

## 3rd Circ. Confirms Free Assignability Of Antitrust Claims

Law360, New York (October 4, 2016, 12:19 PM EDT) -- Antitrust claims are assets that should be freely assigned without impediment.

This is the key takeaway from a pair of decisions issued in the last few weeks by the U.S. Court of Appeals for the Third Circuit. Rejecting attempts to raise barriers to assignments of antitrust claims under contract principles, the court repeatedly held that federal antitrust principles support free assignability of claims.

Historically influential in antitrust jurisprudence, the Third Circuit's opinions will go a long way toward quelling attacks on the viability of antitrust claims filed by assignees of direct purchasers.



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### Wallach: Consideration Not Requirement for Assigning Antitrust Claims

In *Wallach v. Eaton Corp.*, issued Sept. 14, the Third Circuit addressed the validity of the direct antitrust claims brought by an indirect purchaser of component parts of "Class 8" commercial trucks, which had received an assignment of antitrust claims from a direct purchaser.[1] In accordance with the assignment, this indirect purchaser, Tauro Brothers Trucking, brought suit "in[] the shoes of" the direct purchaser from which it had received the assignment.[2]

Invoking contract interpretation principles, the defendants have argued that Tauro Brothers' claims were invalid due to lack of bargained-for consideration. The district court agreed, holding that Tauro Brothers' assignor had received insufficient consideration for a valid contract.[3]

Writing on behalf of the unanimous appellate panel in *Wallach*, Judge Cheryl Ann Krause began her analysis by observing that, while an indirect purchaser is barred from bringing federal antitrust claims in its own right under the U.S. Supreme Court's 1977 decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, an indirect purchaser may lodge a claim that has been validly assigned to it by a direct purchaser.[4]

Turning to the central questions on appeal, Judge Krause first rejected the defendants' suggestion that the court was required to either (1) apply the law of the state in which the assignment was effectuated, or (2) formulate a federal common-law rule based upon a fifty-state survey. Noting the complexity and inconsistency of such an approach, the panel agreed with Tauro Brothers that the Second Restatement of Contracts — under which an

assignment of a legal claim is valid if “written and express, ... even absent consideration” — should be used “as a guidepost to define federal common law” on this issue.[5]

Judge Krause then turned to the defendants’ argument (endorsed by the district court) that bargained-for consideration must be a prerequisite to the valid assignment of a federal antitrust claim as a matter of federal common law.[6]

The panel concluded that no such requirement is warranted. Focusing on the three antitrust-law policy goals enunciated in *Illinois Brick* — ensuring clarity in calculating damages, avoiding duplicitous litigation, and incentivizing private litigants not to let valid claims go stale — Judge Krause emphasized that the Wallach defendants’ proposed consideration requirement would either not promote, or would outright undermine, these three rationales.[7] In particular, “requiring consideration for the assignment of a federal antitrust claim could discourage private enforcement of the antitrust laws in derogation of *Illinois Brick*.”[8]

### **Hartig Drug: Antitrust Claims Arise by Statute, Not by Contract**

The Third Circuit issued its decision in *Hartig Drug Co. v. Senju Pharmaceutical Co.* on Sept. 7.[9] The lead plaintiff in the case, an Iowa-based pharmacy chain, purchased the medicated eyedrops Zymar and Zymaxid from a drug wholesaler that had, in turn, directly purchased them from the pharmaceutical firms that developed and manufactured them. [10] The wholesaler assigned to Hartig Drug any antitrust claims against the developers and manufacturers that the wholesaler had accrued by purchasing Zymar and Zymaxid that it later sold to Hartig Drug.[11]

The district court in *Hartig Drug* initially held Hartig Drug’s assignment to be valid on its face. However, in interpreting the supply contract initially signed between the manufacturer and the wholesaler, the court held that a so-called “anti-assignment clause” — “[t]his Agreement may not be assigned by either party without the prior written consent of the other party” — barred the wholesaler from assigning its federal antitrust claims.[12]

Vacating the district court’s order of dismissal on procedural grounds, the *Hartig Drug* panel cautioned the lower court not to confuse the source of the antitrust claims raised by Hartig Drug. Judge Kent A. Jordan, writing on behalf of the unanimous panel, stressed that “antitrust causes of action arise by statute” — in other words, “by operation of an extrinsic legal regime rather than by contract.”[13] Therefore, the wholesaler’s antitrust claims did not arise under the supply agreement, and were unaffected by terms governing that agreement.

### **Rule 12(b) Confusion Over Antitrust “Standing”**

In both *Wallach* and *Hartig Drug*, the Third Circuit reiterated that Federal Rule of Civil Procedure 12(b)(6) — and not Rule 12(b)(1) — is the appropriate mechanism for challenging the “standing” of an indirect purchaser that brings antitrust claims pursuant to an assignment by a direct purchaser. This is because the validity of such an assignment is relevant to whether such indirect purchasers have “statutory standing[, which] is inherently non-jurisdictional,” and not to Article III standing, which is jurisdictional.[14]

The distinction between Rules 12(b)(1) and 12(b)(6) becomes crucial in cases like these because “a 12(b)(1) factual challenge strips the plaintiff of the protections and factual deference provided under 12(b)(6) review,” thereby “invert[ing] the burden of persuasion” so that it rests upon the plaintiff.[15]

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***DISCLOSURE: Gregory Frank is co-counsel for the plaintiff in Hartig Drug Co. v. Senju Pharm. Co.***

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[1] Wallach v. Eaton Corp., \_\_\_ F.3d \_\_\_, \_\_\_, No. 15-3320, 2016 U.S. App. LEXIS 16796, at \*2-3 (3d Cir. Sept. 14, 2016).

[2] Id. at \*3-8, 15. The Wallach plaintiffs allege a conspiracy among component part manufacturers of Class 8 transmissions to monopolize the Class 8 transmission market. Id. at \*3-8.

[3] Id. at \*8 (discussing Wallach, 125 F. Supp. 3d 487, 492-94 (D. Del. 2015) (Robinson, J.)).

[4] Id. at \*8 n.5, \*13-14 (citing In re Fine Paper Litig. State of Wash., 632 F.2d 1081, 1090 (3d Cir. 1980)).

[5] Wallach, 2016 U.S. App. LEXIS 16796, at \*17-25 (citing Restatement (Second) of Contracts §§ 316-317, 324, 332 (Am. Law Inst. 1981)).

[6] As Judge Krause noted, federal antitrust law is one arena in which so-called "federal common law" remains relevant notwithstanding the Supreme Court's 1938 decision in Erie Railroad Co. v. Tompkins, 304 U.S. 64. See 2016 U.S. App. LEXIS 16796, at \*13 n.11.

[7] Id. at \*14-15, \*26-28.

[8] Id. at \*27.

[9] Hartig Drug Co. v. Senju Pharm. Co., \_\_\_ F.3d \_\_\_, No. 15-3289, 2016 U.S. App. LEXIS 16404 (3d Cir. Sept. 7, 2016).

[10] Id. at \*2-4.

[11] Id. at \*2-5. Hartig Drug alleges, inter alia, that the defendants unlawfully engaged in "product hopping" to forestall the introduction of generic alternatives to their eyedrops. Id.

[12] Hartig Drug, 122 F. Supp. 3d 202, 206-08 (D. Del. 2015) (Robinson, J.)

[13] Hartig Drug, 2016 U.S. App. LEXIS 16404, at \*31-33 & n.17.

[14] Wallach, 2016 U.S. App. LEXIS 16796, at \*9 n.9 (citing Hartig Drug, 2016 U.S. App. LEXIS 16404, at \*15-20).

[15] Hartig Drug, 2016 U.S. App. LEXIS 16404, at \*13-14, \*25 n.14 (citation omitted). As a practical matter, indirect purchasers such as the pharmacy chain in Hartig Drug invariably plead a sufficiently concrete injury in fact for Article III purposes. Id. at \*21-23.