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Counsel Fees

Staples Doesn't Owe States Attorneys Fees on Blocked Merger

Pennsylvania and Washington, D.C. can't require Staples Inc. to reimburse costs they incurred to scuttle the office supply chain's proposed \$6.3 billion merger with Office Depot Inc., but the decision isn't likely to stop states from getting involved in future federal cases (*FTC v. Staples, Inc.*, D.D.C., Civil Action No. 15-2115 (EGS), 2/28/17).

Pennsylvania and D.C. joined the Federal Trade Commission in suing to block the merger in December 2015. They succeeded in convincing U.S. District Judge Emmet Sullivan to enjoin the deal in May 2016, and he held in a Feb. 28 order that Pennsylvania and D.C. can't recover counsel fees for their efforts. Pennsylvania and D.C. sought to recover around \$176,000 for participating in the case.

Sullivan's decision is "is quite unlikely to deter states or D.C. from joining the FTC (or DOJ) in investigating and challenging mergers going forward," Wiggin & Dana LLP partner Robert Langer told Bloomberg BNA.

Fees Not Driving Force. Langer, a former Connecticut Assistant Attorney General for antitrust and consumer protection, said that recovering fees isn't the driving

force behind a state's decision to join the FTC in merger cases. "State attorneys general undertake sovereign enforcement for the public good and in the public interest," he said. The benefits to states of investigating and suing with the FTC, rather than under their own antitrust and consumer protection statutes, "almost always will outweigh the risks of not recovering the costs of the action."

Sullivan denied Pennsylvania and D.C.'s motion for fees and costs because he issued his preliminary injunction under the FTC Act, which does not provide for counsel fees to prevailing parties. Pennsylvania and D.C. said they were owed the reimbursement under the Clayton Antitrust Act, which allows plaintiffs to recover fees.

The FTC, Pennsylvania and D.C. sued to block the deal to give the federal enforcers time to litigate whether the remaining office superstores would harm competition if the merger went through. When Sullivan issued the injunction last year, the parties abandoned the deal rather than proceed through FTC litigation.

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The court's opinion is at <http://src.bna.com/mDA>.