

## Right-to-Try: Compassionate Use Legislation Summary

### Overview

On June 16, 2015, Texas was the 21st state to sign into law a Right-to-Try bill. Since then, 3 other states have passed similar legislation. Although specifics of each state's law vary, the overall premise remains: terminally ill patients are granted access to investigational drugs, biological products, and devices that have undergone Phase 1 trials.

The FDA has not released their position on these laws; however, it has repeatedly tried to simplify its compassionate use process. It established a program called Expanded Access in 2009 in an effort to allow patients with serious health conditions to access drugs not yet approved. Since its creation, the FDA has approved 99% of Expanded Access cases, averaging over 1,200 cases each year. This past year has seen the most applications for Expanded Access yet, topping the chart with nearly 1,900 approvals. The trend is that applications for Expanded Access are increasing every year with a 99% approval rate. <http://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalsApplications/InvestigationalNewDrugINDApplication/ucm172492.htm>

Right-to-Try advocates have decided to sidestep the FDA with the claim that the FDA's process is administratively cumbersome and time consuming. [Richardson/HealthAffairs; Right-to-Try, Texas Senate; SB 694; Corieri, 2015].

Publicity surrounding the legislation has advanced the cause by showcasing emotional narratives of opportunities lost for terminal patients who received approval for investigational drugs from the FDA too late (e.g. Andrea Sloan, Kianna Karnes). Rhetoric by advocates includes calling the FDA the "arbiter of life and death...[that] stands between the patients and the treatments that may alleviate their symptoms or provide a cure" [Corieri, 2015]

Right-to-Try laws are prevailing in the courts even though they conflict rather than complement the FDA's Expanded Access otherwise known as "Compassionate Use" process. [Health Affairs, 2015] but there is still a danger that the federal law will take precedence over state law [Zettler, 2015] even further complicating the health arena for the terminally ill.

Although states are passing this legislation, there appear to be delays in the implementation and utilization of such laws. In most states participation by drug and product manufacturers is voluntary. They may be hesitant to participate in Right-to-Try activities since they cannot charge patients for access to merchandise [Darrow, 2015], are unsure how patient access to experimental therapies may undermine ongoing clinical research, and how adverse events may reduce the chance of FDA approval. [Health Affairs, 2015; Servick, 2014]. In reality, patients may not be able to access the drug/product if the manufacturer chooses not to participate.

### Definitions

The bill varies across states but there are two main sections of each bill: definitions and protections. The definition sections include explanations of the terms "eligible patient," "terminal illness" and "investigational drug." Some states define minimum requirements for informed consent form in this section as well. Less common, a state will put limits on the definition of physician. In Arizona, "physician" for purposes of Right-to-Try "does not include a primary care physician." Another

irregularity is that some states like Michigan and South Dakota have decided to use the term “advanced illness” in place of “terminal illness.” Most if not all of these states begin the definitions section with a provision that limits the definitions outlined to apply only to this bill.

“Investigational drug” is the most straightforward term defined in each bill and has no significant variation from state to state:

“Investigational Drug, Biological Product, or Device” means a drug, biological product or device that has successfully completed phase one of a clinical trial but has not yet been approved for general use by the United States Food and Drug Administration and remains under investigation in a United States Food and Drug Administration-approved clinical trial.

The requirement that a drug remains in clinical investigation puts a significant limit on Right-to-Try. If a drug is pulled out of phase two or if the company decides not to pursue a certain drug past phase one, the drug is no longer available to a patient under Right-to-Try.

“Terminal illness” has significant variations in some states. In Florida and Louisiana, “terminal illness” requires that the physician determine that the patient will die in one year; Louisiana requires two years after the diagnosis if the disease were to run its course. Outside of those two states, terminal illness is defined as “a disease that, without life-sustaining procedures, will soon result in death or a state of permanent unconsciousness from which recovery is unlikely.”

“Eligible patient” has significant variations from state to state. In Indiana an eligible patient does not even need to be terminally ill. The physician determines “there is no reasonable basis to conclude that the medical treatment, when administered as directed, poses an unreasonable and significant risk of danger to the individual receiving the medical treatment.” This means that with informed consent and the permission of the manufacturer, any patient in Indiana can get any investigational drug with a physician’s recommendation and does not need to be terminally ill. Florida requires a second physician concur with the diagnosis of terminal illness and death within one year. The typical definition of eligible patient requires that the patient be terminally ill, have considered all other FDA approved options, have a recommendation from a physician for an investigational drug, have signed an informed consent, and that a physician keep all documents related to the treatment.

#### Access Requirements

Texas and Colorado, along with a number of other states, require the patient apply for a clinical trial for the drug if there is a trial open within 100 miles of the patient. The patient will become eligible if, after applying for trial, the patient has either been denied access to the trial or the clinical trial has not replied to the patient within one week. The case with many patients seeking investigational drugs through Right-to-Try is that they are terminally ill already and will be rejected from most trials because their condition is not useful in collecting data about the drug being investigated. Colorado, Oklahoma and a few other states have variations requiring the patient not be admitted to an inpatient facility.

Finally, some states define minimum requirements for informed consent. Most of these forms include the following minimum requirements: statement that the proposed treatment is not approved by the FDA, statement that the patient concurs with the physician that this treatment is the best option, a clear identification of the investigational drug, clear descriptions of the potential outcomes including the possibility of death, statement that the patient’s health insurance is not required to cover

investigational treatments, statement that eligibility for hospice care may be withdrawn, and a statement that the patient is liable for the costs incurred while undergoing investigational treatment. Again, these are only minimum requirements so an investigational review board (IRB) and physician may add to the informed consent on a case by case basis. Some states, like Texas, simply require that the forms be developed by a state organization such as the Texas Health and Human Services Commission (HHSC).

#### Patient Protections

The protections of the Right-to-Try bills all contain language that “The manufacturer of an investigational drug, biological product, or device may make available and an eligible patient may request the manufacturer’s investigational drug, biological product, or device under this act. This act does not require that a manufacturer make available an investigational drug, biological product, or device to an eligible patient.” This is a barrier to patient access and puts the manufacturer at the center of any controversy. Also, in almost every bill, there is a clause stating that the drugs may only be provided at no cost or at the cost of production. The exception is South Dakota, which requires that the drug, if provided, be given without compensation.

After these provisions, Right-to-Try bills include simple protections for all involved parties: physicians, hospitals, insurers, manufacturers and the patient’s heirs. Civil suits against all parties are mitigated by clauses which state participation in investigational treatments does not give cause of action. Physician licenses are protected by clauses which state that the state medical board cannot use participation in investigational treatments as a basis for any action against a medical license. Hospitals, manufacturers, and insurers are protected by clauses which state they do not have to participate or cover investigational treatments. Finally, patient’s heirs are protected by a clause that states costs related to the investigational treatment do not transfer to the patient’s heirs in the case that the patient dies.

#### Summary

A larger discussion at the federal level is warranted. Rather than bypassing the FDA, the 21st Century Cures Act (HR6) has called for transparency requirements for drug companies participating in expanded access programs and FDA guidance on how adverse drug event data is interpreted and used. [Section 2082 – 2083, Cures Section by Section].

Unresolved issues include:

- i) Transportation of drugs across state lines. [Servick, 2014]
- ii) Variances state-to-state may further lead to complications and hurdles for patients/treating physicians/manufactures
- iii) The definition of an “eligible patient”. Fourteen of the twenty-one states that have enacted the law did so with a provision that requires a patient to have attempted to participate in a clinical trial
- iv) Divergent methods of dealing with liability and defining “terminal illness”