HB 2300: An opposing view of Oregon's "Right to Try" bill

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To: Rep. Buehler and members of the HB 2300 working group
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Introduction

HB 2300, Oregon's "Right to Try" (RTT) bill[**1**], would give terminally ill patients access to investigational drugs without FDA approval. Because of the complexity of this issue, I reviewed opinions from multiple sources and present them here. While I conclude that Oregon should not pass this RTT bill, others who examine this material may conclude otherwise.

This review begins with an estimate of the number of patients who might be either harmed or helped by this bill. It then incorporates opinions from medical ethicists, the pharmaceutical industry, state and national medical associations, patient advocacy organizations, and economic policy institutes.

A. Numbers of patients who might harmed or helped

From 2010 to 2014, the Food and Drug Administration (FDA) received 6129 applications from physicians applying for "expanded access" on behalf of their terminally ill patients. The FDA expanded access program allows patients to receive investigational drugs that lack demonstration of safety or efficacy. The FDA approved 6098 of these applications (99.4%) and did not approve 33 applications.[**2**] The average number of non-approved applications each year is eight.

Applications were not approved primarily because the FDA considered the drugs too dangerous or the FDA suggested other drugs that might be more appropriate for that patient. In these cases, the physician withdrew the application to pursue the suggestion.

Based on these national numbers, Oregon's HB 2300 might allow one patient every 12 years to receive an investigational drug who would not otherwise receive FDA approval.

One patient advocate estimates this number might quadruple with passage of the bill.[**3**] Because of RTT laws passed in other states, the FDA created a shorter written physician application form (one page requiring 45 minutes to complete). This new form may decrease the number of patients bypassing FDA approval. The FDA continues to provide emergency approval over the telephone.[**4**]

Some terminally ill patients who apply to the FDA expanded access program may do so because they are not eligible for clinical trials. Other patients may apply for expanded access rather than possibly receiving a placebo rather than active drug in a clinical trial. Regardless, all patients who receive investigational drugs either through the expanded access program or through state RTT laws become ineligible to participate in any clinical trial. Additionally, there are no programs that track the

outcomes of patients who do not participate in clinical trials nor are these outcomes included in clinical reviews of safety or efficacy.

By removing pathways that include the formal FDA data collection process, RTT laws may decrease the number of patients participating in clinical trials of promising investigational drugs. Thus, RTT laws might delay the availability of these drugs to future patients suffering similar diseases.

Oregon's RTT bill could potentially benefit a small number of terminally ill patients (perhaps less than eight per century). It also could potentially delay the availability of drugs with documented safety and efficacy for future patients with terminal illnesses.

B. Medical ethicists and legal commentators

I found seven medical ethicists and legal commentators opposing RTT laws. [**5-12**] I found none supporting them.

Medical ethicists expressed these concerns:

1. RTT laws, prevent terminally ill patients from participating in clinical trials of investigational drugs already known to have a higher probability of producing benefit.

2. RTT laws allow the exploitation of terminally ill patients and their families by businesses with a financial interest in promoting investigational drugs.

3. The possible side effects of investigational drugs may cause more harm to terminally ill patients than simply an earlier death. Some possible side effects may not affect life expectancy but could reduce the remaining quality of life.

4. Neither the patient nor the attending physician has the same extensive information available to the FDA about investigational drugs. A risk-benefit assessment without FDA consultation is likely to be incomplete, or based on hearsay. One review referred to "informational asymmetries."[**13**]

5. Risk comprehension of experimental drugs is low among the general population and possibly lower still among families of terminally ill patients. Risk-benefit ratios may not be understood in this population.

6. There is no legal or ethical precedent for exempting from FDA supervision one set of patients (those expected to die of their disease within 12 months) while not exempting others (e.g., those with painful diseases, those with severe immobility, or with life expectancies longer than 12 months).

7. Patient demand for non-approved drugs may place attending physicians in the ethically challenging position of wanting to honor a patient's wish to try anything and the obligation to protect their patient from harm.

C. State and national medical societies

Six states passed RTT laws. The opinions of their state medical associations vary considerably and are not uniform.

1. The executive board of the Medical Society of Virginia unanimously supported that state's RTT bill.[**14**]

2. The Louisiana State Medical Society submitted a "green card" in support of its state RTT bill during a legislative hearing, but offered no other opinion. The Governmental Affairs officer said the card was submitted for "purely political reasons" to show support for the legislator sponsoring the bill.[**15**] The Society did insist on providing legal immunity to participating physicians.

3. The Arizona Medical Association offered no opinion on Arizona's ballot measure. The association's Vice President of Operations called the measure, "rice cake," claiming the law provided nothing of substance to patients. She regarded the ballot measure as a political tactic to defeat an incumbent Arizona legislator by his challenger, the wife of an official at the Goldwater Institute.[**16**]

4. The Missouri, Michigan, and Colorado medical associations took no position on their state's RTT laws.[**17**]

5. A California Medical Association spokeswoman expressed reservations about that state's proposed RTT bill: "While the FDA process can be slow, CMA feels it is the appropriate way to address patient safety concerns as part of the risk/benefit evaluation when treating illness. Sick, vulnerable and trusting patients deserve the highest quality of care and safeguards from false hopes and potentially fraudulent schemes." [**18**]

In 2007, the U.S. Court of Appeals heard *Abigail Alliance v. von Eschenbach* 495 F.3d 695 (D.C. Cir. 2007); this court ultimately ruled that terminally ill patients do not have a constitutional right to use medications without FDA approval. The American Society of Clinical Oncology and the Association of American Medical Colleges signed amicus briefs in support of the FDA.[**19**]

On appeal, the Supreme Court declined to hear this case. In a previous Supreme Court case, *United States v. Rutherford*, 442 U.S. 544 (1979), Justice Thurgood Marshall noted, "Nothing in the history of the [Food, Drug, and Cosmetic Act] suggests that Congress intended protections only for persons suffering from curable diseases."[**20**]

The American Medical Association made this comment about the *Abigail* ruling: "AMA policy supports expanded access to promising developmental drugs, as long as any changes do not compromise the clinical trials process that gives doctors the necessary efficacy and safety information about a medication."[**21**]

D. Pharmaceutical Industry

Two national organizations representing the pharmaceutical and biotech industry issued comments opposing RTT laws.

Sascha Haverfield, vice president of scientific and regulatory affairs at the Pharmaceutical Research and Manufacturers of America (PhRMA), expressed the concern noted above that RTT laws may hamper clinical trials and thus delay the availability of proven drugs to future patients [**22**].

The Biotech Industry Organization (BIO) Board Standing Committee on Bioethics has similar concerns and added these [**23**]:

1. "A patient's right to treatment based on his or her autonomous decision-making ability does not supersede a company's ethical responsibility to develop and market safe and effective products as fast as possible."

2. "A patient suffering from a life-threatening illness may not be able to provide consent that is truly informed when receiving a product under an early access program."

Joan Koerber-Walker, president and CEO of the Arizona Bioindustry Association, does not support RTT laws.[**24**]

Richard Garr, CEO of Neuralstem, a Maryland company which manufactures stem cells to treat neurologic diseases, supports RTT laws.[**25**]

E. Patient Advocacy Organizations

I made contact with three patient advocacy organizations. All were deeply distressed by the failure of the FDA to rapidly investigate and approve investigational drugs to treat terminal or rare diseases. They differed in their opinions about RTT laws. Statements from these organizations are attached and are summarized here. One additional comment from another patient organization follows.

1. Frank Burroughs of the Abigail Alliance was the plaintiff in *Abigail Alliance v. von Eschenbach*. He feels passionately that patients will benefit from RTT laws; he was instrumental in the passage of Virginia's RTT law.[**26**]

2. Terry Kalley of Freedom of Access to Medicines adamantly supports RTT laws. He also regards RTT laws as a means to compel FDA reform and was instrumental in Michigan's passage of a RTT law. In his opinion, the ultimate goal is not to pass RTT laws in every state, but to pressure the FDA to create more expeditious means to test, approve, and make available beneficial drugs.[**27**]

3. Tim Boyd, Associate Director of State Policy, National Organization for Rare Disorders, does not support RTT laws. Here is an excerpt from his attached statement: "While NORD is encouraged by state efforts to ensure patients with life-threatening illnesses have access to potentially life-saving therapies, NORD does not believe that "right-to-try" laws are the answer."[**28**]

The National Coalition of Cancer Survivorship signed the amicus brief in the *Abigail* case which supported FDA supervision.[**19**]

F. Economic policy organizations

Several respected policy organizations support RTT laws. All have a similar mission statement promoting free enterprise and small government. Their primary, though not only, argument is that government should not intervene in the rights of terminally ill patients with little to lose from taking investigational drugs.

Goldwater Institute [**29**]

The American Conservative [**30**]

The Heartland Institute [**31**]

Cascade Policy Institute [**32**]

G. The FDA

The F.D.A. does not have a position on RTT laws. It encourages patients to use the existing expanded access program.[**33**]

Conclusions:

The number of patients who may potentially gain access to investigational drugs through an Oregon RTT law is small. We don't know if these terminally ill patients will be helped or harmed by taking investigational drugs without FDA supervision.

Medical ethicists, business organizations, the American Medical Association, and one patient advocacy organization are concerned that RTT laws will harm future patients by reducing the number of patients participating in clinical trials of investigational drugs. This may delay the evaluation and release of future drugs demonstrated to be safe and effective.

Medical ethicists and the California Medical Association expressed additional concerns that RTT laws may create a predatory environment in which businesses exploit the desperation of terminally ill patients and their families.

State medical associations are divided in their opinions.

One patient advocacy organization fully endorses RTT laws. Two endorsed RTT laws as a means to compel the FDA to reform its drug approval process. Their ultimate goal is for the FDA to provide patients with safe, efficacious, life-saving drugs as expeditiously as possible.

Economic policy institutes support RTT laws a means to reduce government interference in private lives.

In summary, two groups endorse RTT laws but with differing motives. Patient advocacy organizations want to promote faster drug evaluation by the FDA. Economic policy institutes want to promote personal liberty.

I conclude that HB 2300 may hurt more patients than it helps and therefore recommend that Oregon not pass HB 2300.

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