition.[81] As discussed further below, whether information is intellectual property and whether a party will suffer harm from competitors are not the same thing.

Nevertheless, the D.C. Circuit began shielding pricing information from public disclosure in some decisions by the 1990s.[82] Indeed, as

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burden of proving that the information is confidential. It is questionable whether the declarations submitted by the three contractors show *any* potential for competitive harm, let alone *substantial* harm.") (emphasis in original); Pacific Architects & Eng., Inc. v. United States, 906 F.2d 1345, 1347–48 (9th Cir. 1990) (affirming ruling to release a contract to provide maintenance services to the government, which included a "unit rate price," on the theory that a competitor would not be able to figure out the profit margin given the "number of fluctuating variables" that go into such a calculation); Brownstein Zeidman & Schomer v. Dep't of the Air Force, 781 F. Supp. 31, 32–33 (D.D.C. 1991) (in mixed ruling, requiring release of "modified unit prices" in contract between AT&T and the Air Force where "multiplier" information would be hard to ascertain without knowing "a great deal about labor costs," and thus fears of harm were too "speculative"); *see also* Acumenics Research & Tech. v. United States, 843 F.2d 800, 807–08 (4th Cir. 1988) (finding that FOIA and Trade Secrets Act are "coextensive" as to exemptions allowing disclosure and, in case where party sought release of pricing information relating to a government contract, affirming release on ground that "there are too many unascertainable variables in the unit price calculation" for a competitor to figure out the contractor's "multiplier," and thus competitive harm was not established); J.H. Lawrence Co. v. Smith, 545 F. Supp. 421, 424–25 (D. Md. 1982) (finding triable fact issues as to whether unit pricing information with NASA should be disclosed under FOIA and the Trade Secrets Act; denying motion for summary judgment aiming to block such disclosure because contracting party had not established competitive harm; "[t]he item prices does not actually reveal the plaintiff's underlying profit or overhead data.").

80 *See Martin Marietta Corp.,* 974 F. Supp. at 40.

81 *See supra* note 68 and accompanying text.

82 *E.g.*, MCI Worldcom, Inc. v. Gen. Servs. Admin., 163 F. Supp. 2d 28, 35–36 (D.D.C. 2001) (granting contractor's motion for summary judgment to block

David Allen Dulaney has shown, that Circuit shifted strongly away from such disclosures in the wake of in a 2003 decision, *McDonnell Douglas Corporation v. United States Department of the Air Force*.[83] In that case, the D.C Circuit reversed a trial court decision to allow publication of option year pricing and vendor pricing information, though it permitted disclosure of information about labor rates.[84] It rejected several arguments from the Air Force in favor of publication—namely, that the actual, adjusted prices would not be released, making it harder for competitors to underbid, and that factors other than price play into contracting decisions.[85] The court accepted the premise that the contractor would suffer substantial competitive harm if such information were released, in that the threat of being underbid constituted such harm.[86] Again, however, the court did not squarely address whether such pricing information constituted a trade secret. Other, similar decisions followed.[87] That failure glossed over a serious analytical deficit. As

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disclosure of pricing data for the remaining years of telecommunications services contracts; "this Circuit has held that line-item pricing...is exactly the type of information that constitutes 'confidential commercial or financial information' and is not disclosable in response to a FOIA request"; contractor showed competitive harm by arguing that disclosure would lead to underbidding in the future); McDonnell Douglas Corp. v. NASA, 180 F.3d 303, 306–07 (D.C. Cir. 1999) (reversing district court decision to release line item pricing information in contract because agency was "illogical" in denying contractor's competitive harm argument; finding that agency's reasoning was "silly" and "illogical" in asserting that release of such information would not lead to underbidding as price is only one factor, and that the real competitive harm was to other bidders who lack such information); Chemical Waste Mgmt., Inc. v. O'Leary, 1995 U.S. Dist. LEXIS 2586, *13–15 (D.D.C. Feb. 28, 1999) (remanding Department of Energy's decision to release unit pricing information where agency's "factfinding and analysis appear to be wanting" as to potential competitive harm to be suffered by contractor, which submitted evidence alleging that a competitor would receive "an unfair advance look" before the next "rebid").

[83] 375 F.3d 1182 (D.C. Cir. 2003); *see also* David Allen Dulaney, *Where's the Harm? Release Unit Prices in Awarded Contracts Under the Freedom of Information Act*, 2010 ARMY LAW. 37, 37–38 (2010) ("[O]ver the last decade, government-friendly decisions by the Court of Appeal for the District of Columbia . . . have virtually ensured that taxpayers cannot find out the amount the government is paying for an individual unit of good or service"; arguing that disclosure serves the public interest and contrasting these cases with a more open process in the United Kingdom).

[84] *See McDonnell Douglas*, 375 F.3d at 1187–90.

[85] *See id*. at 1188–90.

[86] *See id.*

[87] *E.g.*, Canadian Comm. Corp. v. Dep't of the Air Force, 514 F.3d 37, 41–42 (D.C. Cir. 2008) (affirming trial court ruling barring release of line item pricing information in military contract because disclosure would cause substantial competitive harm to contractors; "[b]eyond a general paean to the benefits of public disclosure, therefore, the Air Force has given us nary a reason to believe pricing information that, if disclosed, would work a substantial competitive harm,

noted in Section II above, trade secret is not a pure competition suppressing vehicle. Thus, the simple fear of being underbid—which translates into the fear of facing competition—is not something trade secret protects against. One who is underbid in a situation where the information used does not actually constitute a trade secret has no recourse.

A June 2019 Supreme Court ruling altered the test for FOIA records disclosures by eliminating the "substantial competitive harm" factor we have criticized above.[88] However, the case did not concern pricing information or the definition of a trade secret under the FOIA exceptions, and the court was not presented with an opportunity to define what types of information constitutes a trade secret for FOIA purposes and did not endeavor to do so.[89] Indeed, the case illustrates how courts facing FOIA disputes fail to carefully analyze latent questions about what is truly protectable and what is not.

In *Food Marketing Institute v. Argus Leader Media*, journalists sought access to annual food stamp redemption data on a per-grocery store basis over a period of several years.[90] A trade association resisted disclosure, arguing that groceries would suffer competitive harm if competitors knew the details of food stamp redemptions, in that they purportedly would better know where to locate new stores.[91] Ultimately, the court rejected the two-part

should nonetheless be categorically excluded from [FOIA] Exemption 4."); Essex Electro Eng., Inc. v. U.S. Sec'y of the Army, 686 F. Supp. 2d 91, 93–94 (D.D.C. 2010) (granting summary judgment in favor of the Army against disclosure of unit prices in contract; even though contractor's argument about future harm was "highly speculative because unit prices are based on multiple factors," that sufficed to show substantial competitive harm); Morales v. Pension Benefit Guar. Corp., 2012 U.S. Dist. LEXIS 9101, at *17 (D. Md. Jan. 26, 2012) (granting summary judgment in favor of government entity and against disclosure of option year pricing information because such disclosure "would give competitors of the present contractors leverage with which to persuade PBGC to open the contracts for bidding or renegotiation with others rather than exercise its current option").

[88] *See* Food Mrktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356 (2019).

[89] It is important to stress that *Argus* did not address the meaning of "trade secret" under the FOIA. In any event, as Sharon Sandeen has noted, Congress may need to overhaul the statute, as it reflects language from 1966 that is outdated given the DTSA's definition of trade secrecy. *See* Sharon Sandeen, *High Court FOIA Ruling Has Trade Secrets Implications*, LAW 360 (July 3, 2019), https://www.law360.com/articles/1175163/high-court-foia-ruling-has-trade-secrets-implications ("But the need for greater clarity and certainty is not the only reason Congress should provide a legislative fix. One is needed because a lot has happened since 1966 concerning our conceptions of privacy and secrecy, including the adoption of the Defend Trade Secrets Act of 2016, which provides a definition of 'trade secret' that has become the international norm.").

[90] *See Argus*, 139 S. Ct. at 2361.

[91] *See id*.

FOIA test because its second element (substantial competitive harm) was not rooted in the FOIA's text.[92] The Court instead focused on whether the information at issue was confidential. In doing so, the Court did not seek to define the term "trade secret" in the FOIA, and did not treat the case as one involving intellectual property. Somewhat oddly, the Court defined confidential information as that which the owner customarily treats as private—without asking what would happen if someone treated as private something that was either publicly available, or otherwise did not meet the criteria for trade secret protection.[93] To be sure, the data at issue may well have qualified for trade secret protection—none of the parties appear to have analyzed that question—and questions of protectability thus may await a dispute over more questionable types of information. In any event, *Argus Leader* did nothing to clarify when information qualifies as a "trade secret" for FOIA disputes and when it does not. The ruling may well confuse such matters because it considered only whether a party treated information as confidential, which is hardly dispositive of protectability from an intellectual property standpoint. This decision, as with our FOIA discussion overall, does not affect our critique of naked price in trade secret disputes between state regulators and industry under the Federal Act and state Uniform Acts, because it deals exclusively with the FOIA's older "confidential" terminology and does not purport to address the protection of pricing information under a contemporary trade secret regime.

In open records disputes, the situation is similarly mixed in state courts where open records statutes and regulatory disclosures are at issue. Courts often rule against disclosure on the ground that pricing information is a trade secret, but do not squarely address the question. Many reach their ruling based on complaints by the contractor that it will face price competition in the market if the information were disclosed.[94] Notably, however, in a case involving

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[92] *See id*. at 2365.

[93] *See id*. at 2363-65.

[94] *E.g*., State ex rel. Luken v. Corp. for Findlay Mkt. of Cincinnati, 988 N.E.2d 546, 551–52 (Ohio 2013) (Where party sought records filed with a government agency that included rental rates in a market, court considered Uniform Act factors and also described the six-factor Restatement test to find that the information was a trade secret and thus not subject to disclosure; court considered argument that disclosure would cause tenants to "compare notes" and thus cause a "competitive disadvantage" but did not inquire whether such rates were the type of thing that should be a trade secret in the first place); Waste Mgmt. of Tex., Inc. v. Abbott, 406 S.W.3d 626, 629, 632 (Tex. App. 2013) (same, as to pricing information in waste disposal records); Gannett River States Pub. Co. v. Entergy Miss., Inc., 940 So.2d 221, 225–26 (Miss. 2006) (where publisher sought rate information that a utility charged a third party for electrical services, affirming

commodity rates, the North Dakota high court found that pricing information constituted a trade secret, but nonetheless held that it was subject to regulatory disclosure given the public interest at stake—the "legitimate governmental interest of policing irregularities in the handling of public matters affecting the rates paid by citizens for an essential commodity in this state."[95]

Even though the FOIA is a different regime and disputes under it arise in a different context, these cases show us that, in a potentially analogous regulatory disclosure context, courts here, too, have avoided a full-on analysis of whether pricing information, in context, is truly protectable information, much less a "trade secret" under the FOIA exemptions. That type of analysis is deficient for the broader questions about PBM pricing that we raise, for the simple reason that suffering competitive harm does not establish that intellectual property exists. As noted at the outset, for example, if an ex-employee starts a competing business using general knowledge and training to entice customers away, the former company may have suffered competitive harm, but the information used to inflict that harm cannot be propertized and does not constitute a trade secret.[96] Similarly, if pricing information does not constitute a trade secret, the harm a contracting party might suffer from regulatory disclosure does not, in and of itself, establish that intellectual property rights exist.[97]

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nondisclosure where court treated evidence of harm as conclusive of confidentiality; "Energy produced substantial, credible, and reasonable evidence that disclosing the information . . . would compromise Energy's ability to offer competitive prices to other large users, cripple its ability to negotiate with existing and new customers, and jeopardize Energy's ability to use lucrative high-volume user contracts to keep the rates of smaller users lower."); Am. Family Mut. Ins. Co. v. Mo. Dep't of Ins., 169 S.W.3d 905, 910–11 (Mo. Ct. App. 2005) (where public interest group sought disclosure of insurance premium information that had been provided to government agency, affirming nondisclosure, applying Restatement of Torts factors (but not Comment b) to find trade secrecy but without directly asking if pricing information could be a trade secret; focusing on idea that information had independent economic value and finding that declarations about competitive harm should other insurers see the information and "adjust their pricing to become more competitive").

[95] *See* N. States Power Co. v. N.D. Pub. Serv. Comm., 502 N.W.2d 240, 247 (N.D. 1993) (affirming disclosure of price and volume data in natural gas contracts).

[96] *See supra* note 58 (example of unprotectable employee general skill, knowledge, and experience).

[97] Absent some unlawful act like fraud, underbidding a business rival is not wrongful. *See generally* Charles C. Chapman Bldg. Co. v. Cal. Mart, 2 Cal. App. 3d 846, 857 (1969) (collecting authorities; noting that "price reduction" is "generally a lawful method of competition"). It is important to highlight that many arguments seeking to treat prices as trade secrets are no more than an effort to evade this longstanding principle.

C. Is Naked Price Really a Trade Secret?

We now reach the question that courts in civil litigation and in FOIA disputes have skirted or have not addressed at all: is pricing information, especially in the context of agreements between major Pharmacy Benefit Managers and pharmaceutical companies, a trade secret in the first place, particularly when weighed against a strong public interest?

To be sure, there is something awkward about claiming pricing information—whether a raw price, a profit margin, or related details—as one company's intellectual property. In a market economy, price competition is the norm. A competitor with a better bid does not steal intellectual property from a rival that offers a higher price, even if it consciously tries to underbid that price point—it instead offers similar goods and services, presumably of its own design, at a rate more desirable to the buyer. The buyer makes the choice, not the seller, so the notion that the price belongs to the seller seems off-base for that reason as well. And a price is hardly the same thing as the underlying design, development, or product being bought and sold—the information that is the normal candidate for trade secret protection.

Indeed, the idea that pricing information should qualify for trade secret protection does not fit a traditional justification for intellectual property laws: to encourage and incentivize spending and research to develop useful commercial information. No incentive is needed to encourage companies to buy low and sell high, for that is the ordinary function of the market, and the generation of a price itself is not the same thing as the generation of the information to be sold (or licensed, as the case may be). Moreover, in the narrow PBM context where price gouging has emerged as a serious policy concern, the abstract argument that pharmaceutical manufacturers would not be incentivized to spend on drug development absent the ability to suppress such pricing seems dubious, and the burden should be on the proponent of such an argument to demonstrate why a hypothetical decrease in research not only would come true, but would outweigh the consumer benefit from lower prices for existing pharmaceutical products. And of course, markets generally seem to be able to create perfectly adequate innovation incentives without resorting to hidden prices.

The trade secret statutes do not explicitly mention pricing information among their illustrative lists of information that can qualify as a trade secret. The federal Defend Trade Secrets Act, for example, states that such information includes "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes[.]"[98] Delaware's enactment of the earlier version of the state Uniform Trade Secrets Act and California's enactment of the later version both list "a formula, pattern, compilation, program, device, method, technique, or process[.]"[99] The absence of a specific type of information from these general categories, however, does not mean that the omitted information cannot constitute a trade secret. But with no specific mention of naked prices, the issue remains an open question. And, as described above, merely labeling something as confidential in a nondisclosure agreement does not fill the gap and transform information into a trade secret.[100]

Moreover, if others in the same market reach similar pricing arrangements for similar contracts, it is not clear that pricing could constitute a trade secret for an altogether different reason: if the relevant market participants are reaching the same or similar outcomes independently of one another, such information may be generally known to those in the trade, and thus not a trade secret even if all of them treat it as such.[101] Trade secret law, after all, is not a monopoly, and if two different companies come up with the same information independently and nobody publishes it, theoretically both own the same trade secret—though neither knows that the other also has rights in the same information. And, if not two but all or almost all relevant players in a market come up with the same information, there is no trade secret at all. That is why the federal Defend Trade Secrets Act provides that independent development is not, itself, misappropriation,[102] just as state law courts have also held for many years.[103] Thus, it is also possible that

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[98] *See* 18 U.S.C. § 1839(3). To be sure, financial information is a broad and ill-defined category, but it seems more attuned to information that falls within normal trade secret coverage, such as (for example) research and development costs for a specific type of laboratory testing. *See* OR. REV. STAT. § 646.461 (listing "cost data" among examples of protectable information in Oregon's version of the Uniform Act). A price is not the same thing.

[99] *See* DEL. CODE ANN. tit. 6, § 2001(4); CAL. CIV. CODE § 3426.1(d).

[100] *See supra* note 51.

[101] *See generally* 18 U.S.C. § 1839(3)(B) (information is not a trade secret if it is generally known by those who can benefit from it); CAL. CIV. CODE § 3426.1(d)(1) (same).

[102] *See* 18 U.S.C. § 1839(6)(B) ("independent derivation" is not "improper means").

[103] California is the only UTSA jurisdiction to embed the concept of independent derivation into its statute, *see* CAL. CIV. CODE § 3426.1(a), but courts applying state law in other jurisdictions have uniformly protected a defendant's

if the handful of major PBMs reach very similar pricing arrangements with health care plans, the basic definition of trade secrecy may further limit protection.

Beyond these observations, however, is the question of whether transaction-specific prices that change over time and are subject to renegotiation truly fall within the class of information that can ever constitute a trade secret—in particular, in the highly-regulated pharmaceutical industry.

1. Existing Arguments Against Pricing as Trade Secrets

By far the most sophisticated approach to this question is by Annemarie Bridy in 2009. Based on experience litigating on behalf of a non-profit with medical device manufacturers over whether pricing information in contracts constituted a trade secret, she argues that medical device pricing is not a trade secret and that propertizing it as such "might contribute to the unsustainably rising cost of health care."[104]

Bridy's argument is complex. She questions whether trade secret law is best constituted as a theory of property rights at all, rather than relational theory (an approach that foregrounds duties among contracting parties and is less interested in defining and testing the validity of specific information claimed as intellectual property).[105] Similarly, she asserts the existence of a class of information that is not a trade secret, but merely "confidential business information of a non-trade secret nature."[106] Unfortunately, these initial philosophical moves would destabilize the concept that trade secret law is unitary and thus encompasses business information said to be "confidential" under common standards. As discussed below, these subtle theoretical expressions of theory pose dangers for promoting

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independent development of the same, non-public information as well. *E.g.*, Moore v. Kulicke & Soffa Indus., Inc., 318 F.3d 561, 572 (3d Cir. 2003) (noting that the plaintiff in a trade secret case bears the ultimate burden to prove that defendant did not independently derive its own information); Ahlert v. Hasbro, Inc., 325 F. Supp. 2d 509, 515 (D.N.J. 2004) (example of independent derivation where defendant presented records of independent development of toy gun design).

104 *See* Bridy, *supra* note 66, at 188. Bridy has also advocated for the legislative solution of enacting rules barring certain types of confidentiality agreements for medical device pricing. *See* JAMES C. ROBINSON & ANNEMARIE BRIDY, CONFIDENTIALITY AND TRANSPARENCY FOR MEDICAL DEVICE PRICES: MARKET DYNAMICS AND POLICY ALTERNATIVES (Berkeley Ctr. for Health Tech. Oct. 2009), https://bcht.berkeley.edu/sites/default/files/device-prices-transparency-report.pdf.

105 *See* Bridy, *supra* note 66, at 193–94.

106 *See id*. at 203.

the public interest in trade secrecy disputes, including pharmaceutical pricing.

That said, having proposed these lines of approach, Bridy's primary argument centers on revitalizing an insight from the 1939 Restatement of Torts, which provided the basis for civil trade secret law before the states gradually adopted the Uniform Trade Secrets Act beginning in 1979. As she notes, trade secret cases early in the twentieth century often excluded "ordinary, private commercial information" from trade secret protection.[107] As a result, comment B to Section 757 of the Restatement stated that trade secret protection should not extend to "information as to single or ephemeral events in the conduct of a business," including "the amount of other items of a secret bid." Rather, trade secret protection was to be limited to "a process or device for continuous use in the operation of the business."[108] Thus, Bridy notes that trade secrets were to be "durable information on which the business runs."[109]

Of course, the state law versions of the Uniform Trade Secrets Act superseded the 1939 Restatement—except in New York, the last holdout as of this writing.[110] In superseding the Restatement, the Uniform Act explicitly rejected the limitation that only information in "continuous use" could constitute a trade secret. The official commentary to the 1985 version of the Uniform Act, for example, states that the Act's "definition of 'trade secret' contains a reasonable departure from the Restatement of Torts (First) definition which required that a trade secret be 'continuously used in one's business.' The broader definition in the proposed Act extends protection to a plaintiff who has not yet had an opportunity or acquired the means to put a trade secret to use."[111] That change made sense, because the "continuous use" restriction meant that a company's ongoing research and development efforts, or novel

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[107] *See id*. at 197.

[108] *See id*. at 198 (discussing RESTATEMENT OF TORTS § 757, cmt. B (1939)).

[109] *See id.*

[110] Notably, New York still maintains the rule that trade secrecy does not extend to ephemeral events such as single financial transactions. *E.g.*, Bear, Stearns Funding, Inc. v. Interface Group-Nev., Inc., 361 F. Supp. 2d 283, 305–06 (S.D.N.Y. 2005) (holding that financial and loan information from single, past transaction did not meet the continuous use requirement and citing Lehman v. Dow Jones & Co., 783 F.2d 285, 298 (2nd Cir. 1986) for the similar proposition that ephemeral information about a third party's potential availability for a deal, and the attractiveness of that potential deal was did not meet continuous use requirement).

[111] *See* UNIFORM TRADE SECRETS ACT WITH 1985 AMENDMENTS § 1, cmt. (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1986).

ideas not yet put to practice, would not receive trade secret protection if someone were to misappropriate such information.[112]

Thus, the Uniform Act and its comments did not repeat the Restatement's language about transitory or ephemeral information not qualifying for trade secret protection, but the Uniform Act's logic was aimed at a different issue.[113] Bridy therefore argues that the drafters of the Uniform Act, in doing away with the continuous use requirement, but also the rest of Comment b by silent omission, only inadvertently left open the possibility that pricing information could be a trade secret under the UTSA.[114] Omitting that requirement, she argues, has nothing to do with rendering "transaction specific sales price information" into a trade secret.[115] She notes that many courts still occasionally cited the Restatement even after the local jurisdiction had adopted the Uniform Act, and that—at least on the facts—courts have often rejected trade secret claims based on pricing information.[116]

Ultimately, Bridy argues that courts should consider the Uniform Act's removal of the continuous use requirement in context, and not assume that the removal of that requirement necessarily meant that the remainder of the Restatement's Comment b as to ephemeral, transaction-specific information was thereby also to fall within the ambit of trade secret protection. She finds no intent, on the part of the Uniform Act's drafters, to turn pricing information into trade secrets.[117]

The State of California made a similar, though truncated, argument when opposing Amgen's motion for a preliminary injunction against

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[112] More controversially, this UTSA comment also states that "negative" information can receive protection. *See* POOLEY, *supra* note 51, at § 2.03[2] (2017) (noting change from Restatement). This concept is vague and difficult to define, and may pose public policy concerns as to the rights of departing employees. *E.g.*, Tait Graves, *The Law of Negative Knowledge: A Critique*, 15 TEX. INTELL. PROP. L.J. 387 (2007). In other words, the UTSA's attempt to correct a portion of the Restatement created its own set of nettlesome ambiguities.

[113] Jim Pooley argues that this omission means that the UTSA does, in fact, recognize ephemeral information because it is "considerably broader" than the Restatement. *See* POOLEY, *supra* note 51, at § 2.03[2][a] (2017) ("Under the modern formation reflected in the Uniform Act, bid information is protected.").

[114] *See* Bridy, *supra* note 66 at 200 ("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.").

[115] *See id.* at 199.

[116] *See id.* at 201–02.

[117] *See id.* at 207–08.

the publication of upcoming changes in drug pricing in 2019. It argued both a factual issue— that the information at issue had already been disclosed to "nearly 200 private and public purchases and PBMs who are under no obligation to preserve [Amgen's] confidentiality"—as well as the definitional issue. Specifically, the state argued that, (1) information merely about estimating pricing is not a trade secret at all; and (2) as with Bridy's analysis, information about single or ephemeral events is not a trade secret at all.[118] Thus, these types of arguments are very much part of the landscape in current regulatory disclosure disputes.

McClure and Dulaney, discussed above in the context of FOIA case law, also seem to take a similar approach. McClure, in advocating that pricing information in government contracts should be disclosed in FOIA and Trade Secrets Act disputes, argues that "the definition of a trade secret from the Restatement of Torts should be applied for non-FOIA cases."[119] Dulaney, by contrast, does not make an IP-based argument when proposing that the public interest should prevail in FOIA and other disputes over the publication of pricing information in government contracts, but his arguments are congruent with a concept that such information is transitory and not deserving of trade secret protection in that context.[120]

2. *Fine-Tuning the Critique*

Bridy, McClure, and Dulaney offer important insights into why pricing information in the context of Pharmacy Benefit Manager agreements with pharmaceutical companies should not receive trade secret protection against regulatory disclosure in the public interest. At the same time, their analyses can be strengthened to better fit today's environment, where the Federal Act has been enacted and some version of the Uniform Act is now law in almost every state.[121]

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[118] *See* Respondent's Notice at 20-21, Amgen Inc. v. Cal. Corr. Health Serv., No. 18-stcp-03147 (Cal. Super. Ct. Jan. 28, 2019). Unfortunately, the state's argument was short and buried deep within its brief. It also relied on older, pre-UTSA case law under the Restatement, when trade secrets had to be in continuous use. *See id.* (citing Uribe v. Howie, 19 Cal. App. 3d 194, 207 (1971) (requiring disclosure of pesticide-related information because it was not in continuous use under then then-controlling standard). As discussed here, the thrust of the State's argument is entirely correct, and need not rely on such older case law.

[119] *See* McClure, *supra* note 77, at 217. McClure notes Comment b as well. *See id*. at 214.

[120] *See* Dulaney, *supra* note 83, at 37, 49 (arguing for "a balancing test that incorporates the public interest").

[121] Massachusetts became the latest state to adopt a version of the UTSA in October 2018. *See* MASS. GEN. LAWS ch. 93, § 42–42G. Although Alabama and

To begin with, we need not seek to destabilize trade secret law as a form of property rights in order to argue that pricing information is not a trade secret in the pharmacy benefit context. That is unnecessarily swinging a broad hammer against a very narrow nail. Moreover, it could have unintended negative consequences. In particular, if we start from the presumption that trade secret law should be calibrated to reflect important public policy objectives and not merely private commercial interests, there is a significant need to strongly uphold trade secret law as a property theory, and not the relational theory that the older Restatement would have found appropriate. Specifically, in the common employer/employee context, departing employees have more balanced rights in disputes brought by their former employers if trade secrets are seen as objective, well-defined property rights than in a relational regime where trade secrets could be vaguely-defined, amorphous, and perhaps even available in the public domain.[122] Indeed, by definition a relational theory is significantly more interested in whether the defendant was in a trusted relationship with the plaintiff, and less so in whether the plaintiff has defined specific items as intellectual property that must then be tested for validity. For that reason, a relational theory of trade secret law makes it more difficult for courts to focus on whether specific items of information asserted to be trade secrets should, in fact, receive such protection. Under a relational approach, those asserting trade secrecy rights are more likely to escape scrutiny of overbroad, conclusory claims that broad areas of information are protectable. A property theory focuses everyone on whether any discrete item of information truly qualifies for protection.

Nor should we seek a short cut through the pricing quandary by arguing for the existence of a category of so-called "confidential business information" that is not the same thing as a trade secret. This is the approach that is latent if one were to lean on the Restatement to revitalize its commentary, as well as what the State of Nevada expressly argued in a 2017 regulatory disclosure case.[123]

North Carolina have trade secret statutes that do not entirely match the UTSA, the family resemblance is sufficient to treat them as the same, and for purposes of this Article the differences among the various statutes do not matter.

[122] These points are detailed extensively, with relevant case law, in Charles Tait Graves, *Trade Secrets as Property: Theory and Consequences*, 15 GA. J. OF INTELL. PROP. L. 39 (2007).

[123] *See* Bridy, *supra* note 66, at 203; *see also* Nevada Legislature's Opposition to Plaintiff's Motion for Preliminary Injunction at 6–7, Pharmaceutical Research and Manufacturers of Am. v. Sandoval, No. 2:17-cv-02315-JCM-CWH (D. Nev. Oct. 1, 2017) ("confidential business information that does not rise to the level of a trade secret is not entitled to the same level of protection").

Advocating for the creation of a second class of protectable information in addition to the official class of trade secrets would backfire. It would provide theoretical cover to assert that non-secret information should nonetheless receive legal protection as if it were a trade secret. That is, instead of a two-tier, binary distinction between protectable information and information that is unprotectable and thus usable by all, this concept would create a three-tier, or even multi-tier system where an information-holder has several bites at the apple to assert some level of protection, even for information that is not a trade secret. That would strengthen the hand of the party seeking nondisclosure and weaken the hand of those seeking disclosure in the public interest.

Moreover, such an artificial distinction is arbitrary and analytically impossible to sustain. For example, what exactly is the difference between trade secrets and business information said to be "confidential?" [124] There is no history analytically defining a defensible line between the two, nor can we imagine one when a civil defendant seeks to show that information is in the public domain and thus unprotectable. More important, it runs squarely against the state Uniform Act's preemption doctrine, which is a key part of the modern operation of state trade secret law in almost all UTSA jurisdictions. Just as patent law preempts attempts by litigants and state legislatures to use state law to relax the requirements of the patent laws to assert claims over unpatented information, and just as copyright law preempts state law claims which likewise seek to assert IP-like protection over information that does not meet copyrightability requirements, the Uniform Acts which contain a displacement clause seek to prevent litigants who assert tort claims such as conversion or unfair competition from evading the need to establish trade secrecy.[125] In the case of the state Uniform Act, a large majority of courts have ruled that state trade secret law blocks attempts by civil litigants to use tort law to chase

[124] This does not include personal private information of the type that is the subject of the privacy laws, rather than the intellectual property laws. That is what our qualifier "business information" means.

[125] *See, e.g.,* Robin Feldman, *Federalism, First Amendment, and Patents: The Fraud Fallacy,* 17 COLUM. SCI. & TECH. L.J. 30 (2015) (describing issues related to federal preemption of state laws in various contexts). For examples of federal patent preemption and federal copyright preemption versus state law, *see generally* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989) (patent preemption of a state statute); Sammons & Sons v. Ladd-Fab, Inc., 138 Cal. App. 3d 306 (1982) (patent preemption of state law tort claims); Ultraflo Corp. v. Pelican Tank Parts, Inc., 845 F.3d 652 (5th Cir. 2017) (copyright preemption of state law tort claim).

departing employees with dubious claims over information said to be "confidential but not secret."[126]

These rulings have been critical in preventing employers from bullying departing employees. Imagine circumstances without such a ruling. The state's trade secret act would hold that information was not protected, and therefore employees would be free to use the information as they move to new employment. Despite this, companies would have a powerful weapon to wield against former employers in civil litigation or to hinder employee mobility. Even if an employee-defendant establishes that information is not a trade secret (perhaps because it is publicly available), the employer may still proceed using nebulous tort claims such as "breach of

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[126] UTSA preemption is a topic addressed by a number of articles, including Charles Tait Graves & Elizabeth Tippett, *UTSA Preemption and the Public Domain: How Courts Have Overlooked Patent Preemption of State Law Claims Alleging Employee Wrongdoing*, 65 RUTGERS L. REV. 59 (2013). Some of the states whose highest courts or appellate courts in precedential opinions have affirmed UTSA preemption include Robbins v. Supermarket Sales, LLC v. Supermarket Equip. Sales, LLC, 722 S.E.2d 55, 58 (Ga. 2012) (approving prior Georgia case law to hold that allowing injunctive relief for information that failed to qualify as a trade secret "undermined the exclusivity of the GTSA"); BlueEarth Biofuels, LLC v. Hawaiian Elec. Co., Inc., 235 P.3d 310 (Haw. 2010) (describing the current state of UTSA preemption law nationwide, and siding with other state supreme courts in favoring the majority approach); Mortgage Specialists, Inc. v. Davey, 904 A.2d 652, 665 (N.H. 2006) (affirming pre-trial order dismissing alternative claims, ruling that UTSA is intended as sole claim for trade secret misuse); RK Enter., LLC v. Pro-Comp Mgmt, Inc., 158 S.W.3d 685, 689–90 (Ark. 2004) (reversing trial court; finding broad preemption of alternative tort claim); Savor, Inc. v. FMR Corp., 812 A.2d 894, 898 (Del. 2002) (affirming preemption of unfair competition and conspiracy claims at the pleading stage); Dicks v. Jensen, 768 A.2d 1279, 1285 (Vt. 2001) (holding that UTSA preemption applies to common law claims even if the information does not meet the statutory definition of a trade secret); Frantz v. Johnson, 999 P.2d 351, 357–58 (Nev. 2000) (reversing trial court and holding in favor of broad preemption of various alternative tort claims); Weins v. Sporleder, 605 N.W.2d 488, 492 (S.D. 2000) (reversing trial court and holding in favor of broad preemption; explaining that it would render the UTSA "meaningless" if a plaintiff's trade secret claim is dismissed and "plaintiffs can simply pursue the same claim in the name of a tort"). However, there is a minority position essentially deleting the UTSA's preemption clause, characterized by rulings which egregiously misconstrue the statutory text and seemingly lack any awareness of the existence and purpose of statutory IP preemption. *E.g.,* American Biomed, Grp., Inc. v. Techtrol, Inc., 374 P.3d 820, 827–28 (Okla. 2016) (misreading statutory text and ignoring official UTSA commentary for simplistic ruling that statute does not preempt purported torts over information said to be confidential but not secret—whatever that is supposed to encompass); Burbank Grease Serv., LLC v. Sokolowski, 717 N.W.2d 781 (Wis. 2006) (ruling, over passionate dissent, against preemption of alternative tort claims despite preemption clause in Wisconsin UTSA; no analysis or awareness of public policy issues at stake with respect to IP preemption).

confidence" or "unfair competition."[127] Thus, in attempting to push back expansive trade secret claims that are being used in a troubling manner, one could inadvertently open up even more expansive pathways for troubling behavior.

This prospect highlights the dangers that can occur as trade secret law expands rapidly into new areas. Now that the idea has taken hold in the mind of litigants that trade secret provides a potential weapon throughout the legal landscape, the race is on. In this crush, courts, legislators, and regulators can easily stumble as parties rush to apply trade secret in ever-expanding ways—leaving the history and logic of trade secret law to be trampled in the dust. In a similar vein, scholars and commentators, appalled at the aggressive tactics employed by those who assert trade secret claims at every turn, may also be tempted by approaches that solve the problem at hand while providing unintended consequences in collateral arenas. At this critical juncture in the history of trade secret law, it is essential to search out broad, comprehensive approaches that can impose discipline on the legal sprawl in a manner that is consistent and logically coherent across all boundaries. With this in mind, the following section suggests an approach that can resolve the question at hand in a manner that could be applied throughout doctrinal areas facing the invasive species of trade secret claims. Along the way, we will draw both from doctrines in other areas of intellectual property law and from doctrines in other areas of civil litigation that can help tame the sprawl.

IV. NAKED PRICE AND STEPPING BACK FROM THE BRINK

As trade secret law continues to gain prominence, and as scholars, judges, and practitioners struggle with the public policy problems posed by overbroad application of trade secrecy assertions, we should strive to approach these problems in a manner that best serves the overall public interest, in addition to the public interest at stake in any given problem area. Indeed, if recent articles are indicative, the attention given to the public interest in various aspects of trade secret law—many extending well outside the traditional area of employee/employee disputes—will only continue to grow.[128] Here, we should theorize pricing in regulatory disputes in the pharmaceutical industry in a manner that is consonant with

[127] *E.g.*, SunPower Corp. v. SolarCity Corp., 2012 WL 6160472 (N.D. Cal. 2012) (rejecting former employer's attempt to proceed on tort claims styled as covering information said to be confidential, but not secret).
[128] *See supra* notes 9–13.

promoting the public interest in employment disputes as well as these other areas of law.

To that end, we recognize that the Federal Act is in place now alongside the state Uniform Acts, and that case law under the 1939 Restatement is merely a residual influence where it is consistent with these statutes. We need to put the insights of other scholars regarding trade secrecy and pricing information, as well as new insights, to work in this contemporary legal environment.

We start with the point that there is something perplexing about an assertion that a price is a company's intellectual property, especially in the sense that society receives something in return for private protection. The case law cited above nibbles around the edges at best, and no court seems to have tackled this question at a deep analytical level.

Defining the problem as one simply of ephemeral or transitory information is too imprecise. After all, one can readily envision a sort of Eureka moment, where a scientist or engineer suddenly thinks of an idea that is new and novel, and that in and of itself is highly valuable. Indeed, ideas—as ephemeral as they may be—can constitute trade secrets.[129] By the same token, however, a company could spend years and millions of dollars to develop concrete and lasting technology that, unbeknownst to the developer, someone else released into the public domain, thus negating any trade secret protection. So comparing the time spent thinking about something, or the amount of time or effort put into creating something, versus an idea that arose quickly as a passing thought or a transitory moment, does not in and of itself tell us why pricing information should not receive trade secret status.

One can find theoretical companionship in both copyright and patent law for the notion that determining whether something is properly the subject of protection does not rest on concepts such as the level

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[129] *E.g.*, Altavion, Inc. v. Konica Minolta Sys. Lab. Inc., 226 Cal. App. 4th 26 (2014) (finding that ideas can constitute trade secrets; plaintiff had idea for bar code scanner that was not developed into a product); Charles Tait Graves, *Ruling Continues Solidification of Trade Secrets Law*, DAILY JOURNAL, May 30, 2014 (noting that it was "not surprising" that the *Altavion* court found business ideas to fall within the scope of trade secret law, and that a contrary result would have "badly damaged the overall structure of trade secret law" by encouraging litigants to turn to "vague, standards-free tort labels" to litigate over such information if it had been pushed outside the scope of the UTSA). That said, Annemarie Bridy noted in comments to the authors that an idea might be seen as persistent, rather than ephemeral, because (at least in some cases) the value of the idea carries forward past a single transaction – unlike a price.

of effort and the concrete nature of the creation. Copyright doctrine, for example, holds that one does not gain rights in a work merely through the "sweat of the brow."[130] A work must possess the requisite modicum of creativity, regardless of how much labor the inventor expended.[131] As the Court noted:

> It may seem unfair that much of the fruit of a compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, that is not "some unforeseen byproduct of a statutory regime. It is, rather "the essence of copyright . . . ."[132]

Copyright in the United States does dictate that a work must be fixed in a tangible medium of expression to obtain protection, an approach that arguably prevents entirely ephemeral works from protection. Nevertheless, the copyright fixation requirement—with its logic related to proof of infringement[133]—is entirely separate from the question of whether the requisite creativity exists. All the fixation in the world will not render a noncreative work subject to protection.[134]

Similarly, patent law has rejected analogous concepts. In rulings on patentable subject matter, the Supreme Court has rebuffed arguments that expensive research leading to valuable discoveries should be protectable.[135] When the resulting invention is merely a law of nature, the result remains unpatentable.[136] Patent law, in fact, does not even require the type of concreteness of fixation one might imagine. Rather a patent applicant need not have actually made the invention to obtain protection but can merely describe how one might go about it. This convention, known as "constructive

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[130] *See* Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (landmark case rejecting judicially created "sweat of the brow" concept for copyright protection in a case concerning telephone books).

[131] *See generally id.*

[132] *Id.* at 349 (internal citations omitted).

[133] *See* Kelley v. Chi. Park Dist., 635 F.3d 290, 304 (7th Cir. 2011) ("Fixation serves two basic roles: (1) easing problems of proof of creation and infringement. . . ." (quoting 2 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 3:22 (2010)).

[134] *See, e.g.*, *Feist*, 499 U.S. at 346–47 (identifying a minimal creativity requirement for copyright protection).

[135] *See* Mayo Collaborative Servs. v. Prometheus Labs., Inc., 566 U.S. 66, 91–92 (2012) (rejecting patentable subject matter in a case related to medical diagnostics).

[136] *See, e.g.*, *id.*

reduction to practice,"[137] would not even meet copyright's fixation requirement, given that the constructive reduction to practice is only a description, rather than the thing itself. The point is simply that copyright and patent law eschew notions such as level of effort and ephemerality for determining whether a creation should be the subject of protection. One can find theoretical companionship in both copyright and patent law for the notion that determining whether something is properly the subject of protection does not rest on concepts such as the level of effort and the concrete nature of the creation.

In an analogous manner, ephemerality (or transitoriness) seems too elastic a concept by itself to address the question of whether material should constitute proper subject matter of trade secret protection.[138] Consider specifically the issue of price. A price may or may not be labeled transitory, as the contract reflecting the price may remain in force for some time.

Instead, we should take the points made by the old Comment b in the Restatement, as well as statements in the courts which have expressed doubts about price information constituting a trade secret, as hints that a price is not intellectual property at all—at least in the highly regulated industry in question. The reasons why are straightforward under a contemporary intellectual property theory. A price is not an idea. It is a negotiated point representing value to be exchanged for something. It is a point on a line between two adverse parties, not an act of creation. A price is not an idea in the sense of an origin point for future development, or something latent for additional thinking: it is not inchoate. Even if one could argue that the terms and the pricing approaches one uses to arrive at the price are somehow tantamount to creation, the simple naked price is a number, not something particularly creative. Moreover, the value itself is an abstract placeholder: it could have been something different and was arrived at through adverse negotiation where it was unknown until there was mutual agreement. It is not the same thing as the development of the ideas instantiated in the pharmaceutical products being sold. The property right in the contract is the amount due, the receivable—not the abstract signifier representing that amount.

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[137] U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 2138.05 (9th ed. 2018) [hereinafter MPEP].

[138] A definition of "ephemeral" is "lasting a very short time," and synonyms include "transitory," "transient," "fleeting," and "evanescent." *Ephemeral*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/ephemeral (last visited Feb. 23, 2020).

In fact, the entire notion of price as a creation crumbles apart when one presses on the notion of who the creators are. Price emerges during negotiations between the two parties to an agreement. Thus, price is born through the joint activity of two parties, not one alone. We are not talking about parthenogenesis here.[139] If price were a valid joint creation of those parties, neither party would be able to 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.[140]

In addition, recall that the three PBMs control most of the PBM market. Suppose a drug company has prices or terms that are the similar for all three PBMs. Can price be a secret in that context when all of the PBMs competitors in an industry have a similar price and therefore know the secret? After all, the PBMs are theoretically joint owners if there is a secret; but if all of them are getting roughly the same price, all of them know the price, and there is no secret in their industry.[141] In a broader context, beyond that of pharmaceutical companies, if price were a trade secret created jointly and thus co-owned by the seller and the customer, sellers would be unable to charge substantially similar prices to customers. Doing so would risk that the customers would all know the secret, and thus, allowing the first customer to use litigation to inhibit the seller and its rivals. One cannot imagine that such an outcome—in which a company could not charge a similar price to more than one of its customers—would be consistent with the underpinnings of trade secret law, which is firmly rooted in the notion that companies should be able to interact with others and conduct their business in a rational and efficient manner without risking their valuable intellectual property.

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[139] In parthenogenesis, reproduction occurs when a female gamete produces an embryo without any genetic contribution from a male gamete. *See* Ursula Mittwoch, *Parthenogensis*, 15 J. MED. GENET. 165 (1978).

[140] *See* POOLEY, *supra* note 51, at § 5.01[1][c] n.10 (2017 ed.) ("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."; citing cases including MGP Ingredients, Inc. v. Mars, Inc. 2006 WL 3530726, at *5 (D. Kan. 2006) (joint owner sued the other owner and its parent)).

[141] The existence of information aggregation services in the pharmaceutical industry could, in itself, threaten the existence of the secret. To the extent that these services are able to reverse engineer the price and offer to sell that information, the information would become knowable and no longer secret.

Moreover, price is created in an adversarial process.[142] An adversarial process appears decidedly different from the normal context of joint creation. And if the creation belongs jointly to the PBM and the drug company, is the PBM 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 health plan? 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.

This is especially so in the narrow context at issue, with its specific types of agreements. In the case of PBM contracts, the existence of the agreement, the identities of the contracting parties and the goods and services to be exchanged for that value are all known. These are not secret transactions. PBM contracts are not the product of secret customer lists, where one party to the transaction is unknown. Much is known. This is not a startup company working in so-called "stealth mode" on an idea that is being kept deeply hidden. Indeed, the economic marker of price is among the few major points that are not already transparent in these contracts. Where so many variables are already known, the case for trade secrecy over price is weaker than, say, a business transaction that is entirely unknown, and outside a highly regulated environment.

Ultimately, a price is not a company's intellectual property in this scenario, but instead is a negotiated deal point that an incumbent hopes to hold onto in order to avoid competition. The incumbent got there first, so to speak, and the price is the point at which it arrived. Nevertheless, the company wants to treat "getting there first" as equivalent to "intellectual property." In short, in the PBM context where the contracting parties are known, the subject of their agreement is known, and the product being sold is known, the price at which the parties arrive is not propertizable intellectual property.[143] The Restatement's concepts of ephemerality and transitoriness point in the right direction, but do not provide nearly the necessary logical and theoretical robustness.

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[142] 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 5.

[143] There is a further consideration for older pricing information as to past contracts. Even if one treated current pricing information as a trade secret, outdated information may lack the economic value required under the DTSA and the UTSA. *See generally* Yield Dynamics, Inc. v. TEA Sys. Corp., 154 Cal. App. 4th 547, 578 (2007) (trade secret claim over obsolete software items failed because such software did not meet the UTSA's value requirement).

Even if one were to conclude that bare negotiated price points between PBMs and pharmaceutical manufacturers might constitute trade secret, however, there would be no show-stopping immunity against regulatory disclosure in the context of trade secret. To begin with, the Federal Act and the state Uniform Acts do not provide an immunity to the owner of a trade secret against regulatory disclosure. The state uniform acts provide trade secret owners with a range of remedies against civil misappropriation, while the federal act also provides for prosecutions against criminal misappropriation. Both statutes seek to balance interests between civil plaintiffs (or prosecutors) and defendants by offering limited rights balanced by the need for a robust public domain and rights to independent development. Importantly, neither purports to preempt regulatory or administrative statutes.

For example, California's version of the Uniform Act states that it "does not supersede . . . any statute otherwise regulating trade secrets."[144] More directly, the federal act provides two different types of immunities, but none against regulatory disclosure. It immunizes whistleblowers who disclose their employer's trade secrets to counsel or to the government from lawsuits by their employers,[145] and it immunizes internet service providers from civil misappropriation claims based on user-generated content pursuant to 47 U.S.C. § 230.[146] But the federal act contains no immunity against legislation or regulations requiring pharmaceutical pricing disclosures, even though Congress was surely well aware that various regulatory regimes require submission of potentially confidential information by private companies with at least some

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[144] *See* CAL. CIV. CODE § 3426.7(a). This language, one of the exceptions to the UTSA's general preemption of overlapping tort claims, was undoubtedly designed as a savings clause to avoid conflict with the many California statutes that in some fashion regulate trade secrets— including regulatory disclosure measures. *See* CAL. EVID. CODE § 1060 (treatment of trade secrets in civil proceedings); CAL. FOOD & AGRIC. CODE § 14022 (treatment of trade secrets submitted to government during pesticide evaluations); CAL. GOV'T CODE § 6254.7 (same for air pollution data).

[145] *See* 18 U.S.C. § 1833(b) ("Immunity from Liability for Confidential Disclosure of a Trade Secret to the Government or in a Court Filing").

[146] *See* Defend Trade Secrets Act of 2016, Pub. L. No. 114–153, 130 Stat. 376 (2016), § 2(g) (stating, perhaps oddly at first glance, that the DTSA is not a statute pertaining to intellectual property—language necessary to fit the statute into Section 230's safe harbor immunity); Craft Beer Stellar, LLC v. Glassdoor, Inc., 2018 U.S. Dist. LEXIS 178960, 2018 WL 5084837 (D. Mass. Oct. 17, 2018) (applying immunity to dismiss DTSA claim against website which allows users to anonymously review their employers); Eric Goldman, *The Defend Trade Secrets Act isn't an "Intellectual Property" Law*, 33 SANTA CLARA HIGH TECH. L.J. 541 (2016) (commentary on immunity).

possibility of public disclosure.[147] Though by no means dispositive, the point is that PBMs received no specific protection in this recent legislation.

In short, trade secret law does not present some unusual barrier to regulatory activity. Rather, any regulatory activity should lead instead to the weighing and balancing of the public interest versus the supposed harm in disclosing such pricing. 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.[148] Indeed, the case where companies engaging in exploitation of the citizenry who are effectively captive buyers under health insurance policies to high pharmaceutical prices appears to be a model instance where regulators should put the brakes on overbroad use of trade secrecy assertions. This would echo legislation enacted in the interest of consumers who face serious disadvantages such as information asymmetry,[149] high-pressure sales tactics,[150] and extremely limited bargaining power.[151]

[147] *Cf.* Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 579–580 (1979) (seminal article on regulatory failure by Justice Breyer prior to joining the Court noting that disclosure regulation can serve as an effective alternative to classical regulation in achieving a more competitive market when "the public can understand the information disclosed and is free to choose on the basis of that information.").

[148] *See supra* note 95 and accompanying text. The Supreme Court of North Dakota reached such a decision, finding that price information constituted a trade secret, but that it nonetheless was subject to regulatory disclosure and did not constitute a taking, given the public interest in rates charged in natural gas agreements. *See* N. States Power Co. v. N.D. Pub. Serv. Comm., 502 N.W.2d 240, 247 (N.D. 1993).

[149] *See, e.g.*, Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312 (2006) (federal law related to automobile purchasing); *see also* 120 CONG. REC. S40,711 (daily ed. Dec. 18, 1974) (statement of Sen. Frank Moss) ("By making warranties of consumer products clear and understandable through creating a uniform terminology of warranty coverage, consumers will for the first time have a clear and concise understanding of the terms of warranties of products they are considering purchasing."). Mandatory banking disclosures serve a similar purpose in creating greater market transparency to reduce asymmetric information. *See, e.g.,* Disclosure of Financial and Other Information by FDIC-Insured State Nonmember Banks, 84 Fed. Reg. 9698–9702 (Mar. 18, 2019) (codified at 12 C.F.R. pt. 350).

[150] *See, e.g.,* 16 C.F.R. § 429 (2015) (strengthening a 1972 Federal Trade Commission Cooling-Off Rule designed to prevent "deceptive and unfair practices, including high pressure sales tactics; misrepresenting the quality of goods; and placing inappropriate roadblocks to obtaining refunds").

[151] *See* UNIF. COMMERCIAL CODE § 2-302 (holding that upon finding a contract unconscionable, a court may refuse to enforce the entire contract, enforce the

To the extent that courts and legislatures may struggle with these issues, the struggle would highlight the paucity of decisions and analyses at the intersection of trade secret with other regimes, as well as the need for more robust doctrines in trade secret, itself.

V. THIN TRADE SECRET

Perhaps no single statement sums up the state of legal scholarship in the realm of intellectual property than a comment from the legal scholar Richard Epstein, who dryly noted the following:

> The Field of intellectual property is a growth industry that may, for all I know, involve, an unintended consequence of Moore's Law in that the number of published articles in the field doubles on average every eighteen months. Most of that increased effort has been devoted to copyright and patents.[152]

Although trade secret literature also has expanded since Epstein's comment in 2004, patent and copyright remain well ahead of trade secret, not only in terms of the number of articles published, but also in terms of deep theoretical treatment. Even fifteen years of miraculous brilliance in a field are unlikely to make up for centuries of consideration in the judiciary and the academy.

With this in mind, trade secret could benefit from the wisdom of experience gained in generations of development of copyright and patent law. After all, though only patent and copyright can trace their heritage to Constitutional provisions, all three doctrinal realms flow from a consistent logical grounding: individuals would be unwilling to invest in developing creations and bringing those creations forward for the benefit of society unless the legal system guaranteed the creators the potential to enjoy a return on the fruits

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remainder without the offending clause, or limit the contracts. application to avoid an unconscionable result); *see also* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (defining unconscionability as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. . . . In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power").

[152] Richard A. Epstein, *The Constitutional Protection of Trade Secret Under the Takings Clause,* 71 U. CHI. L. REV. 57, 57 (2004); *see also* Bridy, *supra* note 66, at 188 (citing Epstein's comment for the proposition that "trade secrets have taken a back seat to copyrights and patents in the explosion of scholarship on intellectual property in recent years").

of their labor, free from those who would copy.[153] We note, of course, certain important caveats embedded in the language. Among those are that the system exists for the benefit of society, not the benefit of creators,[154] that protecting a robust public domain is a strong public interest,[155] and that the law guarantees no more than an opportunity to garner a return, rather than guaranteeing a particular return or any return at all.[156] Nevertheless, the more robust jurisprudence of patent and copyright has dealt with a myriad of challenges as those doctrinal areas have developed into their more familiar modern forms—particularly when those intellectual property regimes have brushed up against other policy arenas.

This is not to suggest that intellectual property always yields in the face of other societal goals, or that it necessarily should. Rather, patent and copyright each have developed doctrines to delineate boundaries with other policies embedded in the legal system in an effort to ensure that society can remain faithful to the underlying logic of both. Thus, for example, patent law developed the doctrine of patent misuse in the early twentieth century, as patent jurisprudence crashed headlong into the burgeoning area of antitrust law.[157] In the same vein, copyright developed the doctrine of "thin" protection as courts struggled with the need to respect other societal goals, including freedom of information, and as society adapted to the tectonic shifts of the digital age. In general, doctrines such as misuse and thin protection embody the recognition that intellectual property rights are not solid monoliths, presenting an impenetrable wall through which no party but the rights holder may pass. Rather, intellectual property regimes are brilliantly nimble and subtle systems, deftly threading their way among various societal goals.

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[153] *See* Epstein, *supra* note 152, at 57 (noting that "[i]n many ways, the logic for protecting trade secrets parallels that for protecting patents and copyrights. People will not develop certain forms of information at private cost if the benefits of that information can be immediately socialized by the unilateral actions of others").

[154] *See supra* note 59.

[155] *E.g.*, Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 151 (1989) ("Moreover, the ultimate goal of the patent system is to bring new designs and technologies into the public domain through disclosure.").

[156] *See* FELDMAN, *supra* note 56, at 3, 50–75 (introducing the bargain theory of patents and explaining that "a patent grants some form of an opportunity—a seat at the bargaining table, with certain rules in place"); *see also* Gideon Parchomovsky & R. Polk Wagner, *Patent Portfolios*, 154 U. PA. L. REV. 1, 66 (2005) (noting that studies suggest the vast majority of patents earn no returns at all for their patent holders).

[157] *See* Robin Feldman, *Patent & Antitrust: Differing Shades of Meaning,* 13 VA. J. OF L. & TECH. 1 (2008).

Along these lines, the doctrine of thin copyright protection is particularly illuminating. The term “thin” copyright emerged in the early 1990s in the *Feist* case, in which the Supreme Court considered the question of copyright protection in a phone book. The Court found that copyright protection in a factual work is “thin” given that facts reside in the public domain and others are free to use the factual information contained in a work. The Court emphasized that “copyright is not a tool by which a compilation author may keep others from using the facts or data he or she has collected.”[158]

When copyright is “thin,” the work reflects only scant creativity, although some creativity in the creation or arrangement of information is present.[159] In that circumstance, certain other elements of the case must be particularly strong to warrant a finding of copyright infringement. Specifically, some courts require evidence of what is called “supersubstantial similarity” to find infringement.[160] Courts have found thin copyright protection in cases rejecting claims ranging from architectural plans to Barbie dolls.[161] The logic of thin copyright reflects the concern that copyright might be used to reach beyond its boundaries—extending its grasp to subject matter that should not be restricted to the public and blocking activity outside of the creative appropriation that copyright was intended to prevent.

Beyond the doctrine of “thin” copyright, copyright law’s fair use doctrine similarly reflects the need to prevent copyright from reaching beyond its intended boundaries and to balance competing public interests. Dating back to the nineteenth century, fair use is a judicially created doctrine, eventually codified by Congress in the 1976 Copyright Act.[162] Under the doctrine, even if someone has copied a protected work, the court may rule that the copying is fair rather than foul.[163] The fair use doctrine allows copying “for purposes such as criticism, comment, news reporting, teaching . . .

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[158] *See* Feist Publ’ns v. Rural Tel. Serv. Co., 499 U.S. 340, 359 (1991).

[159] *See id*. at 349.

[160] MELVILLE NIMMER, 4 NIMMER ON COPYRIGHT § 13.03[A][4] (2019)

[161] *See generally* Charles W. Ross, Inc. v. Olsen Fine Home Bldg., LLC, 977 F. Supp. 2d 567 (E.D. Va. 2013); Dream Custom Homes, Inc. v. Modern Day Constr., Inc., 773 F. Supp. 2d 1288 (M.D. Fla. 2011); Jeff Benton Homes, Inc. v. Ala. Heritage Homes, Inc., 929 F. Supp. 2d 1231 (N.D. Ala. 2013); and Mattel, Inc. v. MGA Entm't, Inc., 616 F.3d 904 (9th Cir. 2010).

[162] *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFFICE (Mar. 2019), https://www.copyright.gov/fair-use.

[163] *See* 17 U.S.C. § 107.

scholarship, or research."[164] In the words of the Supreme Court, the doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[165] More importantly, fair use recognizes the importance of various public interests that might be swept aside by an overzealous enforcement regime.[166]

A fair use deliberation includes, but is not limited to, four factors, one of which is the nature of the copyrighted work.[167] Under this factor, the more a work is functional or informational, the less protection the work will receive.[168] As the Supreme Court has explained, the second fair use factor, "calls for recognition that some works are closer to the core of copyright protection than others."[169] In the same vein as the thinness doctrine, fair use attempts to ensure that copyright will not be used to cut off access to material that should be in the public domain or to reach beyond the circumstances in which copyright was intended to operate. Both doctrines thereby balance copyright with competing public interests.

The misuse doctrines of patent and copyright are cut from the same cloth. Both patent misuse and copyright misuse are infringement defenses directed at attempts to improperly expand the time or scope of the rights granted.[170] They are reminders that intellectual property rights are limited grants for limited purposes, not a government license to mow down anyone in one's path. As one of the authors

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[164] *See id*. The categories are not exclusive, with the legislation noting "purposes such as" and the four factors described as to be "included" but not as limited to. *See, e.g.,* DSC Commc'n Corp. v. DGI Tech., Inc., 898 F. Supp. 1183 (N.D. Tex. 1995) (considering the manner in which the material was acquired as part of the inquiry in the case on the grounds that the four statutory factors are not exclusive).

[165] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994) (quoting Stewart v. Abend*,* 495 U.S. 207, 236 (1990)).

[166] *See, e.g.,* Sony Corp. v. Universal Studios, Inc.*,* 464 U.S. 417, 432 (1984) (quoting Justice Stewart's opinion in Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975)) (copyright, "reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

[167] Together, the four factors are: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion taken; and 4) the effect on the market. *See* 17 U.S.C. § 107.

[168] *See* NIMMER, *supra* note 160, at § 13.05; *see also* Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 531 (9th Cir. 2008) (citing NIMMER); Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1268 (11th Cir. 2014) (same).

[169] *See Campbell,* 510 U.S. at 586 (citing NIMMER).

[170] *See* FELDMAN, *supra* note 56, at 137-142 (explaining patent misuse); Troy Paredes, *Copyright Misuse Tying: Will Courts Stop Misusing Misuse,* 9 BERKELEY TECH. L.J. 271, 272 (1994) (explaining copyright misuse).

has noted, "the law would not look kindly upon a patent-holder who insists that anyone who wants to license the invention must agree to murder the inventor's mother-in-law."[171]

As doctrines of equity, patent and copyright misuse spring from the notion of requiring that parties who come to the court must do so with unclean hands. As the age-old maxim goes, one who seeks equity must do equity. In this vein, recent scholarship has suggested that courts develop a doctrine of trade secret misuse to address overreaching by trade secret owners.[172] Trade secret misuse could be deployed as a defense to improper licensing and enforcement practices that threaten to expand the breadth of a trade secret holder's domain, and we welcome recent commentary in this direction.[173]

Although important, intellectual property misuse doctrines have certain drawbacks that need to be addressed in the trade secret space in order to render a trade secret misuse theory most effective. The remedy for patent and copyright misuse traditionally has been that the intellectual property becomes unenforceable—not just in conjunction with the particular behavior or in the case at hand, but in any circumstance, at least until the misuse has been cleared.[174] In light of these potentially draconian effects, courts are reluctant to find misuse, which renders the doctrine less effective than one might hope.[175]

Moreover, the history of patent and copyright misuse is deeply entwined with antitrust. Both trace their roots to early nineteenth century caselaw regarding anti-competitive behavior.[176] The troubling issues arising in the expansive use of modern trade secret law, however, range far beyond anti-competitive conduct (although that concern may be implicated at times). Rather, trade secret is wandering into arenas that raise concerns regarding freedom of speech, ability to petition for redress, labor protections, retaliatory

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171 *See* Feldman, *supra* note 157, at 5.

172 *See* Varadarajan, *supra* note 9, at 783, 798 (advocating the adoption of a doctrine of trade secret misuse, akin to copyright misuse, to address "problematic behavior" such as "restraining reverse engineering, deterring critical speech, and overclaiming trade secret scope to legally unsophisticated employees").

173 *Id.* at 744.

174 *See id*. at 797 (discussing the problem); Thomas F. Cotter, *Misuse*, 44 HOUS. L. REV. 901, 903, 963–964 (2007) (arguing in favor of reforming the remedy so that the particular provision becomes unenforceable, rather than rendering the entire intellectual property right unenforceable for a period of time).

175 *See Varadarjan, supra* note 9, at 797.

176 *See generally* Paredes, *supra* note 170 (tracing the history of copyright misuse).

behavior, racial inequality, and other deep societal concerns.[177] Thus, a remedy grounded in anti-competitive concerns could fall short unless it is tailored for a trade secret-specific application. The promising new scholarship on trade secret misuse is hopefully the start of a new wave of curbing trade secret overreach through such calibration. Its development highlights the need for developing doctrines to delineate appropriate limitations for trade secret's wanderings.

VI. A THEORY OF "THIN" TRADE SECRET PROTECTION

Companies seeking to avoid regulatory disclosure of pharmaceutical pricing information seem to implicitly propose a hard binary: If any item of information makes it over the line to qualify as a trade secret, even if just barely, it is thus immune from disclosure. In short, the potential industry argument is that trade secrecy poses an insurmountable hurdle to requiring disclosure of pharmaceutical pricing, so long as trade secrecy is established even minimally. The trade secret statutes, however, do not support this conclusion. Rather, trade secrecy mirrors its sister intellectual property doctrines in their nuanced and delicate balancing of public interests.

The Federal Act and the state Uniform Acts do not reflect a one-sided regime. Despite its title ("defend trade secrets"), the Federal Act reflects the same balance of interests seen in enactments of the state Uniform Acts. Both are utilitarian statutes that, as their texts demonstrate, seek to balance the rights and obligations of those who create and share non-public, unpatented[178] business information. Both promote economic activity by providing limited rights in information that meets threshold requirements in order to incentivize investments in the infrastructure needed for innovation, but both also protect parties accused of misappropriation by providing a wide variety of defenses—and, in some cases, sanctions

[177] *See, e.g.,* Varadarajan, *supra* note 9, at 783; *see also supra* text accompanying notes 50–53.

[178] Some information protected by trade secret could potentially be patentable, if it were to meet the patentability elements of novelty, nonobviousness, utility, proper subject matter, and sufficient disclosure—as well as going through the process of receiving a patent through the U.S. Patent and Trademark Office. *See* 35 U.S.C. §§ 101–103 (2006). Once the patent application is published, however, the information becomes public, and potential trade secrecy is lost. For most patent applicants, publication occurs eighteen months after the patent application is filed, regardless of whether the patent has been granted. *See* 35 U.S.C. § 122 (2006); *see also* Patent Cooperation Treaty art. 21, June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 231 (explaining that most patent applicants apply for patents outside of the United States, and that treaty obligations require publication of patent applications after eighteen months in those circumstances).

against the trade secret claimant.[179] Above all, by limiting the scope of trade secret rights, the Federal Act and the state Uniform Acts ultimately serve the public interest by securing a broad freedom to use and enjoy unprotected information. In both the judicial and legislative realms, trade secret embeds a substantial dedication to the public interest, by maintaining a robust public domain. Trade secrets are not natural rights. They do not exist outside the legal framework, and there is no metaphysical quality to their conception.[180] As such, trade secret should not be used a tool to hammer an unwitting public.

The goal of intellectual property is to bring innovations to society for their use. This is framed by the general economic argument that free markets are able to maximize social utility for the nation's citizens.[181] We interfere with the free market—by granting intellectual property rights to inventors—solely to provide the incentive for inventors to create their innovations and share those innovations with society. Yes, competitors might beat out the prices, if they knew them. That is the point of a free market.[182] Society deviates from that system only to the extent incentives are necessary, and the intellectual property systems are designed to limit protections to those things legislatures have determined are needed to provide the requisite incentives. The robust freedom to use lots of information reflects the fact that use of the information is the goal in the first place.

Thus, for the point discussed here, the relevant public interest is the free-market economy and the free use of innovations. Those general values are buttressed further by the nation's historic interest in

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[179] *E.g.*, CAL. CIV. CODE § 3426.1(a) (independent derivation and reverse engineering are not "improper means"); 18 U.S.C. § 1839 (6)(B) (same); CAL. CIV. CODE § 3426.1(d)(2) (reasonable security measures requirement); 18 U.S.C. § 1839(3)(A) (same).

[180] Commentators have debated the nature of trade secret rights. Some but not all view trade secret theory as we do, as a property-oriented body of law. Others find bases for trade secret law in contract, or in utilitarian theory. *E.g.*, Robert G. Bone, *The (Still) Shaky Foundations of Trade Secret Law*, 92 TEX. L. REV. 1803 (2014); Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241 (1998); Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311 (2009); Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1 (2007); Charles T. Graves, *Trade Secrets as Property: Theory and Consequences*, 15 GA. J. OF INTELL. PROP. L. 39 (2007); Miguel Deutch, *The Property Concept of Trade Secrets in Anglo-American Law: An Ongoing Debate*, 31 U. RICH. L. REV. 313, 321 (1997).

[181] *See* 2 ADAM SMITH, INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 181 (1799).

[182] *See generally supra* Part II.

freedom of speech, which is reflected in the First Amendment.[183] This is not to suggest that all information unprotected by trade secret is strictly necessary for First Amendment protections. Rather the free flow of information is a value deeply embedded in the nation's history and reflected in the balances struck in the US intellectual property system between protected information and information that is free to all and reserved to none. Once again, this stands in contrast to any notion of innovation as the moral or natural right of inventors—a concept generally foreign to the history and theory of intellectual property in the United States.[184]

As trade secret emerges fully into the pantheon of intellectual property protections, this area of law must develop its own concepts for articulating the limits of its reach. No intellectual property right can be boundless. Consistent with their utilitarian underpinnings, all intellectual property rights must establish their limits and endpoints in a manner that properly reflect the public policy balances reflected therein.

With trade secret becoming a weapon of choice in contemporary intellectual property litigation, there is a growing risk that it will be used in manners far beyond its animating logic of balancing interests between parties, generally those who were in privity with one another, regarding ordinary-course business information. Thus, courts should consider borrowing from copyright to develop its own version of thinness.[185] Thin trade secret would exist when the independent economic value or creation aspect of the secret is scant,

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[183] For literature on the relationship between free speech and intellectual property, *see, e.g.*, Mark Bartholomew & John Tehranian, *An Intersystemic View of Intellectual Property and Free Speech*, 81 GEO. WASH. L. REV. 1 (2013); Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After Eldred, 44 Liquormart, and Bartnicki*, 40 HOUS. L. REV. 697 (2003); Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE. L. REV. 831 (2010); Edmund T. Wang, *The Line Between Copyright and the First Amendment and Why Its Vagueness May Further Free Speech Interests*, 13 J. OF CONST. L. 1471 (2011); Tun-Jen Chiang, *Patents and Free Speech*, 107 GEO. L.J. 309 (2019); Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381 (2008).

[184] *See* FELDMAN, *supra* note 56, at 76–78.

[185] For a very 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 litigation cases involving allegations of wrongful commercial use, based in part on an analogy to copyright's thinness doctrine, to screen out trade secret claims unless the trade secret and the defendant's product bear an especially high degree of similarity to each other). Varadarajan has also written about the need to develop a fair use-type theory for trade secret law. *See* Deepa Varadarajan, *Trade Secret Fair Use*, 83 FORDHAM L. REV. 1401 (2014).

such that the item of information qualifies for protection, but only just so.[186] Unlike secret formula and manufacturing techniques, thin information would exist near the margins of trade secret protection. At this distance from the core conceptualization of what is protectable, they would rest on a lighter limb of the trade secret tree. In that case, the tug of a countervailing public policy interest would have particular force. One would not want defendants to simply claim any interest in the guise of public policy, however. Thus, thin copyright could be designed primarily for circumstances in which trade secret comes into conflict with other doctrinal areas embodying their own public policies. In those circumstances, the doctrine of thin trade secret creates space for navigating the boundaries.

The doctrine of thin trade secret is distinct from the notion of confidential-but-not-secret information that a relational, non-property conception of trade secret law would entertain. Thin trade secret operates only when the information is within the bounds of statutory trade secret status, albeit at the edge of those bounds. In this manner, thin trade secret avoids the trap of creating a vague second tier of protectable information that falls outside the bounds of statutory trade secret protection, a development which would only incentivize the aggressive litigation of weak and nebulous claims, without the framework of rules and defenses the trade secret statutes provide to adjudicate and rebut such claims. There is a risk, of course, that with the existence of thin trade secret, judges could inadvertently sweep unwarranted information into the trade secret fold. Information might be easier to declare a trade secret, given the comfort of being able to deny protection in a particular case through the public interest. Without great care, such an approach could allow the boundaries of trade secret to creep ever wider across time. All jurisprudential arenas, however, face the temptation of rules of convenience, and the antidote is the same throughout. Regardless of the doctrinal area, courts and commentators must find analyses that can be applied with logical consistency across the regime, rather than resting on handy decisions in a particular case that create distinctions without a difference.[187]

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[186] As Sharon Sandeen noted in comments to the authors, 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.

[187] *See generally* Robin Feldman, *Coming of Age for the Federal Circuit*, 18 GREEN BAG 27 (2014) (criticizing the Federal Circuit for relying on rules of convenience and describing such an approach as "death by tinkering").

The concept of thin trade secret has the potential to protect trade secret regime from a societal backlash as new claims stray into uncharted territory. Without such an outlet, courts, in frustration over expansive claiming, could be tempted to slash large and ambiguous swaths of territory, generating confusion in trade secret doctrine. By delineating an area of greater force for public policy, thin trade secret would cabin analysis into a common zone for discussion and thus lessen the chance of mayhem throughout the regime. To be sure, developing a theory of thin trade secret cannot be accomplished in one step. Practical questions, such as what justifications permit application of the concept and what degree of use or disclosure in particular concepts are weighed against protection, await future commentary.

One could conceivably consider borrowing from copyright to develop a fair use trade secret defense. In that vein, courts could examine whether other policies might outweigh a finding that a party's trade secret has been used. Thinness, however, has the advantage of signaling that the supposed trade secret just barely makes it over the line, a conclusion that seems particularly appropriate for these circumstances.

Although intellectual property misuse may provide a useful pathway, we believe that more narrow and targeted rules will be important. In particular, at the dawn of doctrinal development, one would be well-advised to proceed with caution. Thus, the concept of thin trade secret provides a careful approach for recognition of expanding areas of innovation without trampling the public policies reflected in doctrinal areas with which trade secret must interact.

Once again, the example of drug prices and regulatory disclosure is illustrative. As described above, naked price does not fall within the bounds of trade secrets. Even if a court were to find that bare negotiated price points between PBMs and pharmaceutical manufacturers fell within the bounds of trade secrets, those rights would be achingly close to the line. At most, if pricing information in the special context of PBM agreements were deemed to be a trade secret at all, it would be a thin and untraditional right, not core intellectual property. It should pale in comparison to thick IP rights such as manufacturing process details, formula details, and other scientific work products. A thin, barely-over-the-line trade secret hardly deserves the same deference in a regulatory disclosure context as the latter types of information.

It should be particularly susceptible to the public policy concerns underlying the need for disclosure in a regulatory context. Such a status should not be a hard binary, or immunity, against regulatory disclosure when the public interest so warrants.[188]

VII. EMPLOYING THE TOOLS OF TRADE SECRET DOCTRINE

Although new concepts are needed to bring coherence and to reign in the overreach of trade secret, one should not ignore the practical tools in existence which can assist in implementing these concepts. It is important to recognize that trade secret law already contains approaches that can be useful for courts, regulatory agencies, and legislatures to use in preventing trade secret from running rampant. In particular, procedural mechanisms borrowed from civil trade secret litigation can help attorneys for government entities push back against cookie-cutter, overbroad claims to trade secrecy, thereby separating unprotectable pricing information from other information subject to trade secret protection. These mechanisms also offer a means to introduce the concept of "thin" trade secret protection into already-recognized frameworks for defining and narrowing a party's claimed trade secrets.

A. Rejecting Overly Conclusory Industry Submissions

To begin with, courts should be prepared to reject vague, check-the-box declarations submitted by pharmaceutical companies declaring high-level categories of information to be trade secrets, in conclusory language. As discussed above, recent litigation has seen a flurry of such overbroad secrecy assertions. In the 2017 Nevada case, for example, declarants and their attorneys used such phrases as "confidential, completely sensitive, proprietary information regarding the production, cost, pricing, marketing, and advertising of their patented diabetes medicines" and "cost structure, resource allocation, and pricing practices."[189]

This type of argument does not come close to articulating specific, precise information asserted to constitute trade secrets, and thus renders it difficult for courts (and government attorneys) to focus arguments on precise information such as price, rebates, and profits

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[188] In part because takings analysis assumes that there is a valid property right, we have not addressed the literature on takings in this Article. For a discussion of takings law in the context of patents, *see* FELDMAN, *supra* note 5, at 106–108; *see also* Robin Feldman, Betty Chang Rowe, Rabiah Oral, Amy Y. Gu & Katherine Gudhiksen, *The Patent Act and the Constitutionality of State Pharmaceutical Regulation*, 45 RUTGERS COMP. & TECH. L.J. 40 (2019).

[189] *See* Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction at 1,8, *Pharm. Research and Mfrs. of Am. v. Sandoval*, No. 2:17-cv-02315-JCM-CWH (D. Nev. Sept. 13, 2017).

margins for a specific agreement. Just as some courts have rejected overly conclusory submissions by those seeking to prevent regulatory disclosure of pricing information in other contexts,[190] the same should hold true in litigation over PBM pricing agreements.

B. Requiring Particularized Identification of Asserted Trade Secrets

Courts can apply analogous techniques with asserted claims, as well as with party declarations. Specifically, a powerful means to push back against contentions that pharmaceutical pricing constitutes a trade secret is to insist that those claiming trade secret protection identify, with at least reasonable particularity, each separate item of information asserted as a trade secret. This tool, which can be borrowed from decades of civil litigation, can be an effective means to prevent vague, overbroad secrecy contentions deployed to hide narrower items that hardly deserve protection.

In civil trade secret litigation, the plaintiff tactically expresses its alleged trade secrets in a generalized and conclusory fashion, in order to prevent the defendant from preparing defenses such as non-secrecy, and to afford maximum latitude to shape-shift the claims to conform to the defendant's own technology once the technology is produced during discovery. In response, two state legislatures have required that plaintiffs identify the alleged trade secrets with some particularity before discovery begins.[191] Many other courts, including federal courts, have imposed that pre-discovery requirement through case law.[192] Still others have enforced a

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[190] *E.g.*, *GC Micro Corp. v. Def. Logistics Agency*, 33 F.3d 1109 (9th Cir. 1994) (ruling in favor of release of "percentage and dollar amount[s]" paid to government subcontractors, and rejecting unpersuasive declarations submitted by contractors to supposed competitive harm).

[191] *See* CAL. CIV. PROC. CODE § 2019.210 (enacted in 1985); MASS. GEN. LAWS ch. 93 § 42D(b) (enacted in 2018).

[192] *E.g.*, **Ohio**: A&P Tech., Inc. v. Lariviere, 2017 U.S. Dist. LEXIS 211822, at *24 (S.D. Ohio Dec. 27, 2017); **Texas**: United Serv. Auto Ass'n v. Mitek Sys., Inc., 289 F.R.D. 244, 248 (W.D. Tex. Feb. 15, 2013), aff'd, 2013 WL 1867417 (W.D. Tex. April 24, 2013); **Connecticut**: Powerweb Energy, Inc. v. Hubbell Lighting, Inc., 2012 WL 3113162, at *1–2 (D. Conn. July 31, 2012); **Nevada**: Switch Commc'n Grp. v. Ballard, 2012 WL 2342929, at *4–5 (D. Nev. June 19, 2012); **Florida**: AAR Mfg., Inc. v. Matrix Composites, Inc., 98 So.3d 186, 187 (Fla. Dist. Ct. App. 2012); Del Monte Fresh Produce Co. v. Dole Food Co., Inc., 148 F. Supp. 2d 1322, 1325 (S.D. Fla. 2001); **New York**: MSCI Inc. v. Jacob, 945 N.Y.S.2d 864 (Sup. Ct. 2012); **New Jersey**: Avaya Inc. v. Cisco Sys., Inc., 2011 WL 4962817, at *2 (D.N.J. Oct. 18, 2011); **Colorado**: L-3 Commc'ns Corp. v. Jaxon Eng'g & Maint., Inc., No. 10-cv-02868-MSK-KMT (D. Colo. Oct. 12, 2011); **North Carolina**: Ikon Office Sol., Inc. v. Konica Minolta Bus. Sol. USA, Inc., 2009 WL 4429156, at *4 (W.D.N.C. 2009); **Michigan**: Giasson Aerospace

similar requirement during discovery disputes, by requiring that a plaintiff provide specific answers to a defendant's interrogatory seeking a clear description of each alleged trade secret.[193] What often results is a numbered list of written claims, though sometimes several rounds of motion practice are required to obtain clear information.

In the regulatory context, courts can leverage this case law by analogy to require pharmaceutical companies asserting trade secrecy rights to identify purported trade secrets with precision. This will better allow regulatory disclosure to focus on the narrow, exact pricing information to be disclosed, while barring companies from using conclusory language and bundles of information to prevent a focus on whether such precise information constitutes a trade secret.

C. Parsing Combination/Compilation Trade Secret Claims

Third, courts, legislatures, and regulatory agencies should not allow pharmaceutical companies to rely on allegations of so-called

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Sci., Inc. v. RCO Eng'g, 2009 WL 1384179, at *2 (E.D. Mich. 2009); **Utah**: Storagecraft Tech. Corp. v. Symantec Corp., 2009 WL 361282, at *2 (D. Utah Feb. 11, 2009); **Georgia**: DeRubeis v. Witten Tech., Inc., 244 F.R.D. 676, 682 (N.D. Ga. 2007); **Illinois**: Automed Tech., Inc. v. Eller, 160 F. Supp. 2d 915, 925–26 (N.D. Ill. 2001); **Minnesota**: Porus Media Corp. v. Midland Brake, Inc., 187 F.R.D. 598, 600 (D. Minn. 1999); **Delaware**: Leucadia, Inc. v. Applied Extrusion Tech., Inc., 755 F. Supp. 635, 637 (D. Del. 1991); *see also* **New Hampshire**: GT Crystal Sys., LLC. v. Khattak, No. 226-2011-cv-332, 2012 N.H. Super. LEXIS 4 (March 30, 2012) (unpublished).

[193] *See* Caudill Seed & Warehouse Co. v. Jarrow Formulas, Inc., 2017 U.S. Dist. LEXIS 175864, at *9–12 (W.D. Ky. Oct. 24, 2017) (vague and evasive response found insufficiently detailed); Vesta Corp. v. Amdocs Mgmt., Ltd., 2016 U.S. Dist. LEXIS 45741, at *18 (D. Or. Apr. 1, 2016) (finding numerous aspects of Plaintiff's interrogatory response deficient; concluding that "[e]ach item in the list [of trade secret claims] should contain a specific reference to concrete documents and should not contain general references to categories of information"); Switch Commc'ns. Grp. v. Ballard, 2012 U.S. Dist. LEXIS 85148, at *10–18 (D. Nev. June 19, 2012) (holding that trade secret plaintiff was required to identify its trade secret claims with reasonable particularity in response to initial contention interrogatory, and finding that plaintiff failed to do so) (cataloguing numerous cases); Hill v. Best Med. Int'l, Inc., 2010 WL 2546023, at *1–3 & n.4 (W.D. Pa. June 24, 2010) (requiring more detailed interrogatory response where the plaintiff's description identified at least one trade secret claim, but primarily consisted of "general allegations and generic references to products"); StonCor Grp., Inc. v. Campton, 2006 U.S. Dist. LEXIS 24926, at *4–5 (W.D. Wash. 2006) (requiring trade secret plaintiff to answer contention interrogatory with more specificity, where plaintiff only "referenced its complaint and then listed generic technical categories such as 'installer list/network,' 'pricing strategy and policies,' and 'customer lists'").

compilation, or combination, of trade secret claims as a means to prevent the regulatory disclosure of narrower items of information.

In general, a combination trade secret can be an uncontroversial concept: that individual items, each of which may not be a trade secret on its own, can nonetheless be combined in a novel manner in order to form a single, unified process that itself constitutes a trade secret. But in such intellectual property, the trade secret right lies in the interrelated unit as a whole. Owning a protectable combination trade secret does not render individual items within it as trade secrets as well; each such item is only a trade secret if it so qualifies, on its own.

In some instances, trade secret claimants employ artificial combinations to prevent a showing that individual items do not constitute trade secrets.[194] To prevent such tactics by PBMs, courts should focus on the narrow and precise pricing items to be disclosed. Companies which protest that disclosing discrete pricing information requires the disclosure of broader combination-sets should be required to disaggregate such claims in order to focus courts on what is really at issue.

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194 *See* Sit-Up Ltd. v. IAC/Interactive Corp., No. 05.CIV.9292, 2008 WL 463884, at *9 (S.D.N.Y. Feb. 20, 2008) (rejecting claimed combination secret where plaintiff had arbitrarily thrown together individual aspects of its business methods into a false combination claim to try to avoid summary judgment on the individual items); Lawfinders Assocs., Inc. v. Legal Research Ctr., Inc., 65 F. Supp. 2d 414, 423 (N.D. Tex. 1999), *aff'd*, 193 F.3d 517 (5th Cir. 1999) (rejecting claimed combination secret in marketing service for attorneys because, among other things, "[e]ach of the purported trade secrets stands on its own, that is, each purported trade secret does not necessarily rely on another purported trade secret to be useful."); American Airlines, Inc. v. KLM Royal Dutch Airlines, Inc., 114 F.3d 108, 110 (8th Cir. 1997) (where a trade secret plaintiff sought to avoid the defendant's summary judgment motion by having its expert witness alter an asserted combination trade secret claim by omitting some of its elements —and thus making the altered claim better resemble the defendant's own information— the court rejected that attempt, in part because the defendant had never received the elements comprising the plaintiff's more expansive, original claim).

Conclusion

It would be ironic 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, immune from 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, and even if it were, such thin trade secrecy contentions should not be a shield against regulatory disclosure.