PENN STATE HERSHEY: A CAUTIONARY TALE FOR ANTITRUST LITIGATORS

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I. INTRODUCTION

This article addresses a recent decision by the Court of Appeals for the Third Circuit, *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, 914 F.3d 193 (3d Cir. 2019) ("*Penn State Hershey*"), upholding the denial of attorneys' fees to the Commonwealth of Pennsylvania ("Pennsylvania") in an action filed by Pennsylvania and the Federal Trade Commission (the "FTC" or "Commission") to enjoin the proposed merger of two major Pennsylvania hospital systems, on the grounds that it would substantially lessen competition for general acute care inpatient hospital services in the four-county area surrounding Harrisburg.

The decision matters because attorneys' fees matter, not just to plaintiffs and their lawyers, but to the public interest. The ability to obtain attorneys' fees pursuant to fee shifting provisions, like Section 16 of the Clayton Act ("Section 16") under which Pennsylvania sought its fees, incentivizes lawyers to take cases on behalf of clients who could not otherwise afford the cost of litigation. Fee shifting also allows states to pursue complex, resource-intensive investigations into anticompetitive conduct that affects the lives of millions.

This is particularly true in healthcare markets, which are traditionally viewed as a matter of local concern falling within the states' policing powers. State Attorneys General have been persistently active in policing mergers in this arena. They have often joined the FTC in challenging healthcare mergers, as they have learned firsthand how large healthcare providers can increase their market power and thereafter impose significant price hikes on consumers without suffering the loss of patients.[2]

By declining to award Pennsylvania attorneys' fees in a case where the injunctive relief sought was granted, the appellate court established a precedent in the Third Circuit and persuasive authority elsewhere that could have far-reaching consequences for state Attorneys General who not only represent the interests of their states' "natural persons," municipalities, and public entities, through statutory *parens patria* authority, but also the general welfare and economy of the state.

2 See Brief of Amicus Curiae The States of California, Washington, Pennsylvania, Connecticut, Delaware, Illinois, Iowa, Kentucky, Maine, Maryland, Mississippi, Montana, Nevada, New Mexico, Oregon, and Tennessee, *St. Luke's Health Care System v. FTC and State of Idaho*, at 6 (9th Cir. 2014).

II. FEE SHIFTING IN ANTITRUST: A DEPARTURE FROM THE "AMERICAN RULE"

Although the American Rule, which governs most civil litigation in the United States, requires a party to bear its own legal costs unless a statute, contract, or court provides otherwise, certain laws that promote a public purpose — including claims brought pursuant to the federal antitrust statutes — include a fee shifting provision where the prevailing or "substantially prevailing" plaintiff may or shall receive reasonable attorneys' fees from the defendant.[3] Significantly, the first federal antitrust statute, the Sherman Act of 1890, was among the first statutes to pioneer the concept of fee shifting in American jurisprudence. [4] Its one-way fee shifting provision served as a model for legislation in other areas.[5]

Congress' decision to depart from the American Rule for antitrust actions is reflected in Section 4 of the Clayton Act ("Section 4"), which provides treble damages and "the cost of suit, including reasonable attorney fees" to a prevailing plaintiff in a civil damages action.[6] Section 16 governs injunctive relief under the Clayton Act and mandates that "[i]n any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee."[7] This attorneys' fee provision was added to Section 16 in 1976 in response to *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In that case, the Supreme Court held that federal courts lacked the power to award fees absent statutory authority, except in a few narrow circumstances. In response to *Alyeska*, Congress amended Section 16, noting that "the need for the awarding of attorneys' fees in [Section] 16 injunction cases is greater than the need in [Section] 4 treble damage cases. In damage cases, a prevailing plaintiff recovers compensation, at least. In injunction cases, however, without the shifting of attorneys' fees, a plaintiff with a deserving case would personally have to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect."[8] And Congress believed that "[a] prevailing plaintiff should not have to bear such an expense."[9]

III. TEXTUALISM AND THE RIGHT TO FEES UNDER SECTION 16

Despite the fact that the injunctive relief Pennsylvania had sought was granted and the merger abandoned, the Third Circuit determined the State should bear the expenses of litigation in *Penn State Hershey*. As background, in March 2015, the Boards of Penn State Hershey Medical Center and Pinnacle Health System, the two largest hospitals in the Harrisburg area, approved a plan to merge. Following an investigation, the Commission issued an administrative complaint alleging that the proposed merger violated Section 7 of the Clayton Act, which proscribes mergers whose effect "may be substantially to lessen competition, or tend to create a monopoly."[10] To maintain the status quo pending the outcome of the Commission's adjudication on the merits, Pennsylvania and the Commission sought a preliminary injunction in federal court pursuant to Section 16 and Section 13(b), which respectively authorize Pennsylvania and the Commission to seek injunctive relief. The district court denied this relief, discounting the Plaintiffs' geographic market analysis and concluding that there were many procompetitive benefits to consumers in the area should the merger occur. The Third Circuit reversed and remanded the case, directing that the merger be enjoined as a preliminary step, pending the Commission's adjudication on the merits. In response to the Third Circuit's decision, the hospitals abandoned the merger. Thereafter, the Commonwealth moved for attorneys' fees over the opposition from defendants.

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3 While attorneys' fees are discretionary under some statutory schemes, they are mandatory under others, including the federal antitrust statutes.

4 See Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51 (1988), available at: http://ir.lawnet.fordham.edu/flr/vol57/iss1/2.

5 The concept of fee-shifting, a vestige of early English rule that did not survive the American Revolution, returned to the American landscape through three pioneering federal statutes: voting rights legislation (1870), the Interstate Commerce Act (1887), and the Sherman Act (1890). Since that time, hundreds of federal statutes have adopted fee shifting provisions. See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 Law and Contemporary Problems 9-36, at 25 (Winter 1984), available at: https://scholarship.law.duke.edu/lcp/vol47/iss1/2; see also Edward D. Cavanagh, *Attorneys' Fees in Antitrust Litigation: Making the System Fairer*, 57 Fordham L. Rev. 51 (1988), available at: http://ir.lawnet.fordham.edu/flr/vol57/iss1/2.

6 15 U.S.C. § 15.

7 15 U.S.C. § 26.

8 H. R. REP. NO. 94-499, PT. 1, AT 19, 20.

9 *Id.*

10 15 U.S.C. § 18.

The district and Circuit courts each denied Pennsylvania's motion for attorneys' fees, but on wholly different grounds. The district court held that the Commonwealth was entitled to seek fees despite the fact that the appellate court's granting of preliminary injunctive relief had been made pursuant to Section 13(b), a statute that can only be enforced by the Commission and which does not contain a fee shifting provision. The court reasoned that because Congress had drafted Section 16 to protect plaintiffs from "the very high price of obtaining judicial enforcement of . . . the antitrust laws," it would follow along the spirit of Section 16 to allow Pennsylvania to seek fees regardless of whether Section 13(b) had formally served as the basis of relief.[11] After all, the district court observed, Pennsylvania brought a lot to the table by providing "supplemental knowledge of the region and by assuming the role of advocate on behalf of Pennsylvania citizens."[12] Refusing to award fees would "disincentivize" the participation of states from seeking to enforce antitrust laws.[13] Additionally, the district court stressed, it was in the interest of judicial economy to allow Pennsylvania to seek fees even though the relief granted formally occurred pursuant to Section 13(b). Otherwise states would pursue their own injunctive relief in separate proceedings that would ultimately involve "repetitive arguments" and would be "highly inefficient."[14]

Nonetheless, the district court denied Pennsylvania attorneys' fees on the grounds that it had not "substantially prevailed" under Section 16, as the statute's plain language requires. First, the court observed that even if the Third Circuit's grant of a preliminary injunction had catalyzed the hospitals to abandon their merger, voluntary cessation "lacks the necessary judicial imprimatur" because "the change in the parties' legal relationship must be the product of judicial action" to support a finding of prevailing-party status.[15] To this extent, the district court extended the U.S. Supreme Court's rejection of the "catalyst theory" in *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, a case that addressed the fee-shifting provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act, to antitrust actions under Section 16. Consistent with *Buckhannon*, the district court stressed that only "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees."[16] Here, however, the plaintiffs had merely convinced the Third Circuit that there was a likelihood of success on the merits. Because a "likelihood does not mean more likely than not,"[17] there had been no resolution of any merit-based issue. Given those facts, fee shifting was inappropriate. By holding that preliminary injunctive relief under Section 16 cannot provide a basis for attorneys' fees because "likely success" does not meet the merits requirement, the district court amended the statute's plain language. Section 16 does not delineate between permanent and preliminary injunctive relief; yet, under the district court's analysis, attorneys' fees would be inappropriate in preliminary injunction cases.

In contrast, the Third Circuit's decision to deny attorneys' fees to Pennsylvania was premised on the textualist argument the district court rejected, namely, that the State was wholly foreclosed from seeking attorneys' fees because preliminary injunctive relief had been granted under Section 13(b) and not Section 16, which only awards fees to a plaintiff who substantially prevails "in any action *under this section*."[18] Since no relief had been awarded under Section 16, no party had prevailed "under th[at] section."

The Third Circuit focused on the different standards for granting preliminary injunctive relief under Section 13(b) and Section 16. Section 13(b) involves a far more deferential standard, which requires courts to assess only two factors when considering whether a preliminary injunction would be in the public's interest: First, the Commission's likelihood of success on the merits, and second, the weight of the equities.[19] Under a Section 16 analysis, however, the four-part traditional equities test is used for determining the appropriateness of preliminary injunctive relief. Thus, in addition to what the Commission must prove under Section 13(b), a plaintiff must also make a showing of irreparable injury and that the balance of equities tip in its favor. In *Penn State Hershey*, the parties and the appellate court consistently evaluated the merits of preliminary injunctive relief under Section 13(b)'s more deferential two-part standard. Even when it came to legal analysis, it was clear — to the Third Circuit at least — that the only cause of action that had prevailed was the Commission's.

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11 *Fed. Trade Comm'n v. Penn State Hershey Med. Ctr.*, No. 1:15-CV-2362, 2017 WL 1954398, at *3 (M.D. Pa. May 11, 2017) (quoting H.R. Rep. No. 94-499, at 19-20 (1976)).

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at *6.

16 *Id.*

17 *Id.* (quoting *Singer*, 650 F.3d at 229).

18 15 U.S.C. § 26 (emphasis added).

19 *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 337 (3d Cir. 2016).

The Third Circuit could have recognized that preliminary injunctive relief was equally warranted under Section 16, or that while the two modes of preliminary injunctive analyses are distinct, they are not so different as to compel a denial of attorneys' fees. Had the Third Circuit included a single line in its decision recognizing that the Governments had prevailed under Section 13(b) *and* Section 16, the Commonwealth would have likely had a claim to its fees. To this extent, the denial of fees reads like an unnecessary consequence of taking the road easiest to travel: a two-part analysis rather than a four-part one.

IV. CONCLUSION

Penn State Hershey should serve as a cautionary tale to plaintiffs who join in FTC actions. When the relief a litigant seeks can be achieved through two modes of analyses, one of which is simpler than the other, courts often will take the simpler road. Under the rule established in *Penn State Hershey*, that decision will cost plaintiffs their fees even when the Section 16 claims arise from the same facts that support the Court's Section 13(b) analysis and even when the state co-counseled the case.

Penn State Hershey should compel states to make clear that the anticompetitive harms alleged not only support a finding of injunctive relief under the Commission's more deferential permissive Section 13(b) standard, but also the more exacting Clayton Section 16 standard. This would preempt the kinds of arguments that the defendants in *Penn State Hershey* made in their Opposition to Pennsylvania's motion for attorneys' fees, namely, that Pennsylvania had not only failed to satisfy the more exacting Section 16 standard, but had also failed to articulate that standard at any point in the litigation.[20] Going forward, state attorneys general should remind the courts that they bring important knowledge of local markets and the effect of anticompetitive conduct on those markets when seeking injunctive relief and fees under Section 16 — knowledge that courts must account for when issuing their orders.

20 See Defendants' Opposition to the Commonwealth of Pennsylvania's Motion for Attorneys' Fees and Cost, at 3–5.

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