S T A T E O F N E W Y O R K

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I N A S S E M B L Y

(PREFILED)

January 4, 2012

Introduced by M. of A. N. RIVERA, HOOPER, WEPRIN, CASTRO, ORTIZ, CRESPO, BOYLAND, P. RIVERA, COOK, RAMOS -- Multi-Sponsored by -- M. of A. ARROYO, BRENNAN, DUPREY, FINCH, ROBINSON, SCHIMEL -- read once and referred to the Committee on Consumer Affairs and Protection -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee -- again reported from said committee with amendments, ordered reprinted as amended and recommitted to said committee

AN ACT to amend the general business law, in relation to the price gouging of medicine

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. The general business law is amended by adding a new section 396-rrr to read as follows:

S 396-RRR. PRICE GOUGING OF MEDICINE. 1. FOR THE PURPOSES OF THIS SECTION, "DRUG SUBJECT TO A SHORTAGE" SHALL MEAN ANY DRUG OR MEDICAL PRODUCT INTENDED FOR HUMAN USE PUBLICLY REPORTED AS BEING SUBJECT TO A SHORTAGE BY THE U.S. FOOD AND DRUG ADMINISTRATION ON ITS WEBSITE, PROVIDED, HOWEVER, THAT A DRUG OR MEDICAL PRODUCT SHALL ONLY BE CONSIDERED A "DRUG SUBJECT TO A SHORTAGE" DURING THE PERIOD OF TIME THAT SUCH DRUG OR MEDICAL PRODUCT IS LISTED AS BEING SUBJECT TO A SHORTAGE ON SUCH WEBSITE.

2. NO PARTY WITHIN THE CHAIN OF DISTRIBUTION OF ANY DRUG SUBJECT TO A SHORTAGE SHALL SELL OR OFFER TO SELL ANY SUCH DRUG SUBJECT TO A SHORTAGE FOR AN AMOUNT WHICH REPRESENTS AN UNCONSCIONABLY EXCESSIVE PRICE.

3. WHETHER A PRICE IS UNCONSCIONABLY EXCESSIVE IS A QUESTION OF LAW FOR THE COURT.

(A) THE COURT'S DETERMINATION THAT A VIOLATION OF THIS SECTION HAS OCCURRED SHALL BE BASED ON ANY OF THE FOLLOWING FACTORS:

(I) THAT THE AMOUNT OF THE EXCESS IN PRICE IS UNCONSCIONABLY EXTREME;

(II) THAT THERE WAS AN EXERCISE OF UNFAIR LEVERAGE OR UNCONSCIONABLE MEANS; OR

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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(III) A COMBINATION OF BOTH FACTORS IN SUBPARAGRAPHS (I) AND (II) OF THIS PARAGRAPH.

(B) IN ANY PROCEEDING COMMENCED PURSUANT TO SUBDIVISION FOUR OF THIS SECTION, PRIMA FACIE PROOF THAT A VIOLATION OF THIS SECTION HAS OCCURRED SHALL INCLUDE EVIDENCE THAT:

(I) THE AMOUNT CHARGED REPRESENTS A GROSS DISPARITY BETWEEN THE PRICE OF THE DRUG SUBJECT TO A SHORTAGE WHICH WAS THE SUBJECT OF THE TRANSACTION AND THEIR VALUE MEASURED BY THE PRICE AT WHICH SUCH DRUG WAS SOLD OR OFFERED FOR SALE BY THE DEFENDANT IN THE USUAL COURSE OF BUSINESS IMMEDIATELY PRIOR TO THE ONSET OF THE SHORTAGE; AND

(II) THE AMOUNT CHARGED GROSSLY EXCEEDED THE PRICE AT WHICH THE SAME OR SIMILAR DRUG SUBJECT TO A SHORTAGE WAS READILY OBTAINABLE BY OTHER PURCHASERS IN THE TRADE AREA. A DEFENDANT MAY REBUT A PRIMA FACIE CASE WITH EVIDENCE THAT ADDITIONAL COSTS NOT WITHIN THE CONTROL OF THE DEFENDANT WERE IMPOSED ON THE DEFENDANT FOR THE DRUG SUBJECT TO A SHORTAGE.

4. (A) WHERE A VIOLATION OF THIS SECTION IS ALLEGED TO HAVE OCCURRED, THE ATTORNEY GENERAL MAY APPLY IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK TO THE SUPREME COURT OF THE STATE OF NEW YORK WITHIN THE JUDICIAL DISTRICT IN WHICH SUCH VIOLATIONS ARE ALLEGED TO HAVE OCCURRED, ON NOTICE OF FIVE DAYS, FOR AN ORDER ENJOINING OR RESTRAINING COMMISSION OR CONTINUANCE OF THE ALLEGED UNLAWFUL ACTS. IN ANY SUCH PROCEEDING, THE COURT SHALL IMPOSE A CIVIL PENALTY IN AN AMOUNT NOT TO EXCEED ONE HUNDRED THOUSAND DOLLARS AND, WHERE APPROPRIATE, ORDER RESTITUTION TO AGGRIEVED CONSUMERS.

(B) IN ADDITION TO ANY ACTION BROUGHT BY THE ATTORNEY GENERAL PURSUANT TO PARAGRAPH (A) OF THIS SUBDIVISION, A PERSON INJURED BY A VIOLATION OF THIS SECTION MAY BRING AN ACTION TO RECOVER DAMAGES. THE COURT MAY ALSO AWARD REASONABLE ATTORNEYS FEES TO A PREVAILING PLAINTIFF.

S 2. This act shall take effect immediately.