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Liquidia v. FDA: FDA Decision on Extended Exclusivity, If Upheld by Court, Would Add Tool to Pharma's Anticompetitive Toolbox, Experts Say

In a Dec. 5 hearing before a U.S district judge for the District of Columbia, drugmaker Liquidia (LQDA) argued that its lawsuit against the Food and Drug Administration (FDA) is more than a spat over statutory interpretation—it's an effort to keep the FDA from setting a dangerous precedent by rewarding a monopolist's anticompetitive tactics.

Liquidia sued the FDA in August over the agency's decision to grant three additional years of market exclusivity to United Therapeutics (UTHR) for its drug Tyvaso DPI (treprostinil), which treats pulmonary hypertension and is a follow-on version of Tvvaso. The FDA's decision blocked Liquidia from launching a competing drug, Yutrepia (treprostinil), until May 2025.

According to Liquidia, the FDA's surprise decision signals to the industry that any drugmaker whose product has gone off-patent can extend their monopoly indefinitely by gaming the system for new clinical investigation (NCI) exclusivity, which is meant to reward innovative research.

The FDA granted the three years of exclusivity for Tyvaso DPI, an inhaled powder, based on United Therapeutics' BREEZE trial. The study, conducted on 51 patients, showed that this drug form didn't present any new safety issues in patients who were already taking Tyvaso DPI's predecessor—a liquid version known as Tyvaso.

If the FDA's decision is upheld, Liquidia argued in its complaint, "a drug sponsor could simply publish successive 'new' studies every three years—with no innovation—showing that a new drug containing the same ingredients functions similarly to its older drugs [...] and demand that FDA tack on another exclusivity period."

As Judge Timothy Kelly considers his opinion on Liquidia's motion for preliminary injunction and the parties' motions for summary judgement, some competition advocates and pharmaceutical lawyers are thinking about the precedent that a ruling in United Therapeutics' favor could set for the industry writ large.

Giving exclusivity to "something that's less innovative and maybe doesn't give that much to the public, especially if it's just a phase one study on a drug that's been out there for 20 years" could mean "less access, higher costs for patients," said Sean Tu, a patent law and drug law professor at West Virginia University.

The FDA's move may send a signal to other drugmakers with lucrative products, said Tu: "I'll put myself in the brand position and say, what could I do to mimic this situation?"

"The question is whether we should be trying to finance studies by drug companies through granting market exclusivity, unless the studies generate valuable new information about safety and efficacy that support FDA approval of a new indication," said Marc Rodwin, a pharmaceutical law expert and professor at Suffolk University Law School. "Is granting market exclusivity, which is costly to insurers and others that purchase drugs and government that subsidizes insurance, the best way to finance these studies?"

In terms of incentives for the generic industry and drugmakers challenging an incumbent, Rodwin said, the way Liquidia and United Therapeutics' race to market has played out could lead drugmakers like Liquidia to proceed more cautiously.

"It's very difficult to encourage generic entry or competitors that develop something new that will deal with a similar approach, if the cost and effort of doing so is risky because it might come to naught," he said.

According to Rodwin, "Weve set up a system that encourages all the participants that want a product to make claims of exclusivity [...] and of course exclusivity results in higher prices. Basically, once you have the exclusivity, you have closed out competition."

Extending the life of off-patent drugs. Sources told *The Capitol Forum* that it's indeed unusual for companies to be arguing about NCI exclusivity, which is meant to help innovative drugmakers as they first launch a product, when Tyvaso DPI has already gone off-patent.

In October, the Supreme Court ruled in favor of Liquidia against United Therapeutics on patent issues, paving the way for competition in the market.

The Hatch-Waxman Act of 1984, which establishes a pathway for NCI exclusivity, was designed so that "by the time you got around to [...] patent expirations, the exclusivity wouldn't really be relevant," said Frederick Abbott, an intellectual property expert and the Edward Ball Eminent Scholar Professor of International Law at Florida State University.

Patricia Danzon, professor of health care management at the University of Pennsylvania's Wharton School, said "most countries do not permit an extension of the patent life or market exclusivity for the originator beyond the original patents, but in the U.S., patent offices are much more willing to recognize patent extensions for characteristics of the drug other than the composition of matter," resulting in much longer "effective patent life."

What's on the line. The stakes are high for both Liquidia and United Therapeutics. The companies have been embroiled in patent litigation since 2020, when Liquidia first applied for FDA approval of Yutrepia, a dry inhaled powder that treats pulmonary arterial hypertension. That drug would compete with the incumbent product, United Therapeutics' Tyvaso DPI.

This disease market, valued at over $8 billion in annual revenues, is extremely lucrative for United Therapeutics, which reported earnings of over $400 million for its Tyvaso products in the third quarter of 2024. United Therapeutics also has a monopoly on a specific indication called pulmonary hypertension with interstitial lung disease (PH-ILD).

The FDA announced in August 2024 that United Therapeutics' drug qualified for NCI exclusivity, staving off competition through May 2025, even though the patent challenges blocking Yutrepia were cleared in October.

"People don't understand the margins are so large that even a few days of delay are very significant," Tu said.

Abbott agreed: "Companies are just making prudent business decisions, from their standpoint, when they decide to invest five million in litigation to protect the billion-dollar income stream."

Liquidia argued in its complaint that the FDA's decision was unlawful, arbitrary and capricious. The company said the FDA's decision didn't mesh with "congressional intent permitting exclusivity only in strictly limited circumstances involving innovation."

The arguments in the case center around whether the BREEZE trial warrants NCI exclusivity for the drug and whether the FDA adhered to the spirit and letter of the law. At the Dec. 5 hearing, the parties sparred over the reading of the law and regulations guiding NCI exclusivity, with Liquidia arguing that the BREEZE trial duplicates previous research and the FDA arguing that it had accurately interpreted the statutory definition of "new clinical investigation."

Experts were divided on the outcome of the case. Some saw FDA as prevailing by focusing on a defense that focused on fitting BREEZE into the definition of "new clinical investigation," largely based on technicalities.

Others who took a more holistic view of the case were more cautious on the FDA's position: "That's not the first time a pharmaceutical company would've argued that merely changing the route of administration should gain us an additional type of exclusivity of some kind," Abbott said of United Therapeutic's added market exclusivity. "But I would still think that, under those circumstances,

you would require that it should demonstrate some patient benefit, which doesn't seem to be something that's demonstrated here."

Spirit of the law. The Hatch-Waxman Act is meant to promote innovation while keeping drugmakers from abusing the system, according to a 1989 publication in the *Federal Register*.

The FDA said in that notice that the "special criteria" laid out for NCI exclusivity were meant to prevent drug companies from "mak[ing] minor and unimportant alterations in their marketed drug products or [conducting] additional tests which they could claim provide important new information about a marketed drug product."

In that sense, critics said, United Therapeutics and the FDA aren't above reproach.

In conversations with *The Capitol Forum*, some pharmaceutical lawyers echoed Liquidia's concerns about the small size and relatively narrow scope of the BREEZE trial. They questioned whether it's truly "innovative" to show that patients taking an old drug can take a new drug without worse side effects.

Some experts added that the removal of Chevron deference, which encourages courts to read a statute rather than defer to agency decision-making, is a factor that weighs in Liquidia's favor, as the plain language of the law reads that this type of exclusivity is meant to support innovation.

The FDA's "flip-flop." The timeline of the FDA's decision-making also raises questions about the agency's integrity and could set a precedent for the pharmaceutical industry, sources said.

"A lot of this could have been avoided if the FDA [decision] had happened when it was approved and not way later on," Tu said.

The FDA's exclusivity ruling "flip flopped," in Liquidia's words, from a previous agency finding. In a checklist from May 2022, when Tyvaso DPI was first approved, the FDA said the drug didn't qualify for three-year exclusivity.

These checklists, known as exclusivity summaries, are a standard part of the FDA's drug approval process. They're filled out by a regulatory reviewer and then signed by the head of the FDA department focused on the disease the drug treats.

In the Tyvaso DPI checklist, the FDA said "no" when asked whether the drug application required the review of clinical data other than to support a safety claim or the review of anything other than bioavailability or bioequivalence data.

"I do think that the FDA waiting so long to grant the [exclusivity] is unusual," said Emily Michiko-Morris, associate professor and associate director of the Center for IP Law & Technology at the University of Akron. "[But] typically, when you've got a case based on strange facts, the ruling in the case will be limited to the facts."

When it comes to the FDA changing its mind on whether the BREEZE study qualified the drug for NCI exclusivity, "[n]othing could be more arbitrary or capricious," Liquidia has argued.

But the FDA said that checklist didn't represent the agency's official decision—it was "simply the initial assessment of the Clinical Division"—and said the FDA fully explained its reasoning for granting the NCI exclusivity in an Aug. 16 letter to Liquidia.

For its part, cross-claimant United Therapeutics has also downplayed the FDA's "flip-flopping," saying the checklist was just a preliminary decision that didn't involve the FDA's Center for Drug Evaluation and Research Exclusivity Board.

If the agency is allowed to change its mind last-minute, as Liquidia would have it, that may set a difficult precedent for drugmakers seeking to break into new markets.

"What's weird to me is the timing of this," Tu said. "A lot of businesses just need to know, what are the risks? How should I plan out this thing? [Liquidia] invested a ton of money into getting this thing approved, and then, surprise, three years of exclusivity" is granted to the incumbent for its drug.

Company and agency responses. A Liquidia company spokesperson pointed *The Capitol Forum* to the company's filings in the case and said Yutrepia, which was approved before Tyvaso DPI, is more innovative and was developed earlier than United Therapeutics' drug.

"We would like to note that FDA's award of new clinical investigation exclusivity in this case rewards United Therapeutics for having erected a patent thicket," the spokesperson said.

The spokesperson said that "because United Therapeutics filed a Hatch-Waxman lawsuit against Liquidia (which it lost on the merits), they were able to delay final approval of Liquidia's product until after they received approval for their own 'me too' dry-powder treprostinil product. In turn, it was only because they were able to obtain approval for their 'me too' product first that they were awarded the three years of new clinical investigation exclusivity."

According to the spokesperson, "in this case, the new clinical investigation exclusivity—something Congress put into place to reward innovation—is actually keeping the innovator off the market and rewarding United Therapeutics for nothing more than having gamed the system by filing a meritless patent lawsuit."

The head of investor relations for United Therapeutics didn't respond to multiple requests for comment. An FDA spokesperson declined to comment.