CHAPTER 137

Right to Try Act

**SECTION 44‑137‑10.** Definitions.

As used in this chapter:

(1) “Eligible patient” means an individual who:

(a) has a terminal illness, attested to by a treating physician;

(b) has, in consultation with a treating physician, considered and exhausted all other treatment options currently approved by the United States Food and Drug Administration;

(c) has received a recommendation from the treating physician for use of an investigational drug, biological product, or device for treatment of the terminal illness;

(d) has given informed consent in writing to use the investigational drug, biological product, or device for treatment of the terminal illness or, if the individual is a minor or is otherwise incapable of providing informed consent, the parent or legal guardian has given informed consent in writing to use the investigational drug, biological product, or device; and

(e) has documentation from the treating physician that the individual meets all of the criteria for this definition, including an attestation from the treating physician that the treating physician was consulted in the creation of the written, informed consent required under this chapter.

(2) “Investigational drug, biological product, or device” means a drug, biological product, or device that has successfully completed Phase I 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 clinical trial approved by the United States Food and Drug Administration.

(3) “Terminal illness” means a progressive disease or medical or surgical condition that:

(a) entails significant functional impairment;

(b) is not considered by a treating physician to be reversible even with administration of available treatments approved by the United States Food and Drug Administration; and

(c) will result in death without life‑sustaining procedures.

(4) “Informed consent” means a written document that is signed by an eligible patient; or if the patient is a minor, by a parent or legal guardian; or if the patient is incapacitated or without sufficient mental capacity, by a designated health care agent pursuant to a health care power of attorney, that at a minimum includes:

(a) an explanation of the currently approved products and treatments for the eligible patient’s terminal illness;

(b) an attestation that the eligible patient concurs with the treating physician in believing that all currently approved treatments are unlikely to prolong the eligible patient’s life;

(c) clear identification of the specific investigational drug, biological product, or device proposed for treatment of the eligible patient’s terminal illness;

(d) a description of the potentially best and worst outcomes resulting from use of the investigational drug, biological product, or device to treat the eligible patient’s terminal illness, along with a realistic description of the most likely outcome. The description shall be based on the treating physician’s knowledge of the proposed treatment in conjunction with an awareness of the eligible patient’s terminal illness and shall include a statement acknowledging that new, unanticipated, different, or worse symptoms might result from, and that death could be hastened by, the proposed treatment;

(e) a statement that eligibility for hospice care may be withdrawn if the eligible patient begins treatment of the terminal illness with an investigational drug, biological product, or device and that hospice care may be reinstated if such treatment ends and the eligible patient meets hospice eligibility requirements;

(f) a statement that the eligible patient’s health benefit plan or third‑party administrator and provider are not obligated or required to pay for any cost of any investigational drug, biological product, or device or for any care or treatments consequent to the use of such investigational drug, biological product, or device; and

(g) a statement that the eligible patient understands that he is liable for all expenses consequent to the use of the investigational drug, biological product, or device and that this liability extends to the eligible patient’s estate, unless a contract between the patient and the manufacturer of the drug, biological product, or device states otherwise.

HISTORY: 2016 Act No. 230 (H.4542), Section 2, eff June 3, 2016.

**SECTION 44‑137‑20.** Availability to eligible patients of investigational drug, biological product, or device; compensation; costs.

(A) A manufacturer of an investigational drug, biological product, or device may make available to an eligible patient, and an eligible patient may request, the manufacturer’s investigational drug, biological product, or device. Nothing in this article shall be construed to require a manufacturer of an investigational drug, biological product, or device to make such investigational drug, biological product, or device available to an eligible patient.

(B) A manufacturer of an investigational drug, biological product, or device may provide the investigational drug, biological product, or device to an eligible patient without receiving compensation or may require the eligible patient to pay the costs of, or the costs associated with, the manufacture of the investigational drug, biological product, or device.

HISTORY: 2016 Act No. 230 (H.4542), Section 2, eff June 3, 2016.

Library References

Health 300.

Westlaw Topic No. 198H.

C.J.S. Drugs and Narcotics Sections 14, 22, 99 to 107, 113 to 117, 119 to 123, 132 to 133, 135.

**SECTION 44‑137‑30.** No liability to heirs for outstanding debt related to treatment with investigational drug, biological product, or device.

If an eligible patient dies while being treated with an investigational drug, biological product, or device, the eligible patient’s heirs are not liable for any outstanding debt related to the treatment, including any costs attributed to lack of insurance coverage for the treatment.

HISTORY: 2016 Act No. 230 (H.4542), Section 2, eff June 3, 2016.

Library References

Health 300.

Westlaw Topic No. 198H.

C.J.S. Drugs and Narcotics Sections 14, 22, 99 to 107, 113 to 117, 119 to 123, 132 to 133, 135.

**SECTION 44‑137‑40.** Sanctions against health care providers prohibited.

(A) A licensing board shall not revoke, fail to renew, suspend, or take any other disciplinary action against a health care provider licensed in this State, based solely on the health care provider’s recommendations to an eligible patient regarding access to or treatment with an investigational drug, biological product, or device.

(B) An entity responsible for Medicare certification shall not take action against a health care provider’s Medicare certification based solely on the health care provider’s recommendation that a patient have access to an investigational drug, biological product, or device.

HISTORY: 2016 Act No. 230 (H.4542), Section 2, eff June 3, 2016.

Library References

Health 300.

Westlaw Topic No. 198H.

C.J.S. Drugs and Narcotics Sections 14, 22, 99 to 107, 113 to 117, 119 to 123, 132 to 133, 135.

**SECTION 44‑137‑50.** Blocking access prohibited.

No official, employee, or agent of this State shall block or attempt to block an eligible patient’s lawful access to an investigational drug, biological product, or device. Counseling, advice, or a recommendation consistent with medical standards of care from a licensed health care provider does not constitute a violation of this section.

HISTORY: 2016 Act No. 230 (H.4542), Section 2, eff June 3, 2016.

Library References

Health 300.

Westlaw Topic No. 198H.

C.J.S. Drugs and Narcotics Sections 14, 22, 99 to 107, 113 to 117, 119 to 123, 132 to 133, 135.

**SECTION 44‑137‑60.** No private right of action against manufacturer of investigational drug, biological product, or device.

No private right of action may be brought against a manufacturer of an investigational drug, biological product, or device, or against any other person or entity involved in the care of an eligible patient using an investigational drug, biological product, or device, for any harm caused to the eligible patient resulting from the use of the investigational drug, biological product, or device as long as the manufacturer or other person or entity has made a good‑faith effort to comply with the provisions of this chapter and has exercised reasonable care in actions undertaken pursuant to this chapter.

HISTORY: 2016 Act No. 230 (H.4542), Section 2, eff June 3, 2016.

Library References

Health 300.

Westlaw Topic No. 198H.

C.J.S. Drugs and Narcotics Sections 14, 22, 99 to 107, 113 to 117, 119 to 123, 132 to 133, 135.

**SECTION 44‑137‑70.** Insurance coverage; costs; services.

(A) This chapter does not expand coverage an insurer must provide pursuant to Title 38.

(B) This chapter does not require:

(1) a governmental agency to pay costs associated with the use, care, or treatment of a patient with an investigational drug, biological product, or device; or

(2) a hospital or other health care facility licensed pursuant to Chapter 7, Title 44 to provide new or additional services, unless approved or required by the hospital or facility.

(C) A health plan, third party administrator, or governmental agency is not required to, but may, provide coverage for the cost of an investigational drug, biological product, or device, or the cost of services related to the use of an investigational drug, biological product, or device under this chapter.

HISTORY: 2016 Act No. 230 (H.4542), Section 2, eff June 3, 2016.

Library References

Health 300.

Westlaw Topic No. 198H.

C.J.S. Drugs and Narcotics Sections 14, 22, 99 to 107, 113 to 117, 119 to 123, 132 to 133, 135.