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Illinois Brick Direct-Purchaser Rule Precludes Tying Claims by Hospital

Jeffrey May (Wolters Kluwer) · Friday, June 17th, 2011

The U.S. Court of Appeals in Philadelphia earlier this week reaffirmed the “bright-line” rule limiting federal antitrust standing to direct purchasers.

The court upheld dismissal ([CCH 2010-1 Trade Cases ¶77,043](#)) of an antitrust action brought by a small Pennsylvania hospital, which sought to represent members of a proposed class, composed of other hospitals, clinics, and care centers, that purchased drugs manufactured by Amgen Inc.

Under the *Illinois Brick* doctrine, the hospital lacked standing. The doctrine limits federal antitrust actions to suits brought by direct purchasers of the illegally overcharged good and not others in the chain of manufacturing or distribution.

The hospital unsuccessfully argued that it was a direct purchaser because (1) it had a direct relationship with Amgen and (2) it was the first “overcharged” purchaser in the chain of distribution.

The hospital purchased certain pharmaceutical products from an independent middleman wholesaler. As an indirect purchaser, it lacked standing to assert claims that Amgen violated federal antitrust law by “tying” the purchase of two of its drugs—Neupogen and Neulasta—to the sale of another Amgen drug—Aranesp.

According to the hospital, Amgen “tied” the purchase of its White Blood Cell Growth Factor (WBCGF) drugs to the purchase of its Red Blood Cell Growth Factor (RBCGF) drugs. Amgen allegedly offered the hospital discounts on purchases of its WBCGF drugs that were predicated on the hospital’s purchase of Amgen’s more expensive RBCGF drug. Absent the alleged tying scheme, the hospital claimed that it would have preferred to buy cheaper RBCGF drugs offered by Amgen’s competitors.

Direct Relationship with Manufacturer

The court rejected the hospital’s contention that it was a direct purchaser on the ground that it had a direct relationship with the manufacturer. The hospital alleged that the mechanics of the transactions between itself, the wholesaler, and Amgen revealed that it was the direct purchaser of the drugs. However, the hospital was the second purchaser in the chain of distribution. Although there might have been direct interactions between the manufacturer and the hospital relating to a challenged rebate program and the volume of the manufacturer’s drugs the hospital required, the

key question in an illegal tying claim was whether the plaintiff purchased the tied product from the antitrust defendant. In this case, the hospital did not, the court concluded.

Policy Rationales

The court said that, while it was sympathetic to the hospital's complaints regarding Amgen's "rebate program," application of the U.S. Supreme Court's bright line rule was appropriate based on the policy rationales underpinning *Illinois Brick*. There was a possibility that the middleman might have been injured by Amgen's alleged actions. Thus, the risk of multiple liability was present.

Moreover, even if the middleman purchaser was unable or unwilling to bring a suit, that conclusion did not necessarily weigh in favor of giving the hospital standing. In addition, given the complexities of apportionment and the possibility of multiple recovery, the efficient enforcement of the antitrust laws favored application of the direct purchaser rule, according to the court.

The June 14, 2011, decision in *Warren General Hospital v. Amgen Inc.*, No. 10-2778, will appear at **CCH 2011-1 Trade Cases ¶77,484**.

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