

3751--B

Cal. No. 310

2013-2014 Regular Sessions

I N A S S E M B L Y

January 29, 2013

Introduced by M. of A. CRESPO, RODRIGUEZ, RAMOS, MAISEL, DINOWITZ, SKOUFIS, ENGLEBRIGHT, MONTESANO, GIBSON, SCARBOROUGH, ROBERTS, GABRYSZAK, SANTABARBARA -- Multi-Sponsored by -- M. of A. ABINANTI, ARROYO, BOYLAND, BRAUNSTEIN, BRENNAN, CAMARA, COLTON, COOK, CROUCH, DUPREY, FINCH, GOTTFRIED, HEASTIE, HOOPER, MOSLEY, MOYA, PERRY, RIVERA, ROBINSON, ROSA, SCHIMEL, SEPULVEDA -- read once and referred to the Committee on Consumer Affairs and Protection -- reported and referred to the Committee on Codes -- reported from committee, advanced to a third reading, amended and ordered reprinted, retaining its place on the order of third reading -- passed by Assembly and delivered to the Senate, recalled from the Senate, vote reconsidered, bill amended, ordered reprinted, retaining its place on the order of third reading

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:

1 Section 1. The general business law is amended by adding a new section
2 396-rrr to read as follows:
3 S 396-RRR. PRICE GOUGING OF MEDICINE. 1. FOR THE PURPOSES OF THIS
4 SECTION, "DRUG SUBJECT TO A SHORTAGE" SHALL MEAN ANY DRUG OR MEDICAL
5 PRODUCT INTENDED FOR HUMAN USE PUBLICLY REPORTED AS BEING SUBJECT TO A
6 SHORTAGE BY THE U.S. FOOD AND DRUG ADMINISTRATION ON ITS WEBSITE,
7 PROVIDED, HOWEVER, THAT A DRUG OR MEDICAL PRODUCT SHALL ONLY BE CONSID-
8 ERED A "DRUG SUBJECT TO A SHORTAGE" DURING THE PERIOD OF TIME THAT SUCH
9 DRUG OR MEDICAL PRODUCT IS LISTED AS BEING SUBJECT TO A SHORTAGE ON SUCH
10 WEBSITE.
11 2. NO PARTY WITHIN THE CHAIN OF DISTRIBUTION OF ANY DRUG SUBJECT TO A
12 SHORTAGE SHALL SELL OR OFFER TO SELL ANY SUCH DRUG SUBJECT TO A SHORTAGE
13 FOR AN AMOUNT WHICH REPRESENTS AN UNCONSCIONABLY EXCESSIVE PRICE.
14 3. WHETHER A PRICE IS UNCONSCIONABLY EXCESSIVE IS A QUESTION OF LAW
15 FOR THE COURT.

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

LBD02559-06-3

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

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

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

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

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

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

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

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

30 5. PRIOR TO APPLYING FOR AN ORDER FROM THE SUPREME COURT PURSUANT TO
31 SUBDIVISION FOUR OF THIS SECTION, THE ATTORNEY GENERAL, IN CONSULTATION
32 WITH THE DEPARTMENT OF HEALTH, SHALL CONSIDER THE PRICING DYNAMICS
33 UNIQUE TO THE SMALL AND INDEPENDENT DISTRIBUTORS WITHIN THE SUPPLY CHAIN
34 INCLUDING, BUT NOT LIMITED TO, THE PRICE CHARGED BY THE END USE DISPEN-
35 SER RELATIVE TO ITS ACQUISITION COST.

36 S 2. This act shall take effect immediately.