No statutory basis for Pennsylvania’s attorney fee request in hospital merger challenge

AntitrustConnect Blog
January 28, 2019

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Please refer to this post as: Jeffrey May, ‘No statutory basis for Pennsylvania’s attorney fee request in hospital merger challenge’, AntitrustConnect Blog, January 28 2019, http://antitrustconnect.com/2019/01/28/no-statutory-basis-for-pennsylvanias-attorney-fee-request-in-hospital-merger-challenge/

It just got more difficult for states to recover attorney fees when challenging mergers jointly with the Federal Trade Commission. If an injunction is issued under Sec. 13(b) of the FTC Act to block the merger, then a state joining the FTC in a suit to block the merger is foreclosed from seeking attorney fees and costs pursuant to a recent Third Circuit decision.
The U.S. Court of Appeals in Philadelphia has held that the Commonwealth of Pennsylvania did not have a statutory basis under Sec. 16 of the Clayton Act to recover attorney fees and costs in its joint challenge, along with the FTC, to the merger between Penn State Hershey Medical Center and PinnacleHealth System. The parties abandoned the merger after an injunction was issued, and that injunction was issued under Sec. 13(b) of the FTC Act, which has a lower evidentiary bar than Sec. 16 of the Clayton Act. Assuming without deciding that Pennsylvania was a prevailing party, the appellate court explained that the commonwealth prevailed under Sec. 13(b) of the FTC Act, which does not provide for attorney fees, and not Section 16 of the Clayton Act, which does.

A decision denying the request for attorney fees and costs was affirmed, but the appellate court noted that the lower court went too far in its analysis. The lower

court had ruled that Pennsylvania was not foreclosed from seeking attorney fees under Sec. 16 of the Clayton Act.

In 2016, the Third Circuit ruled that a preliminary injunction pending the outcome of an FTC administrative proceeding was appropriate in this case. The antitrust enforcers had claimed that the combination of the two health care providers would substantially reduce competition in the area surrounding Harrisburg, Pennsylvania, and would lead to reduced quality and higher health care costs for the area's employers and residents. The parties subsequently dropped the proposed merger.

Later, the state moved for $1,033,355.50 in attorney fees and $160,072.76 in litigation costs as a prevailing party. The district court held that Pennsylvania was not a plaintiff who substantially prevailed under the Clayton Act. The lower court went on to say that a state or another individual plaintiff who partners with the FTC to argue under Section 13(b) of the FTC Act to block a merger was not barred from seeking attorney fees under Section 16 of the Clayton Act. Thus, the state was not foreclosed from seeking attorney fees under the Clayton Act.

According to the appellate court, once the district court concluded that the injunction was ordered under Sec. 13(b) of the FTC Act and not Sec. 16 of the Clayton Act, its inquiry should have ended. The appellate court said it was not persuaded that the legislative history of the Clayton Act supported the district court's conclusion that the fee-shifting provision of the Clayton Act could be extended to cover an action for injunctive relief under another statute. There was no basis for extending the fee-shifting provisions of the Clayton Act to a claim raised and adjudicated under the FTC Act, in the appellate court's view.

The appellate court also pointed out that the district court ruled that the termination of the merger did not render the commonwealth a prevailing party because the injunction itself did not terminate the merger and, even though the injunction motivated Hershey and Pinnacle to drop the deal, the U.S. Supreme Court had rejected the so-called "catalyst theory" of prevailing-party status. It also noted the lower court supported its decision on the ground that the appellate court's ruling was not a grant of relief "on the merits" as required for prevailing-party status. Because it was not necessary to consider these determinations, which were challenged by Pennsylvania, the appellate court said that it would leave for another day the questions of whether the Supreme Court's rejection of the catalyst theory controls claims for fees under Sec. 16 of the Clayton Act and whether a preliminary injunction entered pursuant to that section can constitute relief "on the merits."

The January 23, 2019, decision is *FTC v. Penn State Hershey Medical Center*, No. 17-227.

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