

Stan Mendenhall
Editor
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Mis-Guidant Litigation?

I am writing about a lawsuit that, on the face of it, has nothing to do with orthopedics. Guidant is a manufacturer of defibrillators and pacemakers, based in Indianapolis, and is scheduled to be acquired by Johnson & Johnson later this year. Guidant has also been in the news for the recall of their Contak Renewal defibrillator.

The reason that I am writing about them is that they have filed a lawsuit against Aspen Healthcare Metrics of Englewood, Colorado that could potentially affect many people who are in similar businesses. Aspen would characterize their business as that of helping hospitals improve the quality and efficiency of their orthopedic and cardiovascular programs. However, in recent years, this has evolved into getting better prices for medical devices, since device costs have gotten to be so high. We have worked on several projects together, and they have also contributed to this newsletter.

In August of 2004, Guidant filed a lawsuit against Aspen Healthcare Metrics claiming that Aspen had divulged “trade secrets” to one of their customers. The trade secrets that they “divulged” were the prices that Guidant was charging another hospital. (For a complete printout of the complaints, please go to www.orthopedicnetworknews.com/litigation/guidant.htm.) Apparently, under a Minnesota trade-secrets law, a suppliers’ prices could be considered a trade-secret, and Guidant is using this law to keep Aspen, and presumably others, from letting customers know how much they are charging others for the same devices.

What isn’t clear from the Guidant complaint is what they consider to be trade secrets. I would want to know if it is the letter that Guidant sends to its customers that outlines the agreement for purchasing rhythm management devices? Is it copies of invoices that Guidant sends to the hospitals? How about copies of purchase orders with Guidant part numbers and prices which the hospital generates internally? How about copies of checks that the hospital sends to Guidant? How about if a hospital enters the invoice numbers into a spreadsheet, and then sends the spreadsheet to a third party? How about if two hospital’s data is aggregated into an average price for the two hospitals? What about all of the foreign governments’ healthcare systems that

have negotiated prices with Guidant, including Canada, France, and Great Britain? Would it be a violation of trade secrets to publish these in the US, even though they are public in other countries?

Similarly, in the August 5th issue of the Wall Street Journal and an August 8th correction, there was a story that Indianapolis-based Eli Lilly, was selling their antidepressant drug Cymbalta at a discount, with restrictions on “negative DUR (Drug utilization review) correspondence with physicians.” On August 8th, they printed a correction from Eli Lilly: “Eli Lilly & Co. in certain legal contracts restricts what insurers, hospitals and health facilities can say to physicians about its antidepressant Cymbalta. The contracts don’t influence what prescribers of the drug can say about it.” What are they concerned about? I would guess that they are concerned that someone who works for the hospital or HMO may complain about the drug’s cost. What is somewhat ironic is that Guidant was essentially spun off from Eli Lilly. Is it the culture of both these companies to stifle discussion on pricing among their customers? So how are hospitals supposed to know whether they are getting a good deal or not?

These days you can go on the web and get comparative prices for airline tickets, CDs, cameras, books, drugs, automobiles, houses, apartments, and personal computers. Why can’t the customers for defibrillators, pacemakers, and CRT devices do the same thing? On what basis does Guidant think its devices are exempt from this consumer scrutiny?

What is chilling is that if Guidant wins against Aspen, this means that any sharing of prices within a Group purchasing organization (GPO), integrated delivery network (IDN), or other group of hospitals may be illegal. That means the roundtable discussions that OR managers have had for decades may have gag orders if they talk about the prices that they pay for medical devices. Other manufacturers may follow suit and essentially put a number of individuals out of business, such as me, IMS America, ECRI, many GPOs, and many consultants that tell their clients how they can get a better deal.

Since Guidant’s sales are over 1,000 times more than Aspen’s, they can launch a legal juggernaut and tie up a small company with legal fees and distractions. In addition to legal fees, Aspen must contend with depositions and all the time and energy that a lawsuit entails. To me, it looks like a bully trying to intimidate a nuisance. Fortunately for Aspen, there is some hope. For one thing, Aspen is now owned by GPO Medassets who has taken on this lawsuit. For another, it is unclear how this Minnesota law may apply in other states. For example, a Florida hospital told me that Florida has “sunshine laws” which basically allow anyone in the state to see how much a hospital is paying for anything. And finally, the whole issue about stifling free speech seems down-right un-American. If this goes to trial next year as expected, we wish them the best. ■