

HOUSE BILL REPORT

HB 2431

As Reported By House Committee On:
Financial Institutions & Insurance

Title: An act relating to pharmaceutical price discrimination.

Brief Description: Regulating pharmaceutical prices.

Sponsors: Representatives Zellinsky, R. Meyers, Schmidt, Kessler, Lemmon, Dorn, Kremen, Grant, Scott, Campbell, Quall and Jones.

Brief History:

Reported by House Committee on:
Financial Institutions & Insurance, January 27, 1994,
DPS.

HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Zellinsky, Chair; Scott, Vice Chair; Mielke, Ranking Minority Member; Dyer, Assistant Ranking Minority Member; Dellwo; Dorn; Grant; Kessler; Kremen; R. Meyers; Schmidt; and L. Thomas.

Minority Report: Do not pass. Signed by 3 members: Representatives Anderson; R. Johnson; and Tate.

Staff: Charlie Gavigan (786-7340).

Background: Washington State regulates the pharmaceutical industry in several ways. Pharmacies, drug manufacturers and drug wholesalers must be licensed by the Department of Health if they are located in Washington or if they are out-of-state but sell to Washington consumers. The sale, delivery and possession of pharmaceutical drugs are also regulated by the Department of Health. State law also encourages the substitution of generic drugs for brand name drugs when the former is cheaper; the prescriber must note on the prescription whether a substitution is allowed, and 60 percent of any savings must be passed on to the customer.

Federal and state anti-trust provisions prohibit unfair competition and price-fixing. Washington State passed the Consumer Protection Act (CPA) in 1961. This is, among other

things, a broad anti-trust statute that allows the attorney general or private parties to take action against violators of the CPA; private parties can seek treble damages in a civil suit. The primary federal statute regulating drug pricing is the Robinson-Patman Act. The Robinson-Patman Act makes it unlawful for persons engaged in business to discriminate in price between different purchasers of the same commodity where the effect lessens competition, creates a monopoly or prevents competition. This act does not prevent price differentials which reflect differences in quantity, manufacture, sale or delivery (i.e. "class of trade"). Also, the act makes exceptions for non-profits purchasing commodities for their own use and for meeting competition.

Pharmaceutical manufacturers differentiate between types of wholesale purchasers on pricing for reasons other than volume, primarily under the "class of trade" exception to federal anti-trust laws. For instance, retail pharmacies generally pay a higher price for pharmaceutical drugs than hospitals, health maintenance organizations, mail-order pharmacies and other organizations.

Article I, Section 8 of the U.S. constitution, the commerce clause, prohibits states from improperly interfering with interstate commerce. Generally, this means that a state cannot protect intra-state businesses from out-of-state competition or cannot unduly burden interstate commerce. Courts usually uphold state statutes that prohibit price discrimination if the statute regulates intra-state activity only.

Article 6 of the U.S. constitution, the supremacy clause, precludes states from passing laws that directly contradict federal law or that regulate an area that the federal government has claimed exclusive jurisdiction over. The federal government has not preempted the field of anti-trust law. Historically, both the federal government and states have passed and enforced anti-trust legislation. In areas that are regulated by both federal and state law, the court generally does not preclude a broader or narrower approach by the state when the federal government has not specifically prohibited such state action.

Summary of Substitute Bill: For prescription drugs delivered to retailers (those who sell directly to consumers) located in Washington State or for prescription drugs eventually sold to Washington customers by out-of-state retailers: (1) Manufacturers must have offered these drugs at the manufacturer's best price to all wholesalers for similar volume purchases, including rebates, free merchandise and other trade concessions; and (2)

manufacturers and wholesalers must have offered these drugs at the manufacturer's or wholesaler's best price to all retailers for similar volume purchases, including rebates, free merchandise, samples and other trade concessions. Hospitals are excluded from these provisions when the drugs are for the hospital's own use: that is, to treat patients of the hospital.

The state and local governments cannot purchase drugs from a manufacturer or wholesaler if they engage in prohibited price discrimination.

Any person that is damaged by prohibited price discrimination may bring a civil suit to recover treble damages. Proof of discrimination is evidence of damages, and the amount of unlawful discrimination is presumed to be the minimum amount of damages sustained. Prohibited price discrimination is also a violation of the Consumer Protection Act, which allows the attorney general to investigate and allows a private civil suit to recover treble damages.

Substitute Bill Compared to Original Bill: The following changes are made: (1) The substitute bill applies to prescription drugs only, rather than both prescription and over-the-counter drugs; (2) the substitute bill applies to drugs sold to out-of-state retailers who sell drugs to Washington consumers (the original bill only applied to drugs sold to instate retailers); (3) the substitute bill exempts hospitals purchasing drugs for the hospital's own use; and (4) the substitute bill adds a severability clause.

Fiscal Note: Requested January 17, 1994.

Effective Date of Substitute Bill: Ninety days after adjournment of session in which bill is passed.

Testimony For: It is unfair for some organizations to obtain prescription drugs at significantly lower prices for the same volume than retail pharmacies. Consumers who purchase prescription drugs at retail pharmacies without the option of participating in discounts unfairly pay a higher price for these drugs; they are subsidizing discounts for HMOs, insurers, mail order pharmacies and other organizations. There is no rational basis for the often significant differences in prices paid by the type of purchaser, which creates an un-level playing field and is unfair to a majority of drug consumers.

Testimony Against: Functional differences between types of purchasers justify price differentials not based on volume, such as different marketing, distribution and administrative

costs. This bill, which requires that all purchasers be offered the same price on a given volume of a drug product, would disrupt the free market system and would be anti-competitive, resulting in the stifling of research and development and driving prices up in the long run.

Witnesses: Gordon Walgren, Pharmpac (supports); Jan Gee Washington Retail Association (supports); Dennis Smith, Washington State Pharmaceutical Association (supports); Stacey Hendrickson, A & H Stores (supports); Dave Broderick and Paul Ramey, Washington State Hospital Association (opposes); Jim Cammack, Jim's Pharmacy (supports); John Swenson, Washington State Society of Hospital Pharmacies (opposes); Pete Penna, Group Health (opposes); Jim Halstrom, Health Care Purchasers Association (opposes); and Cliff Webster, Pharmaceutical Manufacturers Association (opposes).