

June 27, 2011

## In Dismissal of Hospital's Tying Claim Against Drug Manufacturer, Third Circuit Takes Narrow View of Direct Purchaser Requirement

In *Warren General Hospital v. Amgen Inc.*, No. 10-2778, 2011 WL 2321393 (3d Cir. June 14, 2011), the Third Circuit recently affirmed the dismissal of a hospital's claim against Amgen for alleged illegal tying of two blood-treatment drugs, pursuant to the Supreme Court's "direct purchaser" requirement for antitrust standing in a damages action under Section 4 of the Clayton Act. The decision reinforces the role of the direct purchaser rule as a limiting principle on the private enforcement of the federal antitrust laws.

The case involved application of the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which limits the universe of parties "injured" by anticompetitive prices and thus entitled to bring a private antitrust suit under Section 4 of the Clayton Act. Under *Illinois Brick*, only those who purchased directly from the defendant have standing to sue, even if overcharges were alleged to have been passed on by the direct purchaser to others. Since its inception, the direct purchaser rule has been criticized as unduly restricting private antitrust enforcement by barring claims brought by parties who suffer the ultimate economic impact of anticompetitive pricing. Indeed, many states have enacted legislation expressly permitting private damages claims by indirect purchasers under analogous state laws.

Despite this criticism, the Supreme Court has resisted efforts to carve out exceptions. For example, in *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), the Court rejected the argument—advanced against natural gas producers by various states as *parens patriae* for gas consumers—that the consumers, rather than the regulated utilities that purchased the gas and passed on 100 percent of an alleged overcharge, were the proper plaintiffs. According to the Court, the utilities who purchased natural gas from the defendants had sole standing to sue, despite their arguably diminished incentive to do so.

The *Warren General Hospital* case addressed direct purchaser standing for another type of downstream consumer. The plaintiff hospital sought to represent a class, composed of other hospitals, clinics, and care centers, that purchased drugs manufactured by Amgen. According to the complaint, Amgen had engaged in illegal tying of two of its drugs used for treating blood-cell deficiencies. Plaintiff alleged that Amgen possessed a dominant share of the market for its white-blood-cell drug, but faced fierce competition in the market for its red-blood-cell drug. Amgen allegedly tied the two products by offering rebates on the former based on quantities of purchases of the latter.

Although Amgen paid the rebates directly to the hospital, the hospital purchased drugs pursuant to contracts negotiated by a Group Purchasing Organization (GPO). The contracts were structured such that the hospitals would purchase drugs from wholesalers, not directly

from the manufacturers. And, in fact, the district court found that Warren General had made all of its purchases of the relevant drugs from an independent, publicly-traded wholesaler, AmerisourceBergen. The district court concluded that this arrangement deprived the hospital of standing under *Illinois Brick*.

On appeal, the hospital first argued that, based on the nature of its relationship with Amgen, it was in fact a direct purchaser. Specifically, the hospital alleged that it negotiated the value of the rebates directly with Amgen, that it communicated exclusively with Amgen about drug pricing and other issues, and that an Amgen representative serviced the hospital. Additionally, the hospital emphasized that Amgen paid the rebates directly to the hospital.

The Third Circuit rejected the hospital's argument that these allegations were sufficient to make it a direct purchaser within the meaning of *Illinois Brick*. The court focused on these facts: (1) that the hospital placed its orders through AmerisourceBergen; (2) that AmerisourceBergen maintained the right to set prices for the drugs; (3) that AmerisourceBergen, and not Amgen, delivered shipments to the hospital; and (4) that the hospital paid AmerisourceBergen directly and transmitted no funds to Amgen.

The Third Circuit held that, in a tying case, the inquiry must be whether the plaintiff purchased the tied product from the defendant, not whether the defendant provided the plaintiff with direct incentives to make the purchase. For the same reason, the existence of a contract between the hospital and Amgen establishing the terms of the rebate agreement was insufficient, particularly because the contract specified that drug purchases would be executed through a third-party wholesaler. The court noted that the complaint did not allege that the wholesaler was owned or controlled by either party.

Second, Warren General argued that *Illinois Brick* should be interpreted to convey standing on the "first harmed" direct purchaser. According to the hospital, AmerisourceBergen was not harmed because the hospital bore the full cost of the overcharge resulting from the alleged illegal rebate scheme. Recognizing this argument as a variant of the argument rejected by the Supreme Court in *Utilicorp*, the Third Circuit was unpersuaded. The question of actual injury, the court noted, was distinct from the issue of standing under Section 4, which the Supreme Court had resolved by adopting a bright-line rule based on the direct purchaser requirement.

Finally, the Court rejected Warren General's argument that none of the policy reasons underlying the direct purchaser rule would be advanced by denying it standing. The court held that, even in situations where downstream purchasers bear the brunt of an overcharge, allowing suits by indirect purchasers would still raise the specter of subjecting a defendant to multiple, inconsistent awards and "evidentiary complexities and uncertainties" involved in ascertaining how much of the overcharge was 'passed on' to the indirect purchasers." The court noted that even where 100 percent of an overcharge is passed on, direct purchasers can still be injured by reduced demand resulting from the overcharge. Thus, to read *Illinois Brick* as expansively as the hospital advocated would "force courts to engage in complex factual inquiries" that the direct purchaser rule was created to avoid."

The Third Circuit's decision accords with a similar case in the Ninth Circuit, *Delaware Valley Surgical Supply Inc. v. Johnson & Johnson*, 523 F.3d 1116 (9th Cir. 2008). There, a hospital

sought to bring price-fixing and monopoly claims under Section 4 against a medical supplies manufacturer. Although the hospital negotiated its own contract with the manufacturer, it purchased its products pursuant to a separate contract with an intermediary wholesaler. The Ninth Circuit held that the hospital lacked standing under the “sensible and straightforward” ‘bright line rule’ set forth in *Illinois Brick*.”

As these decisions make clear, the direct purchaser rule remains a strict limitation on standing in private antitrust suits.

\* \* \* \*

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Robert A. Atkins  
(212) 373-3183  
[ratkins@paulweiss.com](mailto:ratkins@paulweiss.com)

Andrew C. Finch  
(212) 373-3460  
[afinch@paulweiss.com](mailto:afinch@paulweiss.com)

Kenneth A. Gallo  
(202) 223-7356  
[kgallo@paulweiss.com](mailto:kgallo@paulweiss.com)

Jacqueline P. Rubin  
(212) 373-3056  
[jrubin@paulweiss.com](mailto:jrubin@paulweiss.com)

Moses Silverman  
(212) 373-3355  
[msilverman@paulweiss.com](mailto:msilverman@paulweiss.com)

Joseph J. Simons  
(202) 223-7370  
[jsimons@paulweiss.com](mailto:jsimons@paulweiss.com)

Aidan Synnott  
(212) 373-3213  
[asynnott@paulweiss.com](mailto:asynnott@paulweiss.com)

---

**NEW YORK**

1285 Avenue of the Americas  
New York, NY 10019-6064  
+1-212-373-3000

**BEIJING**

Unit 3601, Fortune Plaza Office  
Tower A  
No. 7 Dong Sanhuan Zhonglu  
Chao Yang District, Beijing 100020  
People's Republic of China  
+86-10-5828-6300

**HONG KONG**

12th Fl., Hong Kong Club Building  
3A Chater Road  
Central Hong Kong  
+852-2846-0300

**LONDON**

Alder Castle, 10 Noble Street  
London EC2V 7JU  
United Kingdom  
+44-20-7367-1600

**TOKYO**

Fukoku Seimei Building, 2nd Floor  
2-2, Uchisaiwaicho 2-chome  
Chiyoda-ku, Tokyo 100-0011  
Japan  
+81-3-3597-8101

**TORONTO**

One Yonge Street, Suite 1801  
Toronto, ON M5E 1W7  
Canada  
+1-416-504-0520

**WASHINGTON, D.C.**

2001 K Street NW  
Washington, DC 20006-1047  
+1-202-223-7300

**WILMINGTON**

500 Delaware Avenue, Suite 200  
Post Office Box 32  
Wilmington, DE 19899-0032  
+1-302-655-4410

---

*Contributing author: John H. Longwell*