

STATE OF NEW YORK

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2023-2024 Regular Sessions

IN ASSEMBLY

May 24, 2023

Introduced by M. of A. KELLES, RIVERA, DAVILA, BURDICK, SIMON, SILLITTI, EPSTEIN, L. ROSENTHAL, WALLACE, LUPARDO, GONZALEZ-ROJAS, PAULIN, THIELE, BICHOTTE HERMELYN, STECK, STIRPE, SMITH, REYES, FORREST, LAVINE, JEAN-PIERRE, JACKSON, GUNTHER, HEVESI, DINOWITZ, MAMDANI, GLICK -- read once and referred to the Committee on Health

AN ACT to amend the public health law, in relation to preserving access to affordable drugs

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Article 2-A of the public health law is amended by adding a
2 new title IV to read as follows:

TITLE IV

PRESERVING ACCESS TO AFFORDABLE DRUGS

Section 282. Definitions.

283. Preserving access to affordable drugs.

7 § 282. Definitions. For the purposes of this title, the following
8 terms shall have the following meanings:

9 1. "ANDA" shall mean abbreviated new drug application as described by
10 505(j) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 335(j).

11 2. "ANDA filer" shall mean a party that owns or controls an ANDA filed
12 with the federal food and drug administration or has the exclusive
13 rights under that ANDA to distribute the ANDA product.

14 3. "Agreement" shall mean anything that would constitute an agreement
15 under state law.

16 4. "Agreement resolving or settling a patent infringement claim"
17 includes any agreement that is entered into within thirty days of the
18 resolution or the settlement of the claim, or any other agreement that
19 is contingent upon, provides a contingent condition for, or is otherwise
20 related to the resolution or settlement of the claim. This shall
21 include, but is not limited to, the following:

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

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1 (a) Any agreement required to be provided to the federal trade commis-
2 sion or the antitrust division of the United States Department of
3 Justice under the Medicare Prescription Drug, Improvement, and Modern-
4 ization Act of 2003, Pub. L. No. 108-173;

5 (b) Any agreement between a biosimilar or interchangeable product
6 applicant and a reference product sponsor under the Biologics Price
7 Competition and Innovation Act of 2009, Pub. L. No. 111-148, that
8 resolves patent claims between the applicant and sponsor.

9 5. "Biosimilar biological product application filer" shall mean a
10 party that owns or controls a biosimilar biological product application
11 filed with the federal food and drug administration pursuant to section
12 351(k) of the Public Health Service Act, 42 U.S.C. 262(k), for licensure
13 of a biological product as biosimilar to, or interchangeable with, a
14 reference product, or that has the exclusive rights under the applica-
15 tion to distribute the biosimilar biological product.

16 6. "NDA" shall mean a new drug application.

17 7. "Nonreference drug filer" shall mean either:

18 (a) An ANDA filer;

19 (b) A company that seeks an abbreviated approval pathway for its drug
20 product under 505(b)(2) of the Federal Food, Drug, and Cosmetic Act, 21
21 U.S.C. 355(b)(2); or

22 (c) A biosimilar biological product application filer, or company
23 seeking FDA approval for a biosimilar under 42 U.S.C. 262.

24 8. "Nonreference drug product" shall mean the product to be manufac-
25 tured under an ANDA or an application filed under section 505(b)(2) of
26 the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 355(b), that is the
27 subject of the patent infringement claim, a biosimilar biological prod-
28 uct that is the product to be manufactured under the biosimilar biolog-
29 ical product application that is the subject of the patent infringement
30 claim, or both.

31 9. "Patent infringement" shall mean infringement of any patent or of
32 any filed patent application, extension, reissue, renewal, division,
33 continuation, continuation in part, reexamination, patent term restora-
34 tion, patents of addition, and extensions thereof.

35 10. "Patent infringement claim" shall mean any allegation made to a
36 nonreference drug filer, whether or not included in a complaint filed
37 with a court of law, that its nonreference drug product or application
38 infringes any patent held by, or exclusively licensed to, the reference
39 drug holder.

40 11. "Reference drug holder" shall mean either:

41 (a) A brand holder that is any of the following:

42 (i) The holder of an approved NDA for a drug product application filed
43 under section 505(b) of the Federal Food, Drug, and Cosmetic Act, 21
44 U.S.C. 355(b);

45 (ii) A person owning or controlling enforcement of the patent listed
46 in the approved drug products with therapeutic equivalence evaluations
47 in connection with the NDA; or

48 (iii) The predecessors, subsidiaries, divisions, groups, and affil-
49 iates controlled by, controlling, or under common control with, any of
50 the entities described in subparagraph (i) or (ii) of this paragraph,
51 with control to be presumed by direct or indirect share ownership of
52 fifty percent or greater, as well as the licensees, licensors, succes-
53 sors, and assigns of each of those entities; or

54 (b) A biological product license holder, which shall mean any of the
55 following:

1 (i) The holder of an approved biological product license application
2 for a biological drug product under section 351(a) of the Public Health
3 Service Act, 42 U.S.C. 262(a);

4 (ii) A person owning or controlling enforcement of any patents that
5 claim the biological product that is the subject of the approved biolog-
6 ical patent license application; or

7 (iii) The predecessors, subsidiaries, divisions, groups, and affil-
8 iates controlled by, controlling, or under common control with, any of
9 the entities described in subparagraph (i) or (ii) of this paragraph,
10 with control to be presumed by direct or indirect share ownership of
11 fifty percent or greater, as well as the licensees, licensors, succes-
12 sors, and assigns of each of those entities.

13 12. "Reference drug product" shall mean the product to be manufactured
14 by the reference drug holder and includes both branded drugs of the NDA
15 holder and the biologic drug product of the biologic product license
16 applicant.

17 13. "Statutory exclusivity" shall mean those prohibitions on the
18 approval of drug applications under clauses (ii) through (iv) of section
19 505(c)(3)(E), section 527 or section 505A of the Federal Food, Drug, and
20 Cosmetic Act, 21 U.S.C. 355(c)(3)(E), on the licensing of biological
21 product applications under section 262(k)(7) of Title 42 of the United
22 States Code or section 262(m)(2) or (3) of Title 42 of the United States
23 Code.

24 § 283. Preserving access to affordable drugs. 1. (a) Except as
25 provided in paragraph (c) of this subdivision, an agreement resolving or
26 settling, on a final or interim basis, a patent infringement claim, in
27 connection with the sale of a pharmaceutical product, shall be presumed
28 to have anticompetitive effects and shall be a violation of this section
29 if both of the following apply:

30 (i) A nonreference drug filer receives anything of value from another
31 company asserting patent infringement, including, but not limited to, an
32 exclusive license or a promise that the brand company will not launch an
33 authorized generic version of its brand drug; and

34 (ii) The nonreference drug filer agrees to limit or forego research,
35 development, manufacturing, marketing, or sales of the nonreference drug
36 filer's product for any period of time.

37 (b) As used in subparagraph (i) of paragraph (a) of this subdivision,
38 "anything of value" shall be interpreted broadly to include any type of
39 consideration, value or benefit a reference drug holder or nonreference
40 drug filer could possibly obtain from the agreement. "Anything of value"
41 shall not include a settlement of patent infringement claims in which
42 the consideration granted by the reference drug holder to the nonrefer-
43 ence drug filer as part of the resolution or settlement consists of only
44 one or more of the following:

45 (i) The right to market the competing product in the United States
46 before the expiration of either:

47 (A) A patent that is the basis for the patent infringement claim; or

48 (B) A patent right or other statutory exclusivity that would prevent
49 the marketing of the drug;

50 (ii) A covenant not to sue on a claim that the nonreference drug prod-
51 uct infringes a United States patent;

52 (iii) Compensation for saved reasonable future litigation expenses of
53 the reference drug holder but only if both of the following are true:

54 (A) The total compensation for saved litigation expenses is reflected
55 in budgets that the reference drug holder documented and adopted at
56 least six months before the settlement; and

1 (B) The compensation shall not exceed the lower of the following:

2 (1) Seven million five hundred thousand dollars; or

3 (2) Five percent of the revenue that the nonreference drug filer
4 projected or forecasted it would receive in the first three years of
5 sales of its version of the reference drug documented at least twelve
6 months before the settlement. If no projections or forecasts are avail-
7 able, the compensation shall not exceed two hundred fifty thousand
8 dollars;

9 (iv) An agreement by the reference drug holder not to interfere with
10 the nonreference drug filer's ability to secure and maintain regulatory
11 approval to market the nonreference drug product or an agreement to
12 facilitate the nonreference drug filer's ability to secure and maintain
13 regulatory approval to market the nonreference drug product; or

14 (v) An agreement resolving a patent infringement claim in which the
15 reference drug holder forgives the potential damages accrued by a
16 nonreference drug filer for an at-risk launch of the nonreference drug
17 product that is the subject of that claim.

18 (c) Parties to an agreement are not in violation of paragraph (a) of
19 this subdivision if they can demonstrate by clear and convincing
20 evidence that either of the following are met:

21 (i) The value received by the nonreference drug filer described in
22 subparagraph (i) of paragraph (a) of this subdivision is a fair and
23 reasonable compensation solely for other goods or services that the
24 nonreference drug filer has promised to provide; or

25 (ii) The agreement has directly generated procompetitive benefits and
26 the procompetitive benefits of the agreement outweigh the anticompet-
27 itive effects of the agreement.

28 2. In determining whether the parties to the agreement have met their
29 burden under paragraph (c) of subdivision one of this section, a court
30 of competent jurisdiction shall not consider any of the following:

31 (a) That entry into the marketplace could not have occurred until the
32 expiration of the relevant patent exclusivity or that the agreement's
33 provision for entry of the nonreference drug product before the expira-
34 tion of any patent exclusivity means that the agreement is procompet-
35 itive within the meaning of subparagraph (ii) of paragraph (c) of subdivi-
36 vision one of this section;

37 (b) That any patent is enforceable and infringed by the nonreference
38 drug filer in the absence of a final adjudication binding on the filer
39 of those issues;

40 (c) That the agreement caused no delay in entry of the nonreference
41 drug filer's drug product because of the lack of Federal Food and Drug
42 Administration (FDA) approval of that or of another nonreference drug
43 product; or

44 (d) That the agreement caused no harm or delay due to the possibility
45 that the nonreference drug filer's drug product might infringe some
46 patent that has not been asserted against the nonreference drug filer or
47 that is not subject to a final and binding adjudication on that filer as
48 to the patent's scope, enforceability, and infringement.

49 3. In determining whether the parties to the agreement have met their
50 burden under paragraph (c) of subdivision one of this section, a court
51 of competent jurisdiction shall presume that the relevant product market
52 is that market consisting of the reference drug of the company alleging
53 patent infringement and the drug product of the nonreference drug filer
54 accused of infringement and any other biological product that is
55 licensed as biosimilar or is an AB-rated generic to the reference prod-
56 uct.

1 4. (a) This section shall not modify, impair, limit, or supersede the
2 applicability of the antitrust laws of the state pursuant to article
3 twenty-two of the general business law, unfair competition laws of the
4 state pursuant to article twenty-two-A of the general business law or
5 the availability of damages or remedies provided therein. This section
6 shall not modify, impair, limit, or supersede the right of any drug
7 company applicant to assert claims or counterclaims against any person,
8 under the antitrust laws or other laws relating to unfair competition of
9 the federal antitrust law or state law.

10 (b) If any provision of this subdivision, an amendment made to this
11 subdivision, or the application of any provision or amendment to any
12 person or circumstance is held to be unconstitutional, the remainder of
13 this subdivision, the amendments made to this subdivision, and the
14 application of the provisions of this subdivision or amendments to any
15 person or circumstance shall not be affected.

16 5. (a)(i) Each person that violates or assists in the violation of
17 this section shall forfeit and pay to the state a civil penalty suffi-
18 cient to deter violations of this section, as follows:

19 (A) If the person who violated this section received any value due to
20 that violation, an amount up to three times the value received by the
21 party that is reasonably attributable to the violation of this section,
22 or twenty million dollars, whichever is greater; or

23 (B) If the violator has not received anything of value as described in
24 this subparagraph, an amount up to three times the value given to other
25 parties to the agreement reasonably attributable to the violation of
26 this section, or twenty million dollars.

27 (C) For purposes of this subdivision, "reasonably attributable to the
28 violation" shall be determined by the state's share of the market for
29 the brand drug at issue in the agreement.

30 (ii) Any penalty described in subparagraph (i) of this paragraph shall
31 accrue only to the state and shall be recovered in a civil action
32 brought by the attorney general in its own name, or by any of its attor-
33 neys designated by it for that purpose, against any party to an agree-
34 ment that violates this section.

35 (b) Each party that violates or assists in the violation of this
36 section shall be liable for any damages, penalties, costs, fees, injunc-
37 tions, or other equitable or legal remedies, including, but not limited
38 to, restitution and disgorgement, that may be just and reasonable. Such
39 remedies shall include, but not be limited to, any remedy available
40 under articles twenty-two or twenty-two-A of the general business law
41 and section sixty-three of the executive law.

42 (c) If the state is awarded penalties under subparagraph (i) of para-
43 graph (a) of this subdivision, it shall not recover penalties pursuant
44 to another law identified in paragraph (b) of this subdivision. This
45 section shall not be construed to foreclose the state's ability to claim
46 any equitable or legal remedy available in paragraph (b) of this subdi-
47 vision.

48 (d) An action to enforce a cause of action for a violation of this
49 section shall be commenced within six years after the cause of action
50 accrued.

51 § 2. Severability clause. If any clause, sentence, paragraph, subdivi-
52 sion, section or part of this act shall be adjudged by any court of
53 competent jurisdiction to be invalid or unenforceable, such judgment
54 shall not affect, impair, or invalidate the remainder thereof, but shall
55 be confined in its operation to the clause, sentence, paragraph, subdivi-
56 vision, section or part thereof directly involved in the controversy in

1 which such judgment shall have been rendered. It is hereby declared to
2 be the intent of the legislature that this act would have been enacted
3 even if such invalid provisions had not been included herein.
4 § 3. This act shall take effect on the sixtieth day after it shall
5 have become a law.