27 Sep 2019

Office of the Attorney General
Strawberry Square
14th Floor
Harrisburg PA 17120

3242

Dear Attorney General's Office

Here are a few comments on Attorney General's Proposed Rulemaking, 37 Pa. Code, Ch. 311, pertaining to unfair Market Trade Practices (49 Pa.B. 3993 (Aug. 31, 2019). I make these comments as an individual and scholar of the antitrust laws. I do not represent the University of Pennsylvania or any other client.

311.2.23 vii. The provision uses the term "actual monopolization" and "actual monopoly power." Section Two of the Sherman Act governing monopolization does not include the term "actual." The proposed rule provides no guidance as to what "actual" adds to the Sherman Act definition and may be construed to be a limitation. Therefore, the term "actual" should be deleted or a clarification of its purpose be provided.

311.9 (b). The provision provides that any prior judgment shall be "prima facie" evidence in a subsequent action. This is modeled on the original version of the Clayton Antitrust Act,15 U.S.C. § 16. However, the both federal law and Pennylvania law have changed since passage of that original provision so that prior judgments can now be used as collateral estoppel without regard to "mutuality of the parties." See, § 65:94.Mutuality of estoppel for res judicata or collateral estoppel, 10 Standard Pennsylvania Practice 2d § 65:94 ("Mutuality, however, is no longer a requirement for raising collateral estoppel in Pennsylvania"); Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979). After Parklane, § 16 was amended to assure that its original purpose of expanding a private parties rights was not read as a limitation on the broader rights granted by Parklane Hosiery. It includes the following additional language: "Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel...15 U.S.C.A. § 16. The additional language contained in the Clayton Act should be added to the Rule. See 2 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶318b,c,d (4th ed. 2015).

311.9 (c). Provides that both notice and the consent of the OAG is required before ant settlement or release of a class action can be place before a court for approval. This conflicts with a federal statute and, for the reasons discussed below, should be amended to harmonize with the federal statute. The federal Class Action Fairness Act ("CAFA") requires notice to the OAG of any class action settlement, but, instead of consent, provides opportunity for the OAG to object, It also requires that more information be provided to the OAG than is required by the proposed rule. It provides:

> **(b) In general.**--Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of--
> **(1)** a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);
> **(2)** notice of any scheduled judicial hearing in the class action;
> **(3)** any proposed or final notification to class members of--
> **(A)(i)** the members' rights to request exclusion from the class action; or
> **(ii)** if no right to request exclusion exists, a statement that no such right exists; and

(B) a proposed settlement of a class action;
(4) any proposed or final class action settlement;
(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;
(6) any final judgment or notice of dismissal;
(7)(A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or...

28 U.S.C.A. § 1715 (West)

The reason affirmative consent should not be required is that experience under CAFA is that state attorney generals generally do not act at all in response to the notice, except in cases of egregiously inadequate settlements. The Rule would require the OAG to maintain an apparatus that would be required to respond to all class action settlements asserting claims under the act as interpreted by the Rule. Rather than affirmative consent, the Rule should, like CAFA, provide a right of objection to the settlement in the pending action. Many current federal antitrust class actions currently bring claims under many different state laws as well, particularly for indirect purchasers in states having state laws permitting indirect purchaser antitrust claims. These claims are generally settled at once. The current provision would preclude a class-wide settlement of indirect purchaser claims including Pennsylvania residents and substantially frustrate the other provisions of the Rule, especially those giving indirect purchasers standing. Little is lost in requiring notice and providing opportunity for an OAG objection rather than affirmative consent. An objection by the OAG will carry great weight, especially as such objections have historically been made only after much consideration and restraint under CAFA. If the consent provision is not removed in favor of notice and opportunity to object, then a twenty day time limit should be included, so that the OAG would be required to provide its consent within twenty days of notice and that, if such consent was not forthcoming within twenty days, consent is assumed. However, the latter proposal would continue to conflict with the CAFA and add great complication to resolution of class actions brought in federal court under the Rule. The proposed Rule also likely conflicts with Rule 1714, Pa. Rules Civ. Pro. conferring the right of approval of a class action settlement on the court.

Sincerely,

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