

ARTICLE

THE STRUGGLE FOR HERSHEY: COMMUNITY ACCOUNTABILITY AND THE LAW IN MODERN AMERICAN PHILANTHROPY

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In the late summer of 2002, the Pennsylvania charitable trust that controls and owns most of the Hershey Foods Corporation put this American corporate icon and one of the world's leading food and confectionary conglomerates up for sale. The Hershey Trust, whose legal beneficiary is the local Milton Hershey School for poor and underprivileged children, told workers, managers and the press that it sought to diversify its investment portfolio long concentrated in Hershey Foods stock, and “unlock the value”¹ of its controlling shares in Hershey Foods by taking bids for all of its shares in the company.

The Hershey Trust's sudden action sparked a community-wide rebellion in and around Hershey, Pennsylvania, that allied workers and citizens, unions and company managers and retired business leaders, judges, legislators and state officials. It provoked national and international media coverage and

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1. Bill Sulon, *Hershey Foods Furor; Trustees Pledge Goal of Protecting Community*, PATRIOT-NEWS (Harrisburg), July 26, 2002, at A1 [hereinafter Sulon, *Trustees Pledge*].

intensive debate throughout the American nonprofit sector. And it incited a sharp judicial, legislative and political struggle that scuttled the Trust's diversification plans.

To whom are charitable organizations accountable? The broad public? Their defined beneficiaries? The communities in which they work and invest, which may be directly and severely affected by their actions? State regulators, judges, legislatures and federal tax authorities? The struggle for Hershey directly illuminates multiple and conflicting notions of charitable accountability and the roles of community, courts, legislatures and state legal officials in balancing and resolving problems of accountability when the interests of charities, communities and beneficiaries seem to conflict.

These are complex, sensitive and controversial questions, and they have arisen with ever stronger force as philanthropic organizations throughout the United States—particularly charitable trusts and private foundations—take steps to diversify their holdings to cope with declining investment returns and volatile markets.² Such issues of philanthropic privilege and accountability are also particularly timely as regulators, the press and the public criticize American philanthropic and charitable organizations for inappropriate uses of their power and privilege, both in their public activities and in their internal operations.³

This Article explores these issues through the lens of one of the most important cases to have addressed these questions of charity, philanthropy and community accountability in decades. The Hershey case also illuminates the capacities, strengths and weaknesses of state executive, judicial and legislative authority over nonprofit institutions.

The first of these issues is the traditionally powerful, yet often highly political roles of state attorneys general and other state authorities in the oversight of charitable organizations. In Hershey and several other recent disputes, state attorneys general have broadly defined their supervisory and enforcement roles. In the case of charitable trusts, traditional doctrine has generally limited the attorneys general to ascertaining that trustee actions are permitted by, and not inconsistent with, the underlying trust instrument, and safeguarding against fraud. In Hershey and other recent cases, attorneys general have expanded their supervisory and enforcement inspection beyond

2. David Bank, *Foundations Feel the Pinch: Stock Plunge Cuts Portfolios and Alters Budgets, Strategies*, WALL ST. J., July 29, 2002, at A6.

3. See Jim Rutenberg, *A Foundation Travels Far from Sesame Street*, N.Y. TIMES, Sept. 6, 2002, at C, available at 2002 WL 26114614; Stephanie Strom, *New Equation for Charities: More Money, Less Oversight*, N.Y. TIMES, Nov. 17, 2003, at F1.

these relatively narrow bounds, exploring the negative effects of charitable and philanthropic activity on communities and the public that go well beyond safeguarding trustee fidelity to fiduciary duty and the interests of beneficiaries that regulators are traditionally required to safeguard.

The second problem is the role of the courts in disputes involving charitable organizations and community impact. In *Hershey*, a local court not only acquiesced in an expanded view of state regulatory authority but went still further, not only reviewing the actions of trustees and state officials, but seemingly becoming close to direct supervisors of trust activity. The *Hershey* court arguably also redefined and expanded the legal duties of charitable fiduciaries such as the *Hershey Trust* by seemingly requiring a consideration of the impact on a particular community by charitable trustees as well as the more traditional focus of the impact of and interests of defined beneficiaries and fidelity to a trust deed.

Finally, the *Hershey* case distinctly illustrates the danger of legislative overreaction to the significant community and public impact of charitable decisions. That overreaction can include legislation that bars certain transactions involving charitable organizations, and substantially broadens the duties of charitable organizations well beyond traditional bounds. This, too, occurred in the *Hershey* case, potentially a long-term result of a specific dispute that may discourage certain forms of charitable and corporate activity into the future.

American and British scholars have long provided exceptionally useful insights into the issues of charitable and philanthropic duty, particularly on the fiduciary duties of charitable organizations and the appropriate role of local and federal regulators.⁴ This Article, however, takes a somewhat different approach: Through a close examination of the *Hershey* dispute, a major, recent case in this area that brought these issues before the American public

4. See generally MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION (forthcoming 2004) [hereinafter FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS]; NORMAN SILBER, A CORPORATE FORM OF FREEDOM: THE EMERGENCE OF THE NONPROFIT SECTOR (Robert W. Gordon & Margaret Jane Rodin eds., 2001); Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400 (1998) [hereinafter Brody, *Fiduciary Law*]; James Fishman, *Improving Charitable Accountability*, 62 MD. L. REV. 218 (2003); Marion R. Fremont-Smith, *Duties and Powers of Charitable Fiduciaries: The Law of Trusts and the Correction of Abuses*, 13 UCLA L. REV. 1041 (1966); Kenneth Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433 (1960); Mark Sidel, *The Nonprofit Sector and the New State Activism*, 100 MICH. L. REV. 1312 (2002); Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement* (Sept. 2003) (unpublished draft, on file with author) [hereinafter Brody, *Whose Public*].

in particularly evocative ways, this Article seeks to provide fresh insights into the complex struggles that underlie these debates.

Part I outlines the intertwined roles of law and community rebellion when the Hershey Trust decided to sell Hershey Foods in 2002. Hershey also illuminates the advantages and disadvantages, the strengths and weaknesses, in the institutional roles played by state attorneys general, state courts, and state legislatures in the regulation of charitable organizations. Part II examines the roles of those key actors in the light of Hershey, particularly in managing the problems that arise when the interests of charitable beneficiaries and the interests of communities seem to diverge. It is in this section where I sometimes sharply critique the role of state regulators, the judiciary and the legislature—particularly the legislature—in the Hershey case.

Part III examines how the problems of fiduciary duty and community impact have been analyzed and resolved in a recent and somewhat similar dispute in Britain, a jurisdiction that provides the antecedents to our law of charitable duties. In that recent case that directly raised problems of trustee duty and community impact, English law mandated a somewhat different result, provoking comparisons that may prove interesting. I conclude with a summary of the interventions in the Hershey case, and with a cautious defense of the role of the state regulator and judiciary in these complex matters.

I. HERSHEY, PHILANTHROPY, AND THE ROOTS OF COMMUNITY REBELLION

A. Hershey, the Hershey Institutions, and the Building of a Community, 1900-1980

The roots of the 2002 conflict over Hershey have their origins in decisions made by one of America's most prominent philanthropists in the early part of the twentieth century. In the early twentieth century, Milton Hershey moved his new chocolate and confectionary firm from Philadelphia to the small central Pennsylvania town of Derry. There his factories, all belonging to Hershey Foods Company, grew to employ over 6,000 workers. "To entice workers," one journalist wrote, Milton Hershey conceived "a model town. Hershey provided utilities, schools, clean streets, a bank, stores, an amusement park, a beautiful theater, lush gardens—'everything a town would need. . . .' It was a feudal kingdom—a benevolent one, but a kingdom nonetheless."⁵

5. Monica von Dobeneck, *Townpeople Wait, Wonder: Will Hershey Still Be Hershey?*, PATRIOT-

In 1909, Milton Hershey and Catherine Hershey devolved virtually all ownership in Hershey Foods to a charitable trust formed to support and operate the Milton Hershey School for poor and underprivileged children.⁶ The Trust is administered by its trustee, the Hershey Trust Company, which is managed by its Board of Directors. The Trust manages a wide array of Milton Hershey's charitable endeavors.⁷

For seven decades the Hershey Trust managed the Milton Hershey School, owned a controlling interest in the Hershey Foods Corporation, and dispensed philanthropic largesse through several other Hershey philanthropic vehicles in and around the town that Milton Hershey built. This history has never been free of conflict, particularly over the Milton Hershey School. That conflict has often involved the local court, which would hear the Hershey dispute in 2002, in direct, detailed supervision of trust activities.

In recent decades, for example, the Milton Hershey School Alumni Association, a group of activist School graduates, has alleged that the Trust condoned mismanagement and abuse and failed to conform to its fiduciary duties in operating the School. These matters came to a head in the late 1990s, when the Hershey Trust proposed devoting \$75 million in surplus trust income to establish a teacher-training institute. That *cy pres* petition to the local court—the same local court that would be asked to intervene in the Trust's plans to sell Hershey Foods in 2002—brought vociferous opposition from the Alumni Association, which opposed any derogation from support for the Hershey School in Milton Hershey's original and limited trust deed. Eventually the local court barred the Trust's plans.⁸ Conflict involving the

NEWS (Harrisburg), July 28, 2002, at A1.

6. For additional information on Milton Hershey, Hershey Foods, the Hershey Trust, and the Milton Hershey School, see generally JOEL GLENN BRENNER, *THE EMPERORS OF CHOCOLATE: INSIDE THE SECRET WORLD OF HERSHEY AND MARS* (2000); JAMES D. McMAHON, *BUILT ON CHOCOLATE: THE STORY OF THE HERSHEY CHOCOLATE COMPANY* (1998). Hershey Foods' brief biography of Milton Hershey and history of the company is at <http://www.hersheys.com/about/milton.shtml> (last visited Nov. 8, 2003).

7. The same Board of Directors managed the Hershey Trust Company and the Milton Hershey School until the debacle in the Summer of 2002. As the Attorney General for the Commonwealth of Pennsylvania put in his brief opposing a lifting of the court-imposed injunction, "[a]lthough the School is separately incorporated, the same individuals direct the affairs of both the School and the Trust Company; they are responsible for the administration of all the assets comprising the trust, as well as for the implementation and oversight of the School's charitable mission." Brief for Appellee Opposing Appellants' Application for Suspension of Injunction Pending Appeal at 6-7, *In re Milton Hershey Sch. Trust*, 807 A.2d 324 (Pa. Commw. Ct. 2002) (No. 2111 C.D. 2002), available at http://www.attorneygeneral.gov/ppd/charity/PDF/Opp_Appellants_applfor_Suspension.pdf (last visited Oct. 21, 2003) [hereinafter Brief for Appellee Pending Appeal]. For clarity both Boards will be referred to in this article as the Trust or as Hershey Trust.

8. See *In re Milton Hershey Sch. Trust*, No. 712-1963, slip op. at 2 (Pa. Ct. Com. Pl. Dec. 7, 1999)

Trust, the School and the Alumni Association became so intense that in 2000, the governing boards of the School and the Trust engaged former Pennsylvania Governor and United States Attorney General Dick Thornburgh and his law firm to investigate the Boards' compliance with their fiduciary duties under Milton Hershey's Deed of Trust.⁹

B. Philanthropic Diversification and the Roots of Conflict, 1980-2001

For years the Hershey Trust's controlling ownership in Hershey Foods helped to insulate America's leading confectionary and chocolate enterprise from takeover pressures, enabling the company to strengthen its core businesses and expand as one of America's iconic companies.¹⁰ But in the early 1980s about 80% of the Hershey Trust's assets remained in Hershey Foods' stock. The Trust began to consider that its very substantial investment in Hershey Foods, a legacy of its history and commitment to the company and the region, might not be entirely appropriate in the light of modern financial duties and the dangers of dependence on the commercial prospects of one company. State law did not then require reconsideration of diversification by charitable trusts; for years, until 1999, Pennsylvania statutes did not require charitable trusts to diversify their portfolios, and even when that change occurred, the Hershey Trust was exempted from the diversification mandate.¹¹

In the 1980s, however, the Trust began a process of gradual diversification from Hershey Foods stock of its own accord. It gradually reduced the value of its portfolio locked into Foods shares, bringing the Trust's holdings in Hershey Foods from about 80% of the Trust's assets in the

(on file with author).

9. The Thornburgh team investigated many of the most controversial matters dividing the School and Trust from its alumni: the intent of the trust settlers, the definition of beneficiaries under the Deed of Trust, funding of the Milton S. Hershey Medical Center, the School's education program, and other issues, concluding that "the law and the Deed of Trust give the Managers broad discretion to manage the School and administer the School Trust. . . . [And] the [School's] Managers have conducted their affairs faithful to the Deed of Trust and consistent with fiduciary standards." KIRKPATRICK & LOCKHART LLP, SUMMARY OF FINDINGS AND CONCLUSIONS OF THE SPECIAL COUNSEL 15 (2002) (on file with author). The Thornburgh report is reprinted at www.mhs-pa.org, along with other documents in the dispute. On the longstanding and bitter dispute between the Alumni Association and the directors of the School and Trust, see Catherine Gewertz, *Alumni, Administrators Lock Horns at Hershey School*, EDUC. WK., Dec. 13, 2000, at 12, 13.

10. David Bank, *H-P Case Illustrates Clout of Foundation Holders*, WALL ST. J., Dec. 24, 2001, at C1.

11. Pennsylvania law required appropriate diversification by charitable trusts beginning in 1999, when title 20, section 7204(a) of the Pennsylvania Consolidated Statutes was enacted. See 20 PA. CONS. STAT. § 7204(a). But that diversification requirement exempted charitable trusts formed before the effective date of the legislation (such as the Hershey Trust). See 20 PA. CONS. STAT. § 7204(b).

early 1980s to 52% of the Trust's assets in mid-2002.¹² A substantial portion of the Trust's diversification came from stock repurchases by Hershey Foods from the Hershey Trust, amounting to some 41.2 million shares of Foods stock worth about \$1.2 billion.¹³ In retrospect, a series of then-isolated developments serve as guideposts toward the conflict over rapid, wholesale Trust diversification that erupted in mid-2002.

In October 1999, Hershey Foods acted again to assist the trustees in their gradual diversification away from Foods stock by adopting a \$200 million stock repurchase program.¹⁴ Hershey Foods accessed that fund in February 2002 to repurchase \$100 million of the Trust's Hershey Foods stock.¹⁵ And in 2000, according to the *Wall Street Journal*, Hershey Foods had "adopted a 'poison pill' shareholder-rights plan . . . to block an unwanted sale."¹⁶ Beginning in the 1990s, the Hershey Trust also began to diversify board membership in order to avoid conflicts of interest with the local Hershey entities. By the time a new Hershey Foods chief executive was appointed in 2001, he was no longer automatically appointed to the Trust Board. This served to avoid conflicts of interest between Hershey Foods and the Trust, but it also further separated Hershey Foods from internal Trust discussions and decision-making on diversification of Trust assets.¹⁷

In 2001 and 2002, Hershey Foods sought to focus on "optimiz[ing] shareholder value" when the shareholders were dominated by the Hershey Trust. Foods undertook a "value-enhancing strategy" that included the sale

12. See *infra* notes 68-73. Even with that diversification, the Trust still controlled about 77% of Hershey Foods stock.

13. Bill Sulon, *Hershey Must Be Sold, 3 Fiscal Analysts Agree*, PATRIOT-NEWS (Harrisburg), Aug. 26, 2002, at A1.

14. Press Release, Hershey Foods Corp., Hershey Foods Purchases Common Stock (Feb. 25, 2002) (on file with author).

15. *Id.* These shares were repurchased at the then-current market price, although Foods would later offer the Trust Company a considerably enhanced buyback option at a premium price. Some \$84.2 million remained available for stock repurchases in the summer of 2002, when the sale explorations were announced. See Hershey Form 10-Q filed Aug. 7, 2002, at <http://www.sec.gov/Archives/edgar/data/47111/000004711102000092/0000047111-02-000092-index.htm> (last visited Oct. 23, 2003).

16. Shelly Branch et al., *Sweet Deal: Hershey Foods Is Considering a Plan to Put Itself Up for Sale; Trust that Benefits a School Controls Firm, but Seeks to Diversify Its Holdings; A Blow to a Company Town?*, WALL ST. J., July 25, 2002, at A1, A6. The Journal noted that "[t]he move indicated to potential buyers that the company wasn't certain the trust would say no if approached with an offer. 'That was our first inkling of a difference of opinion or strategic vision between the trust and the company,' says one industry executive." *Id.* Yet it is also difficult to imagine that Hershey Foods would have adopted the plan without at least the acquiescence of its dominant shareholder.

17. Brett Marcy, *Cutting the Ties that Bind; Without Father, It's No Longer a Close-Knit Hershey Family*, PATRIOT-NEWS (Harrisburg), July 28, 2002, at A1.

of unrelated food and personal consumption businesses, cost-cutting, plant closings, workforce reductions, ending direct participation in cocoa processing and moving toward outsourcing cocoa powder, enhanced marketing, and expanding new distribution channels such as convenience stores and vending machines.¹⁸

This readjustment and cost-cutting also led to conflict with Hershey's unionized workers. When negotiations on health care and wages bogged down in the spring of 2002, nearly 3,000 unionized chocolate workers went on strike for forty-two days,¹⁹ as Foods executives reaffirmed the company's strategy of increasing shareholder value.²⁰ Those "shareholders" were dominated by the Hershey Trust. Increasing shareholder value to the controlling shareholder may have been one way to avoid pressures for more rapid diversification, while enabling the Trust gradually to diversify its holdings in Hershey Foods through the stock repurchase program and outside sales. In the summer of 2002, just before the epic battle erupted that pitted the Hershey Trust against the Hershey community, about 52% of the Trust's assets were invested in Hershey Foods stock, down from about 80% in the 1980s.²¹

18. See, e.g., *Hershey Foods Inc., Several Plants to Be Closed, Sales Force to Be Realigned*, WALL ST. J., Oct. 25, 2001, at B2. The "value-enhancing strategy" language comes from this article. Useful coverage of the Hershey strategy includes: Shelly Branch, *Hershey Turns to Convenience Stores to Sweeten Revenue*, WALL ST. J., Mar. 29, 2002, at B4; *Hershey Sells Throat Drops Unit.*, WALL ST. J., Sept. 7, 2001, at B2; and *Hershey to Unload Certain Brands*, WALL ST. J., May 7, 2002, at B15.

19. See Shelly Branch, *Hershey Accord Seems Remote As Holders Prepare for Meeting*, WALL ST. J., Apr. 29, 2002, at B2; Shelly Branch, *Hershey's CEO Is a Bitter Issue in Candy Strike*, WALL ST. J., May 1, 2002, at B1; see also Shelly Branch & Christina Cheddar, *Hershey and Union End Talks; Company Set to Hire Workers*, WALL ST. J., June 5, 2002, at B4; Marc Levy, *In Hershey, Not-So-Sweet Times: Chocolate Workers Strike Over Company's Cost-Cutting Moves*, WASH. POST, June 2, 2002, at A8. The strike was resolved after forty-two days, in early June 2002, calming investors concerned that production might have been affected several months before Halloween. See *Hershey Reaches Tentative Deal with Striking Factory Workers*, WALL ST. J., June 7, 2002, at B6.

20. Branch et al., *supra* note 16.

21. In mid-2002 the Trust owned 31.4% of Hershey Foods' shares and 76% of the class B voting stock, which have ten times the voting power of class A shares. For discussions of the Trust's holdings in Foods and the ownership interests discussed here, see *id.*; Deborah Cohen, *Hershey Up For Sale*, REUTERS, July 25, 2002; Press Release Hershey Foods Corp., Milton Hershey School Trust Explores Sale of Hershey Foods, PR Newswire, July 25, 2002, available at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=PR_130855&script=410&layout=-6&item_id=319371 (last visited Oct. 23, 2003) [hereinafter Trust Explores Sale]; Press Release, Hershey Trust Company, Statement of Milton Hershey School Trust Regarding Exploration of Possible Sale of Hershey Foods Corporation, PR Newswire, July 25, 2002 (on file with author) [hereinafter Statement of Milton Hershey]. The class B and class A distinctions are from Greg Winter, *Hershey Is Put on the Auction Block*, N.Y. TIMES, July 26, 2002, at C5.

Hershey Foods' "value-enhancing strategy" seemed to have paid off: Hershey's second quarter 2002 financial results, reported in late July 2002, showed stronger earnings and net income, and Hershey indicated that 2002 earnings growth might exceed the earlier advice to analysts.²² But if Hershey Foods expected that the success of this "value-enhancing," cost-cutting and restructurizing would slow the Trust's urgency in continued diversification from its dependence on Foods stock, then Foods was wrong. Instead, serious discussions between the Trust and Hershey Foods on selling the company began in the spring of 2002.

Certainly diversification from the heavy reliance on shareholdings in Hershey Foods was on the agenda for the Hershey Trust, both of its own accord and because of some pressure for diversification that seems to have been applied by the office of Pennsylvania's Attorney General, the key regulator of charitable trusts and other nonprofit organizations in the state.²³ The Attorney General's office later denied that the Trust had been encouraged to sell Hershey Foods, only that diversification in principle was endorsed.²⁴ Serious consideration of the sale option within the Trust Board does not appear to have begun in earnest until there was no longer a Hershey Foods chief executive on the Trust Board, an event that occurred in December 2001, and which was part of an effort promoted by the Pennsylvania Attorney General and others to distance the Trust Board from the Foods Board and reduce conflicts of interest.²⁵

22. *Hershey Foods Corp., Net Rises 20% Despite a Strike; Full-Year Outlook is Raised*, WALL ST. J., July 24, 2002, at A10.

23. *Id.*, Branch et al., *supra* note 16.

24. See Peter L. DeCoursey, *Hershey Sale Issue Holds Peril for Fisher*, PATRIOT-NEWS (Harrisburg), Aug. 25, 2002, at A1; Sarah Ellison, *Sale of Hershey Foods Runs Into Opposition*, WALL ST. J., Aug. 26, 2002, at A3; Brett Marcy & Jan Murphy, *State Urged Hershey Sale*, PATRIOT-NEWS (Harrisburg), Aug. 23, 2002, at A1 [hereinafter Marcy & Murphy, *State Urged*]. "We came away with the clear understanding from [a top Fisher aide] that this [sale] was the direction we should go in," a Trust source was quoted as saying. Marcy & Murphy, *supra*. The chief of the charitable organizations division in the Attorney General's office was quoted by the *Wall Street Journal* recalling that "I tried to get them to appreciate that there were a number of competing issues and that the community couldn't be their sole concern . . . I recall discussing that a premium did exist and they'd be obliged to identify what that premium was." Ellison, *supra*. "Fisher said . . . that there may have been a 'little bit of disconnect' between what his aide said at the December meeting and what some trustees heard." Marcy & Murphy, *supra*. The Attorney General's position on a sale may have begun to weaken even by June, before the sale explorations were announced in July. *Id.* "Our guy, maybe by his language, enabled them to further their plan, which was their plan. . . . But that's not our plan," Fisher told the local press. Brett Marcy & Peter L. DeCoursey, *Fisher Files to Halt Sale of Hershey*, PATRIOT-NEWS (Harrisburg), Aug. 24, 2002, at A1. "I think they used [his] comments to get what they wanted for years." *Id.* The Trust's spokesman, in a direct break with Fisher, called Fisher's comments "positively, unequivocally false." *Id.*

25. See Press Release, Attorney General's Press Office, AG Fisher Reaches Agreement with Milton

C. *Selling Hershey: Diversification, Fiduciary Duty and the Community*

In March 2002, the Hershey Trust Board adopted a resolution “to explore any and all options to unlock the value of their investment in Hershey Foods, including the sale of the company.”²⁶ The “value-enhancing” and strengthening steps taken by Hershey Foods since 1999 and accelerated in 2001 appear not to have insulated Hershey Foods from a sale, as Foods may have hoped,²⁷ but to make a sale of a stronger company more attractive to the Trust and, it hoped, to potential buyers. “[T]he key point was . . . we saw how strong it was,” noted the Trust’s CEO.²⁸ “The wind was at [its] back. . . . With the company in such a strong position, we thought now, if ever, would be a good time to sell.”²⁹

Hershey Foods opposed the Hershey Trust’s plans to sell its controlling shares and, therefore, the company itself. Foods proposed “a buyback or major recapitalization that would reduce the trust’s stake [in Foods], with [Foods] buying some of its shares at a premium,”³⁰ in effect a sweetening of

Hershey School to Restructure its Operations and Admittance Policies (July 31, 2002), *available at* <http://www.attorneygeneral.gov/press/release.cfm?p=3EAC5F90-ABAE-4ECC-BCE36F7225659B3F> (last visited Oct. 26, 2003). For press interpretation, see Peter Jackson, *Hershey School Agrees to Rule Changes*, PITTSBURGH POST-GAZETTE, Aug. 1, 2002, at A1; Bill Sulon, *Ex-Hershey Foods CEOs Blast Sale Plan*, PATRIOT-NEWS (Harrisburg), Aug. 15, 2002, at A1 [hereinafter Sulon, *CEOs Blast Plan*]. A new Hershey Entertainment CEO also did not join the Trust Board when appointed to Hershey Entertainment in 2002. John Troutman, *Mystery Still Surrounds Possible Sale of Chocolate Giant*, PATRIOT-NEWS (Harrisburg), Aug. 18, 2002, at D1.

26. Sulon, *Trustees Pledge*, *supra* note 1 (quoting Richard H. Lenny, Hershey Foods Corp. CEO). The Hershey Foods CEO was informed the next day of that resolution. *Id.*

This is about protecting a trust fund that has over half of its assets in one (company). In today’s market and unknown future, we think that’s putting ourselves at risk and could ultimately be detrimental to the kids of the Milton Hershey School. . . . If I went back to 1980, Hershey Foods would represent more than 80 percent of the trust’s assets. We’ve gotten that down to . . . now closer to 50 percent. But you still have an awful lot of eggs in one basket.

Why the Decision Was Made, PATRIOT-NEWS (Harrisburg), July 27, 2002, at A4 (quoting Trust CEO Robert Vowler) [hereinafter *Why the Decision was Made*].

27. See Sulon, *Trustees Pledge*, *supra* note 1. “[W]e were only two quarters into our new strategy’ of focusing on marketing key brands and shedding weak-selling brands,” said [Foods’ CEO]. *Id.* “That’s what we kept reinforcing to the trust board.” *Id.*

28. *Id.*

29. *Id.* For further elaboration on this point, see also Brett Marcy, *For Trust It Appears Good Time to Sell*, PATRIOT-NEWS (Harrisburg), July 26, 2002, at A1 (“In fact . . . the strong performance of Hershey Foods placed the trust in the perfect position to sell.”). The Trust appears to have decided to “explore with investment bankers . . . what . . . the values might be . . . in the winter” of 2001-2002. *Why the Decision was Made*, *supra* note 26.

30. Branch et al., *supra* note 16. Hershey CEO Lenny put it a somewhat formally but clearly in the

the mechanism by which the Trust had diversified part of its Foods assets in earlier years. Hershey Foods worked on that plan during the several months after the Trust's March resolution to explore a sale.³¹ The Hershey Foods plan seems to have offered to repurchase all of the Trust's remaining stock in Hershey Foods, half at a 10% premium over market price, and the remainder at market price over three to five years.³² The Trust rejected that enhanced buyback plan in May 2002, "requesting that [Hershey Foods] proceed with exploring the possible sale of the entire company."³³ As Hershey Foods explained it, "[g]iven the trust's majority ownership and its determination to explore the sale process, the Hershey Foods Board had no choice but to proceed. Under Delaware law, which governs our company, our board was required to take action in order to protect the interests of the company and all of its shareholders."³⁴

Hershey Foods press release, then considerably more frankly and informally to the local press. "Clearly, the Hershey Foods Company would have preferred to keep Hershey Foods as an independent company. In fact, we proposed a specific alternative to a possible sale of the Company. However, the School Trust rejected our proposal having concluded that a possible sale of the Company was the most prudent course of action consistent with its diversification objectives and its fiduciary obligations to the Milton Hershey School." Trust Explores Sale, *supra* note 21. To the local press, Lenny noted that he was "surprised and extremely disappointed" in the Trust's decision. Sulon, *Trustees Pledge*, *supra* note 1. "This was certainly the furthest thing from my mind when I joined the company. . . . I came here to build the company, not sell it." *Id.*

In the early days after the announcement, protest calls by community members to Hershey Foods were pointedly referred to Hershey Trust. See *id.* In turn the Trust confirmed that it was "exploring steps to divest itself of its controlling interest in Hershey Foods Corp. in order to comply with its fiduciary responsibilities to diversify and protect the assets of the Trust." See Statement of Milton Hershey, *supra* note 21.

31. See Sulon, *Trustees Pledge*, *supra* note 1.

32. Bill Sulon, *Hershey Buyback Plan Critiqued*, PATRIOT-NEWS (Harrisburg), Aug. 21, 2002, at A1 [hereinafter Sulon, *Plan Critiqued*]. An earlier, only partially correct report, had indicated that the Foods plan provided for gradual repurchases of stock owned by the Trust continuing without reaching the 15% threshold at which Trust control of Foods would have ended. See Brett Marcy, *Ex-Trustees Rip Hershey Foods Sale Decision*, PATRIOT-NEWS (Harrisburg), Aug. 1, 2002, at A1 [hereinafter Marcy, *Ex-Trustees Rip Decision*]; see also Bill Sulon, *Stock Sale of Hershey an Option*, PATRIOT-NEWS (Harrisburg), Aug. 28, 2002, at A1 [hereinafter Sulon, *Stock Sale an Option*].

33. Bill Sulon, *Hershey Foods Chief Spells Out Sale Discussion*, PATRIOT-NEWS (Harrisburg), July 31, 2002, at D6 [hereinafter Sulon, *Hershey Foods Chief*] (reprinting CEO Lenny's strongly worded letter to his employees providing the chronology for sale discussions and outlining his opposition to the sale).

34. *Id.* at D1, D6. The decision to sell, and Hershey Foods' acquiescence, was first reported on the front page of the *Wall Street Journal* in late July 2002. See Branch et al., *supra* note 16. The planned sale was attributed to "charitable trusts and foundations [being] under pressure to rethink their investment strategies and diversify for protection," and "state attorneys general . . . who are nudging the trusts to diversify to safeguard their beneficiaries." *Id.*

But the Trust's rejection of gradual stock sales back to Hershey Foods mystified many observers of Hershey Foods and the Trust. After all, the Trust had already reduced its asset dependence on Hershey Foods from some 80% of assets to about half its assets. Why could gradual stock sales not continue until the Trust was satisfied with the continuing diversification of Trust assets? Although the reasons for the decision to move from gradual diversification to block sale were clear to the Trust, Foods, and their investment bankers and lawyers by early 2002, the reasons would be revealed to the public only after the sale plans were reported and confirmed by the Trust and Hershey Foods in late July.

Two days after the sale explorations were announced, the Trust's chief executive officer stated that "[w]e feel we can get a better price on the open market," while reaffirming that "[b]efore we would accept any bids, we would have to be convinced that this community will be protected."³⁵ A key issue was the gap between the buyback premium offered by Hershey Foods to the Trust (between zero and 10% over market value), and the larger "control premium" that the Trust, counseled by external investment advisers, believed it might obtain on the outside market and believed it had a fiduciary duty to explore. In other words, the Trust believed it might be able to realize a higher price for its controlling shares by selling them in an auction rather than agreeing to a gradual buyback, albeit at a premium, by Hershey Foods. Also, the Trust appears to have believed—bolstered by the advice it was receiving from its investment bankers and lawyers—that it had a fiduciary obligation to test the market. The Foods buyback offer was "a nice effort," according to the Trust's CEO. "Our opinion was very simply, we could maximize value better by going to the open market"³⁶

Yet the importance of the gap between buyback and control premium could not be fully understood without a detailed comprehension of the stockholding structure of Hershey Foods—an understanding that very few in the Hershey community had in the summer of 2002. The details only became clear in the days after the sale explorations were announced: Under the complex stockholding structure of Hershey Foods, if the Trust allowed buybacks and other stock sales to reduce its holdings in Foods to below 15%, then it would lose control of the company and the possibility of a "control premium" for selling shares and control as a block.³⁷ And it was a key reason

35. Sulon, *Trustees Pledge*, *supra* note 1.

36. *Id.*

37. Greg Winter, *Hershey Trust Puts Candymaker on Sale*, PITTSBURGH POST-GAZETTE, July 26, 2002, at B13. Winter went on to write:

why the Hershey Trust believed that it must sell Foods outright, rather than gradually selling shares back to Foods itself.

State regulators initially seemed to support the Trust's plans to diversify. An official in the office of the State Attorney General noted that "fifty percent is a high percentage to have in one company for a charity that has day-to-day cash needs."³⁸ Critics of the Trust naturally opposed its plans to sell Hershey Foods, heaping scorn upon its intention of raising more money to support an already well-endowed Hershey School.³⁹ Many early media comments were negative as well, focusing on the potential impact on the local community, despite the Trust's strong pledges to take community interests, jobs and factory locations into account in any decision to sell Hershey Foods, and its

Bristling at the suggestion that it has overlooked its social obligations, the Trust said it was simply acting while it still could. Since the mid-1980s, when Hershey stock represented more than 80 percent of its assets, the trust has been weaning itself off its dependence, trying to become more like other foundations whose financial health does not rise and fall with the fortunes of a single company. . . . While the strategy has lessened its vulnerability to sudden swings in the market, it has also left it in a somewhat precarious position. The Trust had every intention of continuing to decrease its ownership in Hershey, now at about 31 percent. But according to a 1984 agreement reached with the company, once the Trust's stake drops below 15 percent, the coveted class B shares it owns, which account for its overwhelming influence, revert back to class A shares, which have only one-tenth the voting power.

Id. The Trust may also have been influenced by consolidation in the food and confectionary industry, and the simultaneous sale of Pfizer's Adams confectionary unit. *See* Gordon Fairclough & Erin White, *Sale of Chiclets, Dentyne, and Nestle's Hold on KitKat, Make Hershey Bidding Sticky*, WALL ST. J., July 26, 2002, at B1.

The chief executive of the Hershey Trust picked up the explanation:

Going way back to 1980, there was a restructuring of the company which created "A" and "B" shares. "B" shares had ten votes, "A" shares had one vote. We did that to allow the company to refinance itself so it could grow (and as) a mechanism for us to retain control, as the company did that. So we could begin to whittle down on the 80 percent. During the '90s we sold back shares to the company four times. That got us from 80 percent closer to 52 percent where we are now. We could only take that program so far. If we own less than 15 percent of the company, the "B" shares convert to "A" shares—we lose control of the company (because) "B" shares are what control the company. They have 10 votes each. As we've been whittling down, with selling back to the company, we've been getting closer and closer to that 15 percent. So the choice to us was either (go below) 15 percent and lose control, or to just sell it outright. That was sort of the baggage we faced. The hurdle we couldn't get over.

Why the Decision was Made, *supra* note 26 (quoting Robert Vowler, President and CEO of the Hershey Trust Company). Another company official noted that "[w]ith 52 percent of the equity in one security, we're well beyond—10 times beyond—what a prudent investor would have in his own portfolio. Technically, what we should be trying to do is find some way to get down to 5 percent." *Id.* (quoting John Gabig, Chairman, Hershey School Trust Board of Directors).

38. Marcy, *supra* note 29. The official also noted that "the attorney general's office has never established firm goals or compelled the school trust—or any trust in recent memory—to take any specific steps, such as exploring a sale of Hershey Foods." *Id.*

39. *See id.*

strongly expressed preference for “operators and not financial buyers . . . those folks aren’t even allowed in the room.”⁴⁰

D. From Community Opposition to Legal and Political Mobilization

As community opposition to the sale rapidly intensified, state regulators’ comments began to shift toward opposition to the sale. Barely two days after the Trust and Foods’ announcements, the office of Attorney General Michael Fisher (then running for Governor of Pennsylvania) noted that it is “empowered by state law to take into consideration the impact on the community,” and that “it could challenge the deal in court,” while continuing to note that “the office has no problem with the . . . Trust’s exploration of a sale.”⁴¹ Within days the Attorney General’s position seemed to toughen still further, noting that community impact rather than only “strict dollar return” might well be a reasonable factor in the Hershey Trust situation.⁴²

Community opposition began immediately and intensified quickly. On the morning of the announcements, the chief executive officer of Hershey Foods made clear by company-wide video, letter and widely publicized press interviews that he opposed the Trust’s plan to sell Hershey Foods.⁴³ Protests were quickly launched,⁴⁴ suits were filed in the Delaware Chancery Court within two days of the Trust’s announcement,⁴⁵ newspapers hurried into print

40. *Why the Decision was Made*, *supra* note 26. A columnist for the *Philadelphia Inquirer*, however, noted that both the Pew Charitable Trusts and the William Penn Foundation had sold the stock in their founders’ corporations, and asked “[w]hy the Hershey trust and Hershey Foods can’t split up in a similar fashion is a question worth asking.” Andrew Cassel, *Hershey Isn’t Just Another Pa. Industrial Icon for Sale*, *PHILA. INQUIRER*, July 26, 2002, at C1.

41. Charles Thompson & Jan Murphy, *Area Officials Express Fears*, *PATRIOT-NEWS* (Harrisburg), July 27, 2002, at A1.

42. Brett Marcy & Charles Thompson, *Opposition to Hershey Sale Grows: Analysts Lower Stock Outlook for Candymaker*, *PATRIOT-NEWS* (Harrisburg), July 31, 2002, at A1. For later statements, see Charles Thompson, *Candidates Enter Fray on Hershey*, *PATRIOT-NEWS* (Harrisburg), Aug. 7, 2002, at A1; see also Courtney Schlisserman, *Fisher Urges Hershey Trust Not to Sell*, *PITTSBURGH POST-GAZETTE*, Aug. 8, 2002, at E8.

43. Sulon, *Hershey Foods Chief*, *supra* note 33 (reprinting CEO Lenny’s letter).

44. On community and regional opposition to the sale, see, e.g., Ellison, *supra* note 24; Marc Levy, *Town That Hershey Built Fears Losing Legacy*, *WASH. POST*, Aug. 25, 2002, at A6; Brett Marcy & Charles Thompson, *Opposition to Hershey Sale Grows: Outlook for Stock as Foes Unite*, *PATRIOT-NEWS* (Harrisburg), July 31, 2002, at A1; Jack Sherzer, *500 Rally Against Proposed Hershey Sale*, *PATRIOT-NEWS* (Harrisburg), Aug. 3, 2002, at A1. On coalition building among community groups and residents, see Brett Marcy, *Derry Group Prepares for Battle*, *PATRIOT-NEWS* (Harrisburg), Aug. 19, 2002, at B1.

45. Bill Sulon, *Decision Challenged: Shareholder Lawsuits Seek to Influence Outcome*, *PATRIOT-NEWS* (Harrisburg), July 27, 2002, at A5; Shelly Branch, *Sale of Hershey To Be Contested by School Alumni*, *WALL ST. J.*, July 29, 2002, at B10 (discussing the fact that alumni were prepared to sue if the trust

with articles on the consequences for other small towns when they “lost ‘the company,’”⁴⁶ and the Milton Hershey School Alumni Association, long a foe of the Trust’s policies, launched stormy opposition.⁴⁷ Within days, Pennsylvania’s governor was expressing strong concern as well.⁴⁸ Prominent former board members of the Hershey Trust and former executives at Foods added their vocal opposition as well,⁴⁹ newspaper articles pointed out the Trust’s surplus earnings beyond that needed to operate the Milton Hershey School,⁵⁰ and newspaper editorials and opinion articles voiced strong concern.⁵¹ Political figures quickly voiced opposition to the sale, and pledged their support for central Pennsylvania residents and Hershey employees.⁵² As Nestle, Kraft, Cadbury, Mars and others were immediately bruited as potential

sold its stake in Hershey Foods).

46. Brett Lieberman et al., *When Other Towns Have Lost ‘The Company,’* PATRIOT-NEWS (Harrisburg), July 28, 2002, at A20.

47. Brett Marcy & Charles Thompson, *Government Concerned About Sale of Hershey: Alumni Group Objects to Decision by Trust*, PATRIOT-NEWS (Harrisburg), July 30, 2002, at B1.

48. *Id.* Virtually simultaneously, though apparently not directly related to the announcement of sale explorations, the Pennsylvania Attorney General announced an agreement with the Milton Hershey School and Trust intended to resolve longstanding controversies over conflicts of interest in the School and Trust Boards. See Press Release, Attorney General’s Press Office, AG Fisher Reaches Agreement with Milton Hershey School to Restructure its Operations and Admittance Policies (July 31, 2002), at <http://www.attorneygeneral.gov/press/release.cfm?p=3EAC5F90-ABAE-4ECC-BCE36F7225659B3F> (last visited Oct. 23, 2003). The agreement, *inter alia*, prohibited Trust and School board members from serving on the board of certain owned or controlled entities; required independent legal, accounting and financial professionals for both the School and Trust; prohibited persons receiving ownership or employment benefits from a relationship with the Trust from serving on either Board; and revamped School admissions policies to continue to make admission available to poor children. *Id.* Partly as a result of this agreement, a new Board of Directors for the Trust and managers for the School were announced in December 2002. See Tamar Lewin, *10 Board Members to Leave Hershey’s Charitable Trust: More Follow in Effort to Sell Company*, N.Y. TIMES, Nov. 15, 2002, at A22, available at 2002 WL 103084815; Brett Marcy, *Hershey Ousts Sale Advocates; Trust Board Gets Local Flavor as 10 Members Depart*, PATRIOT-NEWS (Harrisburg), Nov. 15, 2002, at A, available at 2002 WL 3017190. For another report on the agreement, see Peter Jackson, *Hershey School Agrees to Rule Changes*, PITTSBURGH POST-GAZETTE, Aug. 1, 2002, at B8.

49. Shelly Branch, *Trust Pushing Sale of Hershey Faces Rising Level of Criticism*, WALL ST. J., Aug. 1, 2002, at B6; Marcy, *Ex-Trustee Rip Decision*, *supra* note 32, at A1; Sulong, *CEOs Blast Plan*, *supra* note 25, at A1.

50. See, e.g., Ford Turner, *Trust Earnings Eclipse School Costs*, PATRIOT-NEWS (Harrisburg), Aug. 5, 2002, at A1.

51. See, e.g., Thomas Hylton, *Honor Hershey*, PITTSBURGH POST-GAZETTE, Aug. 11, 2002, at B1.

52. See *id.*

buyers,⁵³ the Hershey Trust Board reaffirmed its decision to explore a sale, rejecting requests from the Attorney General to explore other alternatives.⁵⁴

In August, the Hershey Trust's reaffirmance that it would proceed with sale explorations brought the struggle over the Trust's sale of Hershey Foods into the judicial and legislative arenas. Within two weeks after sale explorations were announced, Pennsylvania legislators and the Attorney General began discussions of legislation that would require a trust manager to consider the welfare of affected communities along with the interests of trust beneficiaries when managing the assets of a charitable trust, allow a charitable trust to select a lower bidder based partially on community interest standards,⁵⁵ require Attorney General approval of certain sales by charitable trusts, and allow judicial challenge and require judicial approval of certain sales by charitable trusts.⁵⁶

Now more firmly opposing the sale, the state Attorney General quickly responded to the Trust's reaffirmance of its plans to sell Hershey Foods by calling upon the judiciary to oversee and exercise approval authority over the proposed sale.⁵⁷ The Attorney General acted in the local court having jurisdiction over (and with long experience in supervising) the Hershey School Trust, the Dauphin County Orphans' Court, asking the court to require the Trust to disclose "all . . . details of the sale process being pursued," and "[c]ondition any proposed sale . . . upon the express approval of [the] court" after hearing and argument.⁵⁸

53. Dan Ackman, *Nestle and the Chocolate Factory*, FORBES.COM, Aug. 26, 2002, at <http://www.forbes.com/2002/08/26/0826topnews.html> (last visited Oct. 23, 2003); Deborah Ball & Sarah Ellison, *Nestle's Appetite for Acquisitions Quickens*, WALL ST. J., Aug. 7, 2002, at B3; Paul Maidment, *Nestle Nibbles on Expansion*, FORBES.COM, Aug. 6, 2002, at <http://www.forbes.com/home/2002/08/06/0806nestle.html> (last visited Oct. 23, 2003); Richard Morais, *Chewing Over the Cash*, FORBES.COM, Sept. 2, 2002, at <http://www.forbes.com/global/2002/0902/020.html> (last visited Oct. 23, 2003); Bill Sulon, *Courting the Candymaker*, PATRIOT-NEWS (Harrisburg), Aug. 18, 2002, at D1. Few of these reports prominently mentioned Wrigley, the closely-held Chicago firm without a history of bids in such situations that eventually became the high bidder for Hershey Foods.

54. Sarah Ellison, *Hershey Trust Board Decides to Continue with Sale Option*, WALL ST. J., Aug. 8, 2002, at B6.

55. For discussions of the early legislative explorations, see Brett Lieberman & Jan Murphy, *Stopping Hershey Sale Becomes Legal Challenge*, PATRIOT-NEWS (Harrisburg), Aug. 18, 2002, at A3 ("The attorney general wants the law to be clear that the trustees must consider the impact on the community."); *Suggested Law Change Could Hinder Hershey Sale*, PATRIOT-NEWS (Harrisburg), Aug. 9, 2002, at A1.

56. Lieberman & Murphy, *supra* note 55.

57. *Attorney General Says Court Must Decide Hershey Sale*, N.Y. TIMES, Aug. 10, 2002, at C4.

58. Petition for Citation to Show Cause Why a Proposed Sale of Trust Assets Constituting the Controlling Interest in Hershey Foods Corporation Should Not be Conditioned Upon Court Approval at 6, *In re Milton Hershey Sch. Trust*, slip op. (Pa. Ct. Com. Pl. 2002) (No. 712-1963), at <http://www>.

In filing its initial motions, the Attorney General asserted two theories that would come to dominate the legal struggle over Hershey and which remain key components in scholarly discussion of the matter. These were the extent of the Attorney General's *parens patriae* oversight role, and the interests that a charitable trustee, here the Hershey Trust, must consider in its investment and management actions.

The Attorney General asserted that its *parens patriae* authority went beyond merely inquiring into whether the Hershey trustees' actions comported with the deed of trust, a more traditionally limited definition of the state regulator's role. The state Attorney General asserted the *parens patriae* role more broadly, to include "[protecting] the public against any social and economic *disadvantages* which may be occasioned by the activities and functioning of public charities"⁵⁹

The Attorney General also asserted that although "[e]xisting trust law only requires a fiduciary to make decisions that are in the best interests of the charitable trust,"⁶⁰ "[t]his case does not equate with the typical investment decisions that trustees make on a daily basis in discharging their fiduciary duties in that the proposed sale promises to trigger material consequences upon the public welfare extending far beyond those specific to the School Trust alone."⁶¹ In the Attorney General's view, the Trust's duty involved full consideration of community impact in addition to the best interests of the beneficiary.⁶² The "'best offer' to be obtained from the . . . sale [of Hershey Foods] cannot be appropriately determined simply on the basis of accepting the 'highest price' bid, but only upon the careful consideration of all attendant facts and circumstances, including the likely effects on the Hershey community post transaction."⁶³ These were, in the Attorney General's view, the fiduciary responsibilities of the Hershey Trust as charitable fiduciary.⁶⁴

attorneygeneral.gov/ppd/charity/PDF/HersheyPetition.pdf (last visited Oct. 27, 2003). The Attorney General asserted that:

[A]ny public sale of the controlling interest in Hershey Foods . . . while likely to increase the value of the trust, could also result in profound negative consequences for the Hershey community and surrounding areas, including, but not limited to, the closing and/or withdrawal of Hershey Foods Corporation from the local community together with a dramatic loss of the region's employment opportunities, related businesses and tax base.

Id. at 3.

59. *Id.* at 4.

60. *Id.*

61. *Id.*

62. *See id.* at 4.

63. *See id.* at 5.

64. *Id.* at 4. For a news report on the Attorney General filing, see Brett Marcy, *State Tries to Impose*

Community and political opposition to the sale continued to grow, accelerated by mid-August reports that a potential corporate buyer of Foods had been given a tour of the central Pennsylvania manufacturing plants.⁶⁵ Meanwhile, clear divisions developed between the Trust and the Attorney General, who continued to oppose the sale while confirming discussions on diversification but insisting that “never meant in our minds that they go out and sell Hershey Foods.”⁶⁶

On August 19, 2002, Dauphin County Orphans’ Court Senior Judge Warren G. Morgan ordered that the Trust and School show cause why “all the details of the sale process . . . including . . . all of the offers” should not be disclosed to the Court and the Attorney General, and to show cause why the sale of Hershey Foods “should not be conditioned upon the express approval of this . . . Court after . . . hearing and argument on the relative merits of any offers,” directly interjecting the local court and the Attorney General not only into the sale process but the decision on the relative merits of any competing offers.⁶⁷

E. Battling Between the Hershey Trust and the Attorney General

The Trust counterattacked in an attempt to reclaim some support for a possible sale and to increase understanding of its position in the local and state-wide communities. In releasing a letter to colleagues, a Trust board member sought to counter the impression that the Trust Board was committed to selling, reemphasized the Trust’s gradual diversification away from Foods stock over several decades, and stressed that “the board has placed numerous social constraints on any sale. There will be no sale without satisfaction of these constraints.” William Alexander, a board member, attempted to defend the sale explorations as an exercise of a required fiduciary duty for the Trust’s charitable beneficiary, the Milton Hershey School.⁶⁸ Alexander also sought

Limits on Hershey Sale, PATRIOT-NEWS (Harrisburg), Aug. 13, 2002, at A1.

65. *Hershey Plant Tours Continue*, PATRIOT-NEWS (Harrisburg), Aug. 30, 2002, at D1; Bill Sulon, *Hershey Prospect Gets Tour of Plants*, PATRIOT-NEWS (Harrisburg), Aug. 17, 2002, at A1 [hereinafter Sulon, *Prospect Gets Tour*]. Later plant tours by potential buyers were reported at Bill Sulon, *Hershey Plant Tours Hint at Bidding*, PATRIOT-NEWS (Harrisburg), Aug. 23, 2002, at D1 [hereinafter Sulon, *Hershey Plant Tours*].

66. Lieberman & Murphy, *supra* note 55.

67. *In re Milton Hershey Sch. Trust*, No. 713-1963 (Pa. Ct. Com. Pl. Aug. 19, 2002) (order directing the Trust and School to show cause) (on file with author); see also Marc Levy, *Court Orders Hershey Trust to Defend Sale*, PITTSBURGH POST-GAZETTE, Aug. 20, 2002, at E2.

68. Letter from William H. Alexander to the Patriot-News (Aug. 20, 2002) [hereinafter Letter from

to counter the Attorney General's assertion that the Trust's fiduciary duty required it to weigh community impact, while noting that the Trust would voluntarily take community interests into consideration. He explained that the Trust owes "very little" obligation to the community "except to make decisions in the best interest of the . . . School."⁶⁹ He also noted, however, that "[t]he Board knows full well that the school needs a vibrant community to support it so the community will be a consideration when a decision is made."⁷⁰

Finally, in an important passage, Alexander provided his own prediction for how the Hershey struggle would conclude: "[M]y best guess is that the supposed premium for control will be offset by discounts for the Kit Kat license and the social constraints. This will allow the board to structure some arrangements with [Foods]."⁷¹ Alexander was informally predicting what eventually came to pass—that the offers for Foods would not be strong enough to offset "social constraints" and other factors, and that in the end the Trust would not complete the sale of Hershey Foods.⁷² But, it would have gone through the process and been "prudent" in that process—and might well be able to negotiate a better buyback arrangement with Hershey Foods.⁷³

Alexander], in Brett Marcy, *Hershey Buyback Called Likely: Sale Not Certain, Trust Official Says*, PATRIOT-NEWS (Harrisburg), Aug. 20, 2002, at B5 [hereinafter Marcy, *Buyback Called Likely*]. In a letter to the *Patriot-News*, William H. Alexander, the director of the Hershey Trust Company wrote:

Each of the previous sales of Hershey Foods stock had been back to the company with a sales price of the then current market value. Trust advisors insist that no future sale of stock be contemplated without testing to see if there is a control premium above market value if control of the company is sold. . . . [W]e are being advised that we are not being prudent fiduciaries if we sell for \$50/share (hypothetically) when someone is willing to pay \$60/share if they can get control. Once and for all we are going to find out if anyone exists who will pay a sufficient premium to justify a sale.

Id.

69. *Id.*

70. *Id.*

71. Letter from Alexander, *supra* note 68. The British company Rowntree Macintosh licensed the U.S. [production and distribution] rights for Kit Kat and Rolo candies to Hershey Foods in 1970. Marcy, *Buyback Called Likely*, *supra* note 68, at B5. Later, Nestle bought Rowntree. *Id.* Under the license, the Kit Kat and Rolo license rights could "revert" to Nestle if Hershey Foods changed hands. *Id.* As the press reported, "[w]ithout the Kit Kat license, Hershey Foods may not fetch as high a price. Kit Kat accounts for more than \$300 million in annual sales [to Foods]." *Id.*

72. Letter from Alexander, *supra* note 68.

73. *Id.* Alexander also explained why the Trust needed the funds a sale might bring: "Simply put, because we do not want to invade principal, we need to find additional revenue to fund the vision for the school's growth." *Id.* The risks of returning to a buyback option were outlined in Sulon, *Plan Critiqued*, *supra* note 32, including the danger that "during the process, the trust would lose its controlling interest as Hershey Foods racks up debt to buy back the shares, leaving the company open to a hostile takeover."

The Attorney General continued to intensify his role in the Hershey dispute by seeking a temporary restraining order to halt the sale on the ground that “the community would suffer irreparable harm if a sale were reached.”⁷⁴ By this time, faced with intense opposition from the Hershey community and strengthening opposition from the Attorney General’s office, “some members of the board who voted for the exploration of a sale [were] now wavering.”⁷⁵ Yet one important risk associated with such a result was the concern that the Trust Board had a fiduciary duty “to maximize the earnings of the trust:” if the Trust declined “a substantial amount of money on the table,” arguably the Trust might potentially be liable for not maximizing the benefits from the sale process.⁷⁶

74. Press Release, Attorney General’s Press Office, AG Fisher Asks Court To Halt Any Sale Of Hershey Foods: Says Restraining Order Needed To Avoid Irreparable Harm To Hershey Community (Aug. 23, 2002), at <http://www.attorneygeneral.gov/press/release.cfm?p=17348581-3107-4A87-9E17E99F876E7382> (last visited Oct. 23, 2003). The Attorney General also continued to promote efforts to draft legislation requiring charitable trustees to “consider the impact of any sale on the community, not just choose the highest bid for the company.” *Id.* The Attorney General’s comments on the legislative approaches were now carefully worded to apply specifically to Hershey Foods, perhaps because opposition was already developing to legislation with a broader swath of applicability. See Charles Thompson & Brett Marcy, *Hershey Takeover Measures Proposed: Fisher Hopes Moves Would Deter Buyers*, PATRIOT-NEWS (Harrisburg), Aug. 10, 2002, at A1. For useful reporting on the Attorney General’s role in the context of the political events underway and his earlier support for at least some form of diversification, see DeCoursey, *supra* note 24, at A1; Ellison, *supra* note 24; Marcy & DeCoursey, *supra* note 24, at A1; Brett Marcy & Jan Murphy, *Fisher, Group Launch Anti-Sale Assaults*, PATRIOT-NEWS (Harrisburg), Aug. 27, 2002, at B1.

75. Ellison, *supra* note 24. The article further notes that:

Other board members, some of whom initially voted for the sale, feel betrayed by Mr. Fisher’s office and are looking for a way out . . . Still, a majority of the trust’s board is determined to continue exploring the possibility of a sale, if only to know what the company could fetch. The trust isn’t likely to scrap a sale before it sees what the bids are as such a move could spark shareholder lawsuits.

Id. An anonymous source speaking for the Trust Board compared Attorney General Fisher to an arsonist: “He started the fire so he could be the one to put it out. . . .” *Id.* Fisher responded that “this is a decision the trust made on its own and they are using their discussions with [the attorney general’s office] to further their position.” *Id.*; see also Andrew Ross Sorkin, *Price Tag and Local Politics Damp Interest in Hershey*, N.Y. TIMES, Aug. 27, 2002, at C1; Sulon, *Stock Sale an Option*, *supra* note 32.

76. Marcy & Murphy, *State Urged*, *supra* note 24. “To leave a great deal of money on the table, and you don’t accept the highest bid, then you got minority shareholders saying: ‘You could have maximized my investment and you didn’t,’ and now I’m liable to them. So you see the horns of the dilemma here.” *Id.* Another emerging problem with a sale was antitrust approval. See Deborah Ball et al., *Nestle Says a Takeover of Hershey Wouldn’t Pass Antitrust Muster*, WALL ST. J., Aug. 30, 2002, at A1. The Nestle comments, however, could also have been part of a negotiating strategy or to encourage a joint bid. See Steven Pearlstein, *A Bitter Feud Erupts Over Hershey Plant*, WASH. POST, Sept. 2, 2002, at A1 (providing a useful review of the developments in the controversy up to that point).

The Hershey Trust filed its response to the Attorney General's petition for an order restraining the sale of Hershey Foods in late August, asserting that the Attorney General lacked authority for prior review and restraint of the sale of a trust's assets under the Pennsylvania Probate, Estate and Fiduciaries Code ("PEF Code"). The Trust argued that judicial review of the sale of trust assets is substantially limited by the PEF Code and a trustee's authority to sell trust assets is very broad under section 7141 of the PEF Code and under the Hershey Deed of Trust.⁷⁷

The Trust further argued for a traditional reading of the trustees' obligation. It asserted that the Attorney General lacked *parens patriae* capacity to "assert community interests or economic interests of a segment of the public in such a manner as they may be equal to or superior to the interests of the School as the beneficiary of the School Trust," seeking to limit the *parens patriae* capacity of the Attorney General to "enforc[ing] the terms of the School Trust and . . . represent[ing] the interests of those members of the public who currently attend the School, or who might attend the School in the future or who ultimately benefit from a financially secure School."⁷⁸ This was a substantially more narrow vision of *parens patriae* capacity and the fiduciary duties of the Trust, one limited to a definition of the Attorney General's inquiry into "the interests of the School as the beneficiary of the . . . Trust," and explicitly rejecting the notion that the Attorney General's public interest extended to the interest of the Hershey community or the public as a whole.⁷⁹

Judge Morgan then granted the preliminary injunction temporarily barring the sale of Hershey Foods on September 4, 2002. He ordered that during the

77. Answer with New Matter to Motion for Special *Ex Parte* Injunctive Relief at 4, *In re Milton Hershey Sch. Trust*, slip op. (Pa. Ct. Com. Pl. 2002) (No. 712-1963) (on file with author).

78. *Id.* at 8.

79. See *id.* For useful press reports on the Trust's response, see Sarah Ellison & Robert Frank, *Hershey Trust Contests Move to Halt Sale of Chocolate Firm*, WALL ST. J., Aug. 27, 2002, at A4; Marc Levy, *Hershey Seeks to Stop State from Souring Sale*, PITTSBURGH POST-GAZETTE, Aug. 27, 2002, at E1; Bill Sulon, *Fisher's Hershey Stance Hit in Court*, PATRIOT-NEWS (Harrisburg), Aug. 27, 2002, at A1. The Milton Hershey School Alumni Association also joined the fray, arguing that the Attorney General's broad definition of public and community interest and his

expedited legislative effort to fashion a right for a "broad spectrum of interests" . . . considered as having beneficiary status of charitable trusts . . . would, if successful, be a derogation of the rights of the orphan beneficiaries as the sole beneficiaries of the . . . Trust. Such efforts by an attorney general have few known precedents.

Milton Hershey Sch. Alumni Ass'n, Petition to Designate Representative of the Orphan Beneficiaries of the Milton Hershey School Trust at 8, *In re Milton Hershey Sch. Trust*, slip op. (Pa. Ct. Com. Pl. 2002) (No. 712-1963) (on file with author).

disposition of the show cause order issued on August 19, 2002, or other court proceedings, the Trust⁸⁰ “shall not enter into any agreement or other understanding that would or could commit the [Trust] to a sale or other disposition of any or all of the shares of the Hershey Foods Corporation held as corpus of the Trust.”⁸¹ His broad injunction barred not only the sale, but even any “understanding” that “could” commit the Trust to a disposition of “any” Hershey Foods shares.⁸²

Within days the Trust filed an application for stay of the injunction pending appeal to the Commonwealth Court, the next appellate level, to dissolve the injunction.⁸³ The Attorney General, seeking to keep the injunction in place, continued to assert a broad definition of the public responsibility of a charitable trust, and a broad definition of the Attorney General’s role in representing the public in charitable trust matters.⁸⁴ Noting the urgency of the situation—“as a practical matter, the company could be sold at any time now”⁸⁵—as well as the likelihood of substantial readjustment and downsizing should an acquisition occur, the Attorney General argued that staying the injunction and letting a sale proceed would cause immediate and irreparable harm.⁸⁶

80. The formal order is to the “Board of Managers of the Milton Hershey School and the Hershey Trust Company as Trustee of the Milton S. and Catherine S. Hershey Trust, respondents,” the formal trustees. *In re Milton Hershey Sch. Trust*, 807 A.2d 324, 335 (Pa. Commw. Ct. 2002) (attached earlier opinion of Warren G. Morgan, Senior Judge, Dauphin Co. Orphans’ Ct., Sept. 4, 2002).

81. *Id.*

82. *Id.* It is perhaps ironic that Judge Morgan’s order would have applied, at that point, even to Foods’ buybacks of Trust shares, the solution that Foods seemed to prefer.

83. See Appellee’s Brief at 23, *Hershey* (No. 2111 C.D. 2002) (citing Trust Brief and quoting Section 3355 of the PEF Code, 20 PA. CONS. STAT. § 3355). For reports on the Trust’s filing, see Len Boselovic, *Hershey’s Chocolate Mess Starts with Trustees*, PITTSBURGH POST-GAZETTE, Sept. 16, 2002, at D1; *Hershey Had Merger Plan in 1929, Papers Reveal*, PITTSBURGH POST-GAZETTE, Sept. 11, 2002, at C11.

84. See Brief for Appellee Pending Appeal, *supra* note 7, at 19-23.

85. *Id.* at 8.

86. *Id.* at 14. In doing so he sought to employ a broad definition of harm and a broadened definition of trust responsibility than merely income and diversification to the School:

On balance, it is more likely than not that the current employees of Hershey Foods would be worse off under an acquisition than they are now This harm would extend to the Trust itself. The sale of Hershey Foods would seriously impair, if not destroy, the symbiotic relationship which has existed for many decades among the company, the School and its Trust, and the other institutions which together carry on Milton Hershey’s unique vision. This would harm the Trust and its School as much as anyone, since the welfare of the School is bound up with the well-being of the community in which it lies.

Id. at 10.

The Attorney General also rejected the Trust's argument that "the proper *parens patriae* capacity of the Attorney General is [only] to enforce the terms of the School Trust and to represent the interests of those members of the public who currently attend the School, or who might attend the School in the future or who ultimately benefit from a financially secure School."⁸⁷ The Trust noted that, through the establishment of the Hershey Medical Center several decades earlier and other actions, it evinced a broader interest for the wider community beyond the Milton Hershey School and its orphan students.⁸⁸ The key argument was that charitable trusts bear a broader responsibility to the public and the community than only to their defined legal beneficiaries under a trust deed, and the Trust's actions have "demonstrated the need for the broader perspective which it is the Attorney General's function to provide."⁸⁹

The Trust denied that there was statutory or judicial authority for the court to intervene in the sale, characterized the Trust's actions as "a proper fiduciary exercise intended to protect and preserve the assets of the School Trust and to develop additional assets which will enable the School to serve greater numbers of students," and asserted that "any 'measurement' of advantages or disadvantages to the public is impossible" until the sale process goes further.⁹⁰ The Trust reemphasized that it and the School

are well aware of the special relationship of Hershey Foods Corporation to the School and the Hershey community's interest in any proposed sale. The Attorney General has not cited, nor can he cite, any evidence that the Trust Company and the School have not taken and will not continue to take into consideration this special relationship or the communal implications of any possible sale of Hershey Foods Corporation as part of a good faith exercise of their respective fiduciary duties under the Deed of Trust.⁹¹

87. *Id.* at 21 (quoting Trust Brief ¶ 22).

88. *Id.* (quoting Trust Brief ¶ 22).

89. *Id.* at 22.

90. Answer with Objections and New Matter to Petition for Citation for Rule to Show Cause at 3, 6-7, *In re Milton Hershey Sch. Trust*, slip op. (Pa. Ct. Com. Pl. 2002) (No. 712-1963) (on file with author).

91. *Id.* at 6.

The Attorney General cannot assert the interests of the community in the School Trust because that is not a legally recognizable interest that can be balanced against the benefits to the beneficiary. However, the Trust Company and the School have considered, and will continue to consider, the special relationship of the School and School Trust to Hershey Foods Corporation, and the benefits to the School of having this business continue operations in the community in which the School is located.

Id. at 10.

So, the Trust did not deny that its good faith exercise of a charitable trust's fiduciary duty would include consideration of community and public interests—but it strongly objected to a redefinition of legal duties in which community impact would rise to the level of consideration of the interests of the trust's named beneficiary, the School and its students. It also strongly objected to these determinations being made by the Attorney General or the court rather than the Trust.⁹²

[There is no] equality of interests between the School and its surrounding community. The Trust Company and the School respectfully submit that any possible sale of Hershey Foods Corporation must be reviewed in a context that gives primacy to the interests of the School, which is the only designated beneficiary of the School Trust.⁹³

Instead, the Trust asserted that the Attorney General is trying to “creat[e] ‘beneficiaries’ not designated by the [Hersheys].”⁹⁴ In short, “[t]he Attorney General cannot assert the interests of the community in the School Trust because that is not a legally recognizable interest that can be balanced against the benefits to the beneficiary.”⁹⁵

F. Denouement

As the judicial battle raged, Hershey Foods' discussions with potential acquirers continued, as community opposition mounted and press reports mentioned increasing “wavering” by members of the Trust Board.⁹⁶ On September 10, 2002, the situation increasingly uncertain, Judge Morgan issued his written judgment on the injunction. Though he termed “Milton Hershey's charitable interests . . . narrowly restricted,”⁹⁷ Judge Morgan's definition of those charitable interests at stake—and his specific mention of interests well

92. *Id.* at 7-8. In particular, citing support in Pennsylvania law, the Trust asserted that “the Attorney General is attempting to usurp power of the Board of Directors of Hershey Foods and to arrogate unto himself a power that Milton S. Hershey and Catherine S. Hershey solely vested in the Trust Company and the School [and] in direct contravention of statutory law” *Id.*

93. *Id.*

94. *Id.* at 8-9.

95. *Id.* at 9-10.

96. Robert Frank & Sarah Ellison, *Nestle, Cadbury Discuss Terms of Possible Joint Bid for Hershey*, WALL ST. J., Sept. 9, 2002, at A3; see also Amy Barrett, *How Hershey Made a Big Chocolate Mess*, BUS. WK. ONLINE, Sept. 9, 2002, at 54, at http://www.businessweek.com/@NgmOaoQQtRBoORIA/magazine/content/02_36/b3798059.htm (last visited Oct. 23, 2003) (“[T]here are signs that the board of the trust itself may be at odds over the wisdom of a sale.”).

97. *In re Milton Hershey Sch. Trust*, 807 A.2d 324, 329 (Pa. Commw. Ct. 2002) (attached earlier opinion of Warren G. Morgan, Senior Judge, Dauphin Co. Orphan's Ct., Sept. 4, 2002).

beyond the Milton Hershey School—presaged the result. Mr. Hershey “was concerned for children and for his community”⁹⁸ and “[t]he symbiotic relationship among the School, the community, and the Company is common knowledge.”⁹⁹

After reviewing the “reduction in the workforce and [the] relocations of plant operations and closing of duplicate facilities” that might follow a sale of Hershey Foods and the urgency of the Trust’s sale process,¹⁰⁰ Judge Morgan reaffirmed that “the beneficiary of charitable trusts is the general public to whom the social and economic benefits of the trusts accrue,” concluding that “the Attorney General has the authority to inquire whether an exercise of a trustee’s power, even if authorized under the trust instrument, is inimical to the public interest.”¹⁰¹ Calling the Trust’s explanation of the explanatory nature of the sale process an “affront to the intelligence,”¹⁰² Judge Morgan agreed that the Attorney General had shown the required potential harm for an injunction, “the adverse economic and social impact against the public interest if a sale of Hershey Foods Corporation takes place, particularly in its effect on employees of the Corporation and the community of Derry Township.”¹⁰³ Judge Morgan noted that “the deed of trust gives the trustee discretionary powers of investment and a court will not ordinarily interfere with what appears to be an act within that discretion. The rule is, however, a general rule, not an absolute.”¹⁰⁴ He also noted that the Trust is under no obligation to diversify, and that the School does not need additional funds.

Following the Trust’s appeal of the injunction, the Pennsylvania Commonwealth Court declined to address the Trust’s assertion that “the Attorney General has no authority to prevent an otherwise lawful disposition of trust assets under the guise of protecting the public.”¹⁰⁵ Instead the

98. *Id.* (attached earlier opinion of Warren G. Morgan, Senior Judge, Dauphin Co. Orphans’ Ct., Sept. 4, 2002).

99. *Id.* at 332 (attached earlier opinion of Warren G. Morgan, Senior Judge, Dauphin Co. Orphans’ Ct., Sept. 4, 2002).

100. *Id.* at 331 (attached earlier opinion of Warren G. Morgan, Senior Judge, Dauphin Co. Orphans’ Ct., Sept. 4, 2002).

101. *Id.* at 330 (attached earlier opinion of Warren G. Morgan, Senior Judge, Dauphin Co. Orphans’ Ct., Sept. 4, 2002).

102. *Id.* at 327 (attached earlier opinion of Warren G. Morgan, Senior Judge, Dauphin Co. Orphans’ Ct., Sept. 4, 2002).

103. *Id.* at 330, 331 (attached earlier opinion of Warren G. Morgan, Senior Judge, Dauphin Co. Orphans’ Ct., Sept. 4, 2002).

104. *Id.* (attached earlier opinion of Warren G. Morgan, Senior Judge, Dauphin Co. Orphans’ Ct., Sept. 4, 2002).

105. *Id.* at 327 (original appellate opinion).

appellate court limited its review to “determin[ing] whether the trial court had the ‘apparently reasonable grounds’ required to support its decision.”¹⁰⁶ And the Commonwealth Court declined to find that “no apparently reasonable grounds exist to support the order,”¹⁰⁷ appending Judge Morgan’s September 10, 2002, adjudication with approval in a 4-1 vote to uphold the injunction.

A sharp dissent challenged the view that

the Attorney General has authority to become fully involved under a *parens patriae* theory to protect the “public” regarding the proposed sale . . . prior to the Trustees making any decision under the trust laws of Pennsylvania to actually sell trust assets. If that were the case, then the Attorney General could become fully involved in the decision-making process of every charitable trust or, for that matter, in every charity in Pennsylvania.¹⁰⁸

The dissent also challenged the breadth of the lower court decision: “By precluding even an ‘understanding’ [relating to a sale], . . . the trial court . . . also precluded any discussion leading to an agreement to bring an agreement to court.”¹⁰⁹ The dissent would have overturned the injunction as an error of law, asserting that Pennsylvania law does not provide

any authority for the Attorney General to essentially act as co-trustee or co-manager of the Trust and be part of the process leading up to a decision by the Trustees to take a certain action. . . . Absent a showing that the Trustee’s actions are against the terms of the Trust or that the Trust provisions themselves are against public interest, the *parens patriae* powers of the Attorney General do not apply.¹¹⁰

Instead, according to the dissent, specific sections of the Pennsylvania PEF Code empower the Trust to sell trust property and restrain judicial review.¹¹¹

A week after Judge Morgan confirmed the injunction, thereby delaying the sale indefinitely, the Trust Board met to consider the offers on the table for Hershey Foods. After an eleven hour, contentious and difficult meeting, the Trust Board voted 10-7 not to accept any offers, terminated the Hershey sale process, and asked Hershey Foods to announce the decision. Press reports indicated that Wrigley, the privately-held Chicago-based gum and confectionary company, was the high bidder for Hershey Foods, and had been

106. *Id.*

107. *Id.* (original appellate opinion).

108. *Id.* at 335 (Pellegrini, J., dissenting).

109. *Id.* at 336 (Pellegrini, J., dissenting).

110. *Id.* at 337, 338 (Pellegrini, J., dissenting).

111. *Id.* at 338 (Pellegrini, J., dissenting).

willing to provide certain guarantees for jobs and for the continued viability of the Hershey factories.¹¹²

In the wake of the aborted sale, and in the midst of a close gubernatorial campaign, the Attorney General came under renewed attack for his role in the Hershey debacle.¹¹³ The Attorney General was forced to defend his office's actions in print, noting his "responsibility to ensure that charitable trusts are not administered in a way that harms the public" and expressing pride at the victory in halting the sale.¹¹⁴

G. After Victory: Revenge and Reform

As the sale process ended, attention turned to the Hershey Trust and its Board—vilified by the community, internally divided, its relationships with its chief regulator deeply frayed, a suspicious judge having retained jurisdiction over the case, and financial analysts cynical over the two month struggle to sell the company.¹¹⁵ With the Trust still interested in diversifying its portfolio away from dependence on Foods holdings, financial analysts and reporters immediately assumed that the Trust and Hershey Foods would negotiate a share repurchase plan, perhaps not unlike that offered by Foods in the spring (and rejected by the Trust pending sale explorations), but perhaps now open to the public as well.¹¹⁶

112. A significant part of the Wrigley offer was in stock, a deterrent to the deal. The combined company would have been named WrigleyHershey, according to one report. See Dan Ackman, *Hershey Says No, Bankers Cry Foul*, FORBES.COM, Sept. 18, 2002, at <http://www.forbes.com/2002/09/18/0918topnews.html> (last visited Oct. 26, 2003); see also David Greising, *Wrigley Might Have Melted in Hershey Deal*, CHI. TRIB., Sept. 22, 2002, § 5, at 1; see also Ameet Sachdev, *Scandal and Upheaval*, CHI. TRIB., Dec. 31, 2002, § 3, at 1. Hershey Foods' statement put the onus clearly on the Trust for the failure of the process. For post-sale information, including reaction and commentary, see *The Chocolate War*, PITTSBURGH POST-GAZETTE, Sept. 18, 2002, at A22; *Hershey Kissonoff: An Aborted Sale Leaves Unanswered Questions*, PITTSBURGH POST-GAZETTE, Sept. 25, 2002, at A18 [hereinafter *Hershey Kissonoff*]; Martha Raffaele, *Joy in Candyland*, PITTSBURGH POST-GAZETTE, Sept. 19, 2002, at E1.

113. *Hershey Kissonoff*, *supra* note 112. "Did [the Attorney General's earlier investigation of the Trust and the School] nudge the Hershey Trust into action that Mr. Fisher himself later opposed? The public deserves a full explanation. . . . Hershey is more than a chocolate theme park. It is an important Pennsylvania asset that must be managed correctly." *Id.*

114. Mike Fisher, *Attorney General's Office Had a Duty to Challenge Hershey Sale*, PITTSBURGH POST-GAZETTE, Sept. 25, 2002, at A18.

115. See, e.g., Bill Sulon, *Local Trustees Prove Key*, PATRIOT-NEWS (Harrisburg), Sept. 21, 2002, at B1 (providing a director-by-director breakdown of the March 2002 vote to explore the sale of Hershey Foods and the September vote to end the sale process); see also David Olive, *Bittersweet*, TORONTO STAR, Sept. 21, 2002, at C1.

116. See, e.g., Sulon, *Plan Critiqued*, *supra* note 32.

Calls immediately began for removal of some, or all, of the members of the Hershey Trust Board, and calls accelerated for legislative action that would prevent the Trust from attempting to again sell Hershey Foods.¹¹⁷ Faced with this anger and the continuing injunction in place against the sale, but hoping to begin to end the judicial process, the Trust wrote to the Attorney General, promising not to attempt another sale of Hershey Foods without seeking court approval.¹¹⁸ The next day, the Hershey Trust filed a motion in the Dauphin County Orphans' Court seeking dismissal of all sale-related matters, arguing that the sale had become a moot issue, and the Trust had promised to seek court approval for any future sale process; thus the court had no reason to retain jurisdiction.¹¹⁹

In early October, the Attorney General opposed the Trust's motion to end the judicial process, urging the court to retain jurisdiction and only consider granting the dismissal motion if the court ordered any later sale to be subject to the Attorney General and the court's approval.¹²⁰ Showing continuing, sharp mistrust of the Hershey Trust, the Attorney General's filing noted that "[a] sale of Hershey Foods Corporation is indeed still possible, albeit perhaps no longer imminent, and all of the important and outstanding matters at issue will again be presented whenever a future sale occurs."¹²¹

117. See *Community Leaders Seek Hershey Trust Board Ouster*, ASSOCIATED PRESS NEWSWIREs, Sept. 24, 2002, at <http://www.webprowire.com/summaries/249232.html> (last visited Oct. 26, 2003); Marc Levy, *Battle for Hershey Foods Corp. Not Over Quite Yet*, Sept. 23, 2002, at <http://www.tnonline.com/archives/news/2002/09.23/hershey.html> (last visited Oct. 26, 2003); Brett Marcy, *Fisher Urged to Oust Trust Board*, PATRIOT-NEWS (Harrisburg), Sept. 24, 2002, at B6. For Trust reaction and extensive attempts to explain and rebuild relationships with the community, see Bill Sulon, *Hershey Trust Seeks "Healing" in Community, President Says*, PATRIOT-NEWS (Harrisburg), Sept. 25, 2002, at A1; Todd Thatcher, *Vowler: We Will Not Explore a Sale Again*, HERSEY CHRON., Sept. 25, 2002 (on file with author); *Vowler Seeking to Heal Divisions*, PATRIOT-NEWS (Harrisburg), Sept. 29, 2002, at F1.

118. Letter from A. John Gabig, Chairman, Milton Hershey School Board of Managers, to Mike Fisher, Pennsylvania Attorney General (Sept. 26, 2002) (on file with author). For useful press reports, see Sarah Ellison, *Hershey Foods' Controlling Trust Says It Has "No Intentions to Sell,"* WALL ST. J., Sept. 27, 2002, at B5; *Hershey Trustees Promise Notice*, PATRIOT-NEWS (Harrisburg), Sept. 27, 2002, at D1.

119. Motion to Dismiss of the Hershey Trust Company and the Milton Hershey School, *In re Milton Hershey Sch. Trust*, slip op. (Pa. Ct. Com. Pl. 2002) (No. 712-1963) (on file with author). See *Hershey Trust Wants Case Dismissed*, ASSOCIATED PRESS NEWSWIREs, Sept. 27, 2002; Bill Sulon, *Hershey Trust Seeks to End Court Cases*, PATRIOT-NEWS (Harrisburg), Sept. 28, 2002, at A6.

120. Attorney General's Answer and New Matter in Opposition to Motion to Dismiss of the Hershey Trust Company and the Milton Hershey School, *In re Milton Hershey Sch. Trust*, slip op. (Pa. Ct. Com. Pl. 2002) (No. 712-1963) (on file with author).

121. Brett Marcy, *Fisher Still Seeks Ruling on Hershey*, PATRIOT-NEWS (Harrisburg), Oct. 4, 2002, at A1.

The two sides met in battle once again in the Dauphin County Orphans' Court before Judge Morgan on October 10, 2002, clashing in a forty-two minute argument over whether the court should end its involvement in the Hershey sale by dismissing the various pending petitions and injunctions. The Trust continued to argue that the matter was moot; the Attorney General asserted that underlying issues remained to be resolved by the court and that the sale could return to court at any time. The Attorney General's representative called the Trust's letter to the Attorney General "unverified, unsworn, not legally binding, [and] capable of rescision,"¹²² noting that "[a]bsent an order from this Court the board in our view will be free to put the community, . . . the Attorney General's Office and . . . this Court through round two."¹²³

If the court chose to dismiss the actions, the Attorney General argued, it should retain jurisdiction and require that Trust directors "honor their representations to the Court and to the Attorney General and secure this Court's approval for any proposed future sale of Hershey Foods."¹²⁴ The Attorney General proposed an order that would have extended court jurisdiction over Trust directors and School managers as individuals, a proposal sharply challenged by the Trust. And the Attorney General's argument noted the need for "all details of the sale process," asking for sensitive legal and commercial details that had not yet been discussed publicly.¹²⁵

On October 16, 2002, Judge Morgan issued a decision dissolving the September injunction and dismissing the Attorney General's action, but also requiring that the Trust and the School give the Attorney General "prompt written notice" of any intention to sell controlling shares in Hershey Foods,

122. Transcript of Argument on Motion to Dismiss at 22, *In re Milton Hershey Sch. Trust*, slip op. (Pa. Ct. Com. Pl. 2002) (No. 712-1963) (on file with author).

123. *Id.* at 25.

124. *Id.* at 17.

125. *Id.* at 17-18. For example:

[H]ow the board members arrived at their decision to put this company up for sale; . . . what information . . . was presented to the full board as opposed to select individuals or committees . . . before they voted to put the company on the block; what influence the investment bankers and others who stood to make large sums of money on this deal had on the decision that this board made to put this company up for sale; exactly what the Hershey Foods Corporation buy back offer was; whether it was even seriously considered; . . . how much, if at all, the board members considered the impact that this sale would have on the Hershey community . . .

Id. at 18-19. From a research perspective, it would certainly be useful to have that information. The arguments were covered in Brett Marcy, *Trust Argues for Dismissal of Case*, PATRIOT-NEWS (Harrisburg), Oct. 11, 2002, at B1.

and retaining jurisdiction over the dispute.¹²⁶ But Judge Morgan's formal adjudication also provided a key bridge to the next step in the Hershey dispute—the removal of a significant number of Trust directors, reorganization of the Trust and School Boards, and the adoption of state legislation protecting Hershey Foods from future sales efforts.

In his opinion, Judge Morgan made the following stark “observations” that served as a determined epigraph to the Hershey dispute:

The memorials of a good and generous man have not been well served by events surrounding this litigation. In this midstate area, Hershey is everybody's town; there is a shared pride in identifying with that community, its industry and the School, all founded by Milton S. Hershey. Respect for the memory of Milton S. Hershey demands reconciliation among those three interests as essential to effectively carrying out his philanthropic scheme. We view the resolution adopted by the Directors/Managers [of the Trust] on October 2, 2002, as a proper gesture toward that reconciliation; but it will not be enough. It appears to many that the Directors/Managers, whatever their skills and however well-intentioned their efforts, have become detached from that philanthropic scheme, not the least significant reasons for this being that the membership of each Board is unusually large and the residences and daily lives of too many members are distant and disconnected from the charitable interests they serve. Reconstituting the Boards in number and composition closer to the model utilized by Milton S. Hershey during his lifetime, and until recently by all succeeding Boards, will hasten the reconciliation.¹²⁷

After Judge Morgan's direct and acerbic statement, matters proceeded quickly. In December 2002, just before a significant meeting with analysts in Hershey, Hershey Foods announced plans for stock repurchases of up to \$500 million.¹²⁸ And fueled by Judge Morgan's comments, pressure continued to

126. *In re Milton Hershey Sch. Trust*, No. 712-1963, slip op. at Decree ¶¶ 2-3 (Pa. Ct. Com. Pl. 2002) (on file with author); see also Dave Hamilton, *Judge Blasts Hershey Trust Board*, REUTERS, Oct. 16, 2002, at <http://sg.biz.yahoo.com/reuters/nn16390257.html> (last visited Oct. 26, 2003).

127. *In re Milton Hershey Sch. Trust*, No. 712-1963, slip op. at 4 (Pa. Ct. Com. Pl. 2002) (on file with author). For useful coverage of the decision, see Brett Marcy, *Hershey Challenges Dismissed; Judge Requires Trust to Inform State of Any Sale Plans*, PATRIOT-NEWS (Harrisburg), Oct. 17, 2002, at B1.

128. Hershey Foods Corporation, Form 8-K, filed Dec. 12, 2002, at <http://www.sec.gov/Archives/edgar/data/47111/000004711102000146/f8k12122002.txt> (last visited Oct. 26, 2003); see also News Release, Hershey Foods Corp., Hershey Foods Announces Share Repurchase Program and Additional Pension Funding (Dec. 12, 2002), at http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=PR_130855&script=410&layout=-6&item_id=363722 (last visited Oct. 26, 2003). This \$500 million was in addition to the \$84 million in repurchase authority still available from the 1999 stock buyback action taken by its board. See Q3 2002 Hershey Foods Earnings Conference Call-Final, FD (Fair Disclosure), WIRE, Oct. 17, 2002 (noting the \$4 million authorization from the previous buyback in an interview with Frank Cerninara, Chief Financial Officer, Hershey Foods Company). In connection with the third quarter results Hershey announced that the sale explorations had cost the company \$17.3 million. *Id.* Some analysts placed Wrigley's bid-related expenses upwards of \$10 million. See Delroy Alexander, *Wrigley Net Rises on Strong Growth; Donnelley Warns of Lower Profit*, CHI. TRIB., Oct. 24, 2002, § 3 (placing the costs at \$9 million); Dave Carpenter, *Wrigley Net Up 8 Percent; Misses Estimate on High Costs*, ASSOCIATED

mount for a reconstitution of the Hershey Board and the removal of directors who had voted to explore the sale or the Wrigley bid in July 2002. Under the implicit threat that Judge Morgan would himself directly revamp the Trust and School Boards utilizing his own authority over charitable trusts, the Judge, the Attorney General and Trust officials met to discuss reordering the Boards. The goal of the discussions was reducing board size, increasing the number of local members, and reintegrating Hershey Foods and other Hershey entity members onto the Boards.¹²⁹

In mid-November 2002, the new Trust and School Boards were announced, eliminating six seats from the Trust Board and seven from the School Board, adding the Hershey Foods chief executive to both Boards, eliminating all members who voted to continue with the Hershey sale in September, removing the Trust chief executive from the School Board, and making both Boards considerably more local in nature.¹³⁰ The roles of Hershey Foods, the Hershey Trust, and a particularly active Attorney General and court in the Hershey dispute were now coming to a close, but the legislative struggle was only beginning.

PRESS NEWSWIRES, Oct. 23, 2002 (noting that the \$10 million dollar estimate of analysts is too high).

129. For coverage of the shake-up of the Hershey Boards, see Brett Marcy, *Hershey Trust Board Working on Makeup*, PATRIOT-NEWS (Harrisburg), Nov. 13, 2002, at B1; Brett Marcy, *Hershey Trust Faces Big Shake-up*, PATRIOT-NEWS (Harrisburg), Nov. 12, 2002, at A1; Brett Marcy, *Hershey Trust Puts Off Board Overhaul*, PATRIOT-NEWS (Harrisburg), Nov. 14, 2002, at A1; Wendy Tanaka, *Hershey Trust Board Faces Overhaul*, PHILA. INQUIRER, Nov. 2, 2002, at C1; Todd Thatcher, *Friends of Hershey Foods Takes Stand on Trust Company Board with Position Paper*, HERSHEY CHRON., Oct. 23, 2002, available at http://www.zwire.com/site/news.cfm?newsid=5805197&BRD=2249&PAG=461&dept_id=450612&rft=8 (last visited Oct. 26, 2003); Todd Thatcher, *Hershey Trust Company Board Reportedly Reorganizing*, HERSHEY CHRON., Nov. 6, 2002, available at http://www.zwire.com/site/news.cfm?newsid=5970092&BRD=2249&PAG=461&dept_id=450612&rft=8 (last visited Oct. 26, 2003).

130. For comments and coverage, see Press Release, Attorney General's Press Office, AG Fisher Announces Reconstituted Hershey Trust Board; Says New Board Will Further Milton Hershey's Vision (Nov. 14, 2002), at <http://www.attorneygeneral.gov/press/release.cfm?p=1AD88F95-1248-4B6A-8D4C312599643AC1> (last visited Oct. 26, 2003); Lewin, *supra* note 48, at A22; David Marcus, *Mike's Last Stand*, CORP. CONTROL ALERT, Dec. 23, 2002 (on file with author); Marcy, *supra* note 48, at A1; News Release, Milton Hershey School, Board Announces Membership (Nov. 14, 2002), at <http://www.mhspa.org/default.asp?id=1402> (last visited Oct. 26, 2003).

II. PHILANTHROPY AND COMMUNITY ACCOUNTABILITY AFTER HERSHEY: THE ROLE OF ATTORNEYS GENERAL, COURTS, AND LEGISLATURES

A. *Politics, Representation and Voice in the Attorney General's Role in Charitable Enforcement: Lessons from Hershey*

American state law has traditionally vested state attorneys general with primary oversight authority over charitable trusts and corporations within their state jurisdiction. For charitable trusts, as Evelyn Brody points out, “[i]t is th[e] absence of parties with a property interest that explains why the law grants standing to the attorney general to enforce the trust’s terms (including its charitable purpose) and the fiduciaries duties”¹³¹ The same concepts limit trustees’ and donors’ rights to oversight, and have traditionally provided the courts with *cy pres* authority to reform charitable trusts on traditional grounds of impossibility or impracticability.¹³² In the case of charitable corporations, concepts of public benefit have maintained the attorney general’s role in virtually all states.¹³³

The Attorney General’s actions in Hershey illustrate one side of a spectrum of attorney general oversight and supervision activity—a particularly active oversight role. Traditionally, that has not been the majority approach in the United States. Marion Fremont-Smith has noted that the state attorney general’s role “does not include . . . a right to direct either the day-to-day affairs of the charity or the action of the court.”¹³⁴ A number of courts concur in that statement of limited scope for oversight and supervision.¹³⁵ Brody restates this principle:

Proper State enforcement action over fiduciary decision-making reduces to a single rule: The role of the attorney general and courts is to guard against charity fiduciaries’ wrongdoing, and not to interfere in decision-making carried out in good faith. . . . [A] State attorney general has the obligation to provide oversight of the charitable sector. To this, an attorney general is vested with the authority to seek to correct breaches of

131. Brody, *Whose Public*, *supra* note 4, at 20. For detailed discussions of the role of the state attorney general in charitable trust enforcement, see EVELYN BRODY, *THE LEGAL FRAMEWORK FOR NONPROFIT ORGANIZATIONS*, in *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* (forthcoming); Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873 (1997) [hereinafter Brody, *Charitable Endowments*]; Brody, *Fiduciary Law*, *supra* note 4.

132. See Brody, *Whose Public*, *supra* note 4, at 21.

133. See *id.*

134. FREMONT-SMITH, *GOVERNING NONPROFIT ORGANIZATIONS*, *supra* note 4, at Chapter Six.

135. See, e.g., *Midkiff v. Kobayashi*, 507 P.2d 724 (Haw. 1973).

fiduciary duty that have not otherwise been remedied by the board. However, the attorney general is not a “super” member of the board.¹³⁶

Hershey illustrates another place on that spectrum of attorney general oversight and supervision—a considerably more intrusive position, and one, at least in the Hershey case, seemingly clearly influenced by politics. As Judge Morgan noted in the Hershey case, “the beneficiary of charitable trusts is the general public to whom the social and economic benefits of the trusts accrue,” and “the Attorney General has the authority to inquire whether an exercise of a trustee’s power, even if authorized under the trust instrument, is inimical to public interest.”¹³⁷

In Hershey, the Attorney General sought at different times to uphold quite diverse, sometimes even contradictory, principles. Early in the case, the Attorney General sought to uphold the notion of prudent investment and diversification; later, concepts of community accountability and impact. In his later actions, the Attorney General moved beyond representation of the specific interests of specific beneficiaries (such as the Milton Hershey School and its students) to representing the interests of an entire community, one only arguably within the scope of Milton Hershey’s will.

The Attorney General’s role in the Hershey dispute has come under intense criticism from scholars and other commentators, and is likely to provoke further criticism as others explore the important Hershey case. That criticism is fueled by the supportable presumption that, in Hershey, the Attorney General’s intervention against the sale of Hershey Foods was influenced and advanced by politics. But politics—in the sense of representation of community interest and impact—was perhaps not wholly inappropriate in the Hershey Foods matter. The Attorney General’s intervention (even in its relationship to personal political interests) can well be seen as an aggressive attempt to represent community views and interests that might otherwise have gone unrepresented in the struggle for Hershey. The representation of those interests may well be appropriate when the differentiated impact of the Hershey sale might have fallen so distinctly and heavily on a particular community, and when the community might well have had no other significant voice in the legal proceedings.

If we agree that community voice is worthy of representation in situations like Hershey—situations in which the impact of the decisions of charitable fiduciaries seems likely to fall disproportionately on a defined

136. Brody, *Whose Public*, *supra* note 4, at 51.

137. *Id.* at 6.

community—then we are left with an important problem. This is the issue of overlapping representation, or conflicts in representation: Can the attorney generals simultaneously represent prudent investment and diversification principles as well as public benefit as a whole, as well as the interests of a defined community that may be adversely impacted by philanthropic decision-making?

One answer to that problem is that state regulators, including those elected by political means, face the problem of overlapping representation in much of what they do, and it is their job to sort out representational priorities as they do their jobs. Here, the choice made (and, of course, at least partly for political reasons) was to represent the community and its interests, and that was a choice influenced strongly by politics and voter choice.

If political influence is inevitable—if legal doctrine is not the deciding force in every exercise of attorney general authority in the charitable sector—then perhaps it is better that it is popular political influence, openly expressed, rather than the influence of corporate or philanthropic lobbyists and donors behind the scenes. My point here is that the representational choices of the Attorney General in the Hershey struggle, and the fact that the Attorney General had to make such choices, were not necessarily inappropriate given the limited institutional actors available for oversight and supervision of the nonprofit sector, the importance of public perception and views in the actions of the nonprofit sector, and the indisputable fact that we have chosen to retain oversight and enforcement of the charitable system within the political realm rather than handing it over to purportedly “non-political” charity commissions or boards.¹³⁸

B. The Roles of the Judiciary in Charitable Enforcement: From Referee to “Super Board Member”

Closely related to the role of the Attorney General in the Hershey matter is the role of the judiciary, a matter well worth discussion because of the

138. On charity commissions and boards, a long debate in the United States, see Gary Walker & Jean Grossman, *Philanthropy and Outcomes: Dilemmas in the Quest for Accountability*, in *PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA* 172 (Charles T. Clotfelter & Thomas Ehrlich eds., 1999); Adam Yarmolinsky & Marion R. Fremont-Smith, *Preserving the Private Voluntary Sector: A Proposal for a Public Advisory Commission on Philanthropy*, in *COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS*, 5 *FILER COMMISSION RESEARCH PAPERS* 2857 (Dept. of the Treasury ed., 1977); Kenneth Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 *HARV. L. REV.* 433 (1960). For a recent discussion of these themes in the context of other cases, see Sidel, *supra* note 4, at 1312.

extraordinarily detailed, extensive role played by the local court in Hershey. The position of courts in the charitable context, like that of attorneys general, has often been constrained. In restating the general understanding of the judicial role, Marion Fremont-Smith notes that courts “may adjudicate only disputes brought to their attention by opposing parties and . . . they are confined to the issues raised by these parties.”¹³⁹ She notes only quite limited exceptions—“where the charity fiduciaries seek ‘instruction’ from the court, and, in some jurisdictions (and exercised rarely), where the court may exercise equity power to act under its own motion.”¹⁴⁰

The apparent role of the court in Hershey is far different from the doctrine of limited intervention traditionally outlined and defended by legal commentators. Judge Warren Morgan of the Dauphin County Orphans’ Court defined his role in exceptionally broad terms, and then proceeded to use all the powers he claimed. After initially granting a show cause order against the Hershey Trust, Judge Morgan then granted a preliminary injunction against the sale of Hershey Foods that was worded considerably more broadly than the Attorney General requested.¹⁴¹ Ten days later, Judge Morgan’s written adjudication affirming and explaining the injunction stated his view of his expansive role and jurisdiction in the Hershey matter in broad and now considerably more formal terms. Judge Morgan directly, even defiantly, declined to serve as “a passive instrument of the parties,”¹⁴² noting that “the public interest in the controversy and this Court’s inherent plenary powers of supervision over trusts may lead us to add to our consideration of the issues

139. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS, *supra* note 4, at 6-7.

140. *Id.*

141. *In re Milton Hershey Sch. Trust*, 807 A.2d 324, 335 (Pa. Commw. Ct. 2002) (attached earlier order of Warren G. Morgan, Senior Judge, Dauphin Co. Orphans’ Ct., Sept. 4, 2002).

[T]he Board of Managers of the Milton Hershey School and the Hershey Trust Company . . . shall not enter into any agreement or other understanding that would or could commit the respondents to a sale or other disposition of any or all of the shares of Hershey Foods Corporation held as corpus of the Trust.

Id. The language of Judge Morgan’s preliminary injunction was even broader than that requested by the Attorney General, who did not request enjoining an “understanding” or enjoining as broad a scope as “a sale or other disposition of any or all of the shares of Hershey Foods Corporation held as corpus . . .” *Id.* Instead, the Attorney General requested that the court “preliminarily enjoin [the Trust] from committing to sell, transfer, exchange, lease, or otherwise alienate or dispose of its holding in Hershey Foods Corporation” without judicial approval and notice to the Attorney General. Motion for Special *Ex Parte* Injunctive Relief Pursuant to 42 Pa. R.C.P. No. 1531(a) at 4, *In re Milton Hershey Sch. Trust*, slip op. (Pa. Ct. Com. Pl. 2002) (No. 712-1963) (on file with author).

142. *Hershey Sch. Trust*, 807 A.2d at 328 (quoting Charles E. Wyzanski, *A Trial Judge’s Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1292 (1952)) (attached earlier opinion of Warren G. Morgan, Senior Judge, Dauphin Co. Orphans’ Ct. Sept. 4, 2002).

such facts not offered by the parties as might aid our determination,” particularly referencing earlier judicial proceedings on the Hershey Trust in the same court that were also exceptionally detailed.¹⁴³

In that ruling, the court also undertook to define Milton Hershey’s charitable intent separately from the parties’ efforts and arguments. “Milton Hershey’s charitable interests were narrowly restricted,” Judge Morgan began, then defined them broadly: “He was concerned for children and for his community.”¹⁴⁴ The court took judicial notice of the earlier *cy pres* proceeding involving the Hershey Trust and School in 1999, when the Trust sought judicial approval for the use of Trust funds to build a teacher training and child research facility, using that judicial notice to emphasize that the Trust did not lack for funds for its core mission.¹⁴⁵ And he outlined, in stark terms, his view of the severe consequences of the sale of Trust assets, the need to act quickly, and to enjoin even an “understanding” of a sale—all based as much on economic and business rationales as legal doctrine.¹⁴⁶

In the *Hershey* adjudication, the court defined its own role, jurisdiction and powers in a particularly expansive fashion: “That this Court has broad visitorial and supervisory powers over charitable trusts is also well established. . . . The Court ‘within its appointed orbit is exclusive, and therefore necessarily as extensive as the demands of justice.’”¹⁴⁷

Later in the dispute, the Orphans’ Court went still further—including a stark commentary on the failings of the Hershey Trust when it ultimately disposed of the dispute, and, at least according to the press, directed discussions with the Attorney General on the realignment of the Hershey Trust board. The Court’s last adjudication in the matter required that the Hershey Trust and School “give prompt written notice to the Office of the Attorney General . . . of any intention to offer for sale shares of the Hershey Foods Corporation amounting to a controlling interest in the Corporation,” and

143. *Id.*

144. *Id.* at 329.

145. *Id.*

146. *Id.* at 331. Judge Morgan noted:

[T]he bid price usually includes a premium. This leads the acquiring company to introduce management efficiencies in order to cut costs to achieve an acceptable return and, if a public company, to respond to the concerns of investment analysts. The likelihood is great that these efficiencies will result in reduced work forces with a potential for plant location changes. Unless an event during the bid process for merger or acquisition actually precludes a bid, mere delay in the process will not discourage interested parties from submitting their bids.

Id. at 329-30.

147. *Id.* at 330 (citing *In re Estate of Coleman*, 317 A.2d 631 (Pa. 1974); *In re Toner’s Estate*, 103 A. 541 (Pa. 1918); *Shollenberger’s Appeal*, 21 Pa. 337 (Pa. 1853)).

retained jurisdiction.¹⁴⁸ But, as noted above, the Court went further still, providing “observations” that led directly to the removal of a significant number of Trust directors, reorganization of the Trust and School Boards and at least indirectly toward the adoption of state legislation protecting Hershey Foods from future sales efforts.¹⁴⁹

What accounts for the breadth of judicial power asserted and wielded in *Hershey*? The proposition that the court should have broad supervisory powers is unquestioned. There seems little doubt that the court was correct in its assertion of “inherent plenary supervision over trusts,” as a matter of both Pennsylvania and more general trust law.¹⁵⁰ Even the notion of an “exclusive” role “within its appointed orbit . . . and therefore necessarily as extensive as the demands of justice,” while using a century-old rhetorical flourish to exercise the widest possible judicial power, is not subject to significant dispute.¹⁵¹

But why the notion of “visitorial” powers, expressed by the court on more than one occasion? “[S]upervisory” powers and “exclusive” powers would seem to imply more than enough authority, authority that the *Hershey* court showed no reluctance to exercise. Why did the court import (or re-import) a notion of judicial visitation into these proceedings? Was this merely another rhetorical flourish, or was it a somewhat different notion of judicial power over charity at work in the *Hershey* context? It may have been both, but it is worth noting the frequent recitation of the “visitorial and supervisory powers” of the Orphans’ Court.¹⁵² In recent times those terms have almost never been defined, either together or separately, making it difficult to determine whether there is any substantial difference between “visitorial” and “supervisory” judicial powers. In older cases, from Pennsylvania and elsewhere, there is a notion of judicial “visitorial” power over charitable trusts deriving from the “visitorial” powers of the Commonwealth (state), and a broad notion of the power and role such authority encompasses.¹⁵³

148. *In re Milton Hershey Sch. Trust*, No. 712-1963, slip op. at Decree ¶¶ 2-3 (Pa. Ct. Com. Pl. 2002) (on file with author).

149. See *supra* notes 140, 145 and accompanying text. See also Marcy, *supra* note 127, at B1.

150. See RESTATEMENT (SECOND) OF TRUSTS §§ 348, 394 (1935).

151. *In re Milton Hershey Sch. Trust*, 807 A.2d 324, 330 (Pa. Commw. Ct. 2002) (attached earlier opinion of Warren G. Morgan, Senior Judge, Dauphin Co. Orphans’ Ct., Sept. 4, 2002) (quoting Shollenverger’s Appeal, 21 Pa. 337, *4 (1853)).

152. On the older doctrine of visitation, see Roscoe Pound, *Visitorial Jurisdiction Over Corporations in Equity*, 49 HARV. L. REV. 369 (1936); see also 1 WILLIAM BLACKSTONE, COMMENTARIES *468-69; 9 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 58-61 (1944).

153. See, e.g., *Myers v. Crick*, 114 A. 255 (Pa. 1921).

A well-known Pennsylvania case involving the Pew Trusts put the role of the Pennsylvania courts clearly:

Not only is an orphans' court required to involve itself in all matters concerning the administration and distribution of a trust, but it bears as well an historic, special burden of overseeing charitable trusts. . . . "The scope of the powers that may be exercised by that court in relation to the administration, management and control of the trust property is *ample for all purposes*" In *Laverelle's Estate* . . . the court said, "The power to 'control' has a comprehensive significance, including the right to direct, remand, dominate," The scope of supervisory control of necessity includes any matter which concerns the integrity of the trust res—its administration, its preservation and its disposition and any other matter wherein its officers [trustees] are affected in the discharge of their duties.¹⁵⁴

Those historical roots provide some clue to the breadth of the powers that the Hershey court invoked, powers beyond a more limited traditional role in ascertaining whether the trustees' acts were inconsistent with the deed of trust. The legacy of "visitation," at least in the Pennsylvania judicial context, implies that the courts are acting directly to ensure the correct enforcement and operations of a charitable trust, using the "proper means to secure the operation of the trust for the use of the beneficiaries," implying considerably more expansive behavior than determining the consistency of trustees' acts with a deed of trust or adjudicating a pending dispute.¹⁵⁵ In short, "it is the duty of th[e] court, in furtherance of its visitatorial powers over charitable trusts, to implement th[e] intent [of a charitable trust]."¹⁵⁶

The Commonwealth exercises its visitatorial and supervising powers through the orphans' court, under the provisions of the statute known as the Price Act. That court is, therefore, not merely a court of competent, but of exclusive jurisdiction, for the control and direction of managers and trustees in the use and disposition of property belonging to incorporated charities.

Id. at 256. Thus, the court is exercising the traditional "visitatorial" powers of the state over charitable trusts, a notion that is still accepted in modern law.

154. *In re Pew Memorial Trust No. 2*, 5 Pa. D.&C.3d 698, 704-05 (Pa. Ct. Com. Pl. 1977).

155. *Lopes v. Sch. Dist. of Borough of Greensburg*, 112 A. 155, 157 (Pa. 1920).

156. *In re James Estate*, 199 A.2d 275, 278 (Pa. 1964). In Roscoe Pound's words, however, "[f]ew ideas were more familiar in the formative era of the common law" than visitation. Pound, *supra* note 152, at 369. In the modern era, American commentators have written relatively sparsely about the "visitatorial" powers of state courts over charitable trusts. Brody's superb work on charitable fiduciaries refers to the modern English visitatorial system that allows the founder or an appointee to serve as a visitor, exercising "the exclusive right to adjudicate upon the domestic laws which the founder has established for the regulation of his bounty," and noting that in many cases English visitors are in fact senior judicial officers. Brody, *Charitable Endowments*, *supra* note 131, at 879. Brody also treats visitation in the context of health care conversions. For useful background on the history and role of visitation, focusing mainly on whether donors should have a modern version of visitation rights to challenge the acts of trusts and corporations, see Rob Atkinson, *Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655 (1998); James Fishman, *The Development of Nonprofit Corporation Law and an*

The exercise of judicial authority in *Hershey*, while defiantly extensive, does not appear inconsistent with the breadth of powers originally and traditionally accorded the Pennsylvania judiciary in cases of charity, particularly in those states where those powers derive largely or partly from equity. The explicit citation of the court's "visitorial" powers certainly sends a signal that the *Hershey* court intended to exercise powers in a broader and more aggressive way than the general model of nonprofit judicial intervention might indicate, which is understandable given the history of the power in Pennsylvania.

The court's broad exercise of "visitorial" power, at least in the *Hershey* dispute, also implies a lack of trust in other institutions of government—a lack of trust in their ability to sort out legally and politically complex interests at stake, a lack of trust in their representational decisions, even, perhaps, a lack of trust in the politics that seemed so clearly to have buffeted and influenced those representational decisions. The court seems to have believed that it was uniquely situated, not only by its powers but also by history, in attempting that "reconciliation." It also seems to have thought that its role extended beyond adjudication of the legal issues brought before it to a set of instructions (carefully termed "observations") that at least resulted in the reorganization of the Trust and School Boards and the elimination of a number of trustees, and perhaps in the legislature's protective legislation as well. The court that would go so far is rare—but, by the same token, the court that had the *Hershey* Trust and its decisions before it so many times, over so many years, and that was so familiar with the complexities of the Trust and the multiple interests surrounding it, and had the breadth of judicial power that Pennsylvania law seemed to accord to it, is rare as well.

*C. Legislating the Role of Charitable Fiduciaries:
Legislative Over-Action as Localist, Political Response*

As the judicial and political battle for *Hershey Foods* was ending, the Attorney General and the state legislature were collaborating to put in place

Agenda for Reform, 34 EMORY L.J. 617 (1985). In Atkinson's *Unsettled Standing*, the author quotes from Kenneth Karst's seminal 1960 article on nonprofit accountability, Karst, *supra* note 138. Atkinson, *supra* at 694 n.189 ("The doctrine of visitation should be given a swift statutory burial.") (citing Karst, *supra* note 138, at 433, 446). In the same article, Atkinson cites George Gleason Bogert and George Taylor Bogert's famous treatise: visitation as a "relic of earlier times" and not especially "practical or desirable" today. *Id.* (citing GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUST AND TRUSTEE* § 416, at 63 (rev. 2d ed. 1991)).

a statutory bar to the sale of Hershey Foods that would come to have significant implications for the future of charitable trusts and the scope of Attorney General review of trustee actions. That proposal was put on a fast track by the Pennsylvania legislative leadership and adopted by the Pennsylvania Senate on October 9, 2002, with no recorded debate and only one dissenting vote.¹⁵⁷

As adopted by the Pennsylvania Senate and sent on to the Pennsylvania House, the statute was an amendment to Pennsylvania's prudent investor rule requiring that charitable trustees take community interest into account when making investment and management decisions with respect to certain assets.¹⁵⁸ In specific terms, with respect to "charitable trusts holding a controlling interest in certain publicly traded business corporations," the statute provides that a fiduciary for such a charitable trust shall "not consummate any investment or management decision executing a change in the trust's control of that corporation, by sale, merger, consolidation or otherwise, without" providing sixty days notice to the Attorney General, and thirty days notice to the affected employees.¹⁵⁹ It affords the Attorney General "power to obtain judicial review [of such a trust decision] if the Attorney General concludes that the fiduciary should be prevented from executing such a change in control."¹⁶⁰

The statute also shifted the burdens in judicial review. When the Attorney General requests court review, the trust "must prove by clear and convincing evidence that executing the change in the trust's control of the corporation is necessary to maintain the economic viability of the corporation and prevent a significant diminution of the trust assets or to avoid an impairment of the charitable purpose of the trust."¹⁶¹ If judicial approval for

157. S. 186-60, 1st Sess., at 2226-27 (Pa. 1994) in LEGISLATIVE JOURNAL OF PENNSYLVANIA SENATE, 186th of the General Assembly, at 2226-27 (Oct. 9, 2002) (showing the Senate role on House Bill 2060 to be 48-1 in favor); see also Charles Thompson, *Future Hershey Sale Obstacles OK'd*, PATRIOT-NEWS (Harrisburg), Oct. 10, 2002, at B1.

158. Title 20, section 7203 of the Pennsylvania Consolidated Statutes stipulates that a fiduciary shall consider, among other things, to the extent relevant to the decision or action . . . an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries, including, in the case of a charitable trust, the special relationship of the asset and its economic impact as a principal business enterprise on the community in which the beneficiary of the trust is located and the special value of the integration of the beneficiary's activities with the community where that asset is located.

Prudent Investor Rule, PA. CONS. STAT. ANN. § 7203(c)(6) (Supp. 2002).

159. Section 7203(d)(1)(i), (ii).

160. Section 7203(d)(2).

161. Section 7203(d)(3).

a change in control is granted, the court must ensure that legal guarantees for severance payments and labor contracts are upheld. And, seeking to provide Hershey Trust board members and others with a shield against liability for not selling to collect the “control premium” in the interest of the trust beneficiary, the legislation also stipulates that trustees administering “a controlling interest in a publicly traded business corporation received as an asset from the settlor,” as in the Hershey Foods stock received by the Trust from Milton Hershey, “shall not be subject to liability for the commercially reasonable sale of certain shares of the corporation not necessary to maintain control and for which no control premium is realized”¹⁶²

The statute as adopted by the Pennsylvania Senate explicitly reconfirmed that the Pennsylvania fiduciary diversification requirement, enacted only in 1999, does not apply to trusts formed before December 25, 1999, “even if the action of the trustee [in deciding not to diversify] occurs after December 25, 1999.”¹⁶³ Finally, the statute made the requirements for charitable trusts controlling business corporations retroactive to the Hershey Foods dispute.¹⁶⁴

At this point, the “Hershey bill” was not yet law. As the Pennsylvania House began consideration of it in late 2002, legislators and legal specialists began to urge caution in the adoption of a statute that might chill charitable and business activity by placing limits in the way of corporate sales, additional to limits already within the power of the Attorney General or the courts. Critics warned that the legislation might apply to certain private foundations as well as charitable trusts, and that the statute’s vague wording of “controlling interest” might implicate investments by a wider range of charitable institutions than originally envisioned. This would be dangerous because federal tax laws bar private foundations from owning or controlling more than 20% of a corporation.¹⁶⁵

Critics of the “Hershey bill” also challenged the addition of a requirement to consider community interests under the prudent investment rule applicable to charitable trusts. All this, critics noted, might discourage future donors from using corporate stock to fund charitable entities, if they believed that

162. Section 7203(d)(5).

163. Section 7204(b)(1).

164. The text of House Bill 2060, signed into law by the Governor as Law 133, specifically states, “20 Pa. C.S. § 7203(d) shall apply retroactively to circumstances related to an investment or management decision executing a change in control where the review or approval of a Commonwealth agency or court is pending on the effective date of this section.” H.B. 1060, P.N. 4466, 186th Gen. Assem., Reg. Sess. (Pa. 2002).

165. Patricia Horn, *Being Charitable May Get Tougher: A Bill Aimed at Hershey Foods Could Harm Trusts, Experts Say*, PHILA. INQUIRER, Oct. 18, 2002, at C1.

their wishes and the flexibility of their trustees might be hampered by the statute's new limits. And a financial analyst noted that the statute "could prevent affected companies from attracting the higher share prices that often accompany takeover bids," "diminish[ing] the value of Hershey stock."¹⁶⁶

Under increasing scrutiny and criticism, the "Hershey bill" was brought up for debate in the Pennsylvania House in late October 2002. During the debate, a state representative raised numerous questions about the implications of the legislation. He asked whether it was aimed only at Hershey, noting that Pennsylvania's Constitution would bar adoption of such a law applicable only to one entity.¹⁶⁷ He sharply queried the Republican sponsors on the vagueness of the "controlling interest" threshold that would trigger the statute's limitations, noting that the private foundation requirement of divestiture of holdings in corporations over 20% might well be stymied by the bill. And, noting the rapid progress of the bill through the legislature, he called for public hearings on the bill, and noted that private foundations, which might be severely affected, should have an opportunity to assess and respond to it.¹⁶⁸

Finally, the dissenting representative drew a sharp distinction between the Attorney General's original proposal and the bill that had emerged:

I really agreed with the Attorney General's original proposal for a court review and approval of an agreement when it is reached to protect community interest. This proposal seems to go far afield to what his original proposal was. I am not sure whom it applies to and whom it does not, and I am not sure many of you do. I think there are numerous drafting ambiguities . . . And it also challenges provisions in Federal law and the U.S. Constitution.¹⁶⁹

166. *Id.*

167. H.R. 186-69, 1st Sess., at 1936 (Pa. 1994) in *LEGISLATIVE JOURNAL OF PENNSYLVANIA-HOUSE*, 186th of the General Assembly, at 1936 (Oct. 22, 2002) (comments of State Representative Nickol). *See* PA. CONST. art. III, § 32 (amended 1967) (restricting the ability of the state legislature from amending the charters of corporations through special laws as well as forbidding the general assembly from indirectly enacting special laws by partially repealing general law).

168. H.R. 186-69, 1st Sess., at 1936 (Pa. 1994) in *LEGISLATIVE JOURNAL OF PENNSYLVANIA-HOUSE*, 186th of the General Assembly, at 1936 (Oct. 22, 2002) (comments of State Representative Nickol). Representative Nickol further noted that "this bill has been around for so few days—2 days in the House; 1 day in the Senate—[and has] never gone through the Judiciary Committee in either chamber." *Id.* Representative Nickol went on to criticize the bill's provision for Attorney General review of a covered transaction "before a decision is actually made. I am not sure at that point in time how you can have a judicial review over something like this . . . in which the fiduciary must prove the economics of a deal before it has even been negotiated . . ." *Id.* at 1937. And he noted that potential conflict of laws in applying new provisions of the Pennsylvania Business Corporation Law to Delaware companies like Hershey Foods. *Id.*

169. *Id.*

His motion to recommit the bill for a public hearing failed, the “Hershey bill” was adopted by a wide margin, and sent to the Governor for signature.¹⁷⁰

Opposition continued to mount during the ten business days the Pennsylvania Governor was allowed to sign or veto the bill, apparently spearheaded by an unusual informal coalition of business and nonprofit interests. A financial website affiliated with *The Economist* understood the bill’s “warning to potential hostile acquirers: Don’t go after certain companies based in Pennsylvania.”¹⁷¹ Other legislators called it an “over-reaction,” noting that in the Hershey dispute “the existing law—without any changes—worked.”¹⁷²

Several newspapers concerned with potential effects on the Pennsylvania business climate editorialized against the legislation, urging the Governor not to sign it. One said that it “serves neither trusts nor Pennsylvania businesses,”¹⁷³ criticizing the broadening of fiduciary consideration to include community interests as an inappropriate expansion of trustee duties that “changes the mission of a trust—which in this case is to fund the operation of the Milton Hershey School for disadvantaged children. Instead of serving the children, the trust would serve the workers and, by extension, politicians.”¹⁷⁴ Another called it “political grandstanding that has passed for governance.”¹⁷⁵

170. *Id.* at 137-38. For the Attorney General’s reaction, see Press Release, Attorney General’s Press Office, AG Fisher Commends General Assembly for Passing Bill Requiring Charities Selling a Business to Consider the Impact on the Community (Oct. 22, 2002), at <http://www.attorneygeneral.gov/pressrelease.cfm?p=CC8F04E4-8771-4B80-84550AA7653A4AFB> (last visited Oct. 26, 2003). For additional coverage of the debate, see John Kennedy, *House Protects Hershey, Teachers in Rare Session*, PA. L. WKLY., Oct. 28, 2002; Martha Raffaele, *House Passes Bill to Curb a Sale: The State Attorney General Could Require Court Review of Deals Involving Publicly Traded Firms That Charitable Trusts Control*, PHILA. INQUIRER, Oct. 23, 2002, at C1. Even the original sponsor of the measure voted against it, calling the bill:

[D]rastically and hastily altered from the version he proposed last fall. “My concern is that at some point, it will have an impact on Hershey Foods shareholders, and in my mind I wasn’t prepared to have the Pennsylvania attorney general serving as chief investment officer for one of the largest corporations in Pennsylvania.” [He] said the bill places “hurdles to competitiveness” in the state. Bill Sulon, *Bill on Charitable Trusts Signed*, PATRIOT-NEWS (Harrisburg), Nov. 7, 2002, at D1 (noting the disapproval of State Representative Lewis, an original sponsor of the bill).

171. Stephen Taub, *Whistleblower Right: Duke Understated Profits*, CFO.COM, Oct. 30, 2002, at <http://www.cfo.com/Article?article=7971> (last visited Oct. 26, 2003).

172. Charles Thompson, *Legislation Would Impede Future Sale of Hershey*, PATRIOT-NEWS (Harrisburg), Oct. 23, 2002, at B1.

173. *‘Hershey Foods Bill’ Is Bad for Business*, THE MORNING CALL, Oct. 24, 2002, at A16.

174. *Id.* see also Bill Bergstrom, *Nonprofits Worry About Legislation Putting Strings on Hershey Sale*, PITTSBURGH POST-GAZETTE, Oct. 25, 2002, at C29 (quoting leaders of non-profits who worried about the effects of the legislation).

175. *‘Hershey Bill’ Doesn’t Deserve To Become Law*, YORK DAILY REC., Nov. 5, 2002, at A6. The

Just days before the Governor's decision was required, the business community went public. A state-wide business leader expressed "concerns about the scope of the legislation and the potential unintended consequences that it might have for all companies in Pennsylvania."¹⁷⁶ Labor and supporters of Hershey Foods lined up in support of the bill. Hershey Foods expressed muted criticism, "in a quandary because they do not want to give the impression they want to sell the company or that it is in dire financial condition."¹⁷⁷

Yet despite growing concerns, the "Hershey bill" was signed into law by the Governor of Pennsylvania on November 6, 2002¹⁷⁸—although within weeks after the signing there were signals that some legislators regretted its severe stipulations and might push for ameliorating amendments in a future legislative session.¹⁷⁹

D. The Dangerous Character of the Legislature's Intervention: Backward from the "Prudent Investor"

In at least three respects, the Pennsylvania legislative solution marks a distinct change from prior Pennsylvania law, and is a position seemingly taken by no other state. First, the statute appears to prioritize community interest and impact at an equivalent level the interest of the legal beneficiaries of a

editorial noted:

[W]hile the number of companies controlled by charitable trusts are few, it's hard to imagine why any such company would decide to expand or move to Pennsylvania with these additional restrictions. And other businesses contemplating life in Pennsylvania might well view such a bill as a symbol of an overheated regulatory climate. . . . [N]onprofit groups worry that the measure puts the big thumb of state government on the obligations of trustees of charitable organizations. Holding them to a legal threat that they cannot do damage—real or perceived—to the community where they're located is new ground.

Id.

176. Bill Sulon & Charles Thompson, *Trust-Regulation Bill Assailed*, PATRIOT-NEWS (Harrisburg), Oct. 29, 2002, at D1. A professor said that the legislation "reduces the value of the trust and the stock value of the company. . . . Even if the rules are seen by some as the best thing to come down the pike since apple pie and motherhood, they still make the state less competitive. This is an invasion of private-sector authority." *Id.*

177. *Id.* Hershey Foods only noted: "We are concerned the bill has far-reaching implications that have not been thoroughly reviewed or considered. . . . We did communicate our concerns to the General Assembly. However, these concerns remain unresolved." *Id.*

178. Sulon, *supra* note 170, at D1. For other useful interpretations of the "Hershey bill," see Christopher Gadsden, *The Hershey Power Play*, at http://www.trustsandstates.com/ar/estate_hershey_power_play/ (last visited Oct. 24, 2003).

179. *See, e.g.,* John M.R. Bull, *State Lawmakers Expecting Light Duty for Next 6 Weeks*, PITTSBURGH POST-GAZETTE, Nov. 18, 2002, at A10.

charitable trust, when a charitable trust seeks to sell a controlling interest in a publicly traded corporation.¹⁸⁰

Second, the statute puts a substantial legal burden on the charitable trust in attempting to defend itself against judicial review of such a proposed sale easily requested by the state. Rather than merely showing that the proposed action is consistent with or nonviolative of the terms of the deed of trust, a charitable trust now “must prove by clear and convincing evidence that executing the change in the trust’s control of the corporation is necessary to maintain the economic viability of the corporation and prevent a significant diminution of trust assets or to avoid an impairment of the charitable purpose of the trust.”¹⁸¹

Finally, the legislature provides a direct liability shield for trustees who do not collect a “control premium” through the sale of a public company, then enhances that liability shield by encouraging charitable trustees to undertake the “commercially reasonable sale of certain shares of the corporation not necessary to maintain control and for which no control premium is realized” when administering “a controlling interest in a publicly traded business corporation received as an asset from the settlor” (as in the Hershey Foods stock received by the Trust from Milton Hershey).¹⁸²

The Pennsylvania statute adopted in the environment of revenge and victory after the collapse of the Hershey sale returns us, at least in Pennsylvania, to an era that trusts and trustees might have long assumed to be gone, when charitable trust investments were subject to more severe restrictions than in the modern era. The Pennsylvania statute may even be seen as a modern, sophisticated version of the old “legal list,” when states limited the permissible investments trustees were allowed to make, publishing allowable investments on statutory lists.¹⁸³ In effect, Pennsylvania has told charitable trusts controlling public companies that they may not sell those

180. Prudent Investor Rule, 20 PA. CONS. STAT. ANN. § 7203(c)(6) (Supp. 2002). The statute stipulates that a

fiduciary shall consider, among other things, to the extent relevant to the decision or action . . . an asset’s special relationship or value, if any, to the purposes of the trust or to one or more of the beneficiaries, including, in the case of a charitable trust, the special relationship of the asset and its economic impact as a principal business enterprise on the community in which the beneficiary of the trust is located and the special value of the integration of the beneficiary’s activities with the community where that asset is located.

Id.

181. *Id.* § 7203(d)(3).

182. *Id.* § 7203(d)(5).

183. See Mayo Adams Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 OHIO ST. L.J. 491 (1951).

private companies absent meeting an exceptionally high bar under judicial review, in effect requiring such trusts to continue to hold such “listed” investments.

In the twentieth century those restrictive investment lists largely disappeared under the acceptance of the rules of the prudent investor.¹⁸⁴ The prudent investor rule clearly expresses a preference for diversification in the investment of trust assets,¹⁸⁵ but it also leaves room for less diversification in particular circumstances. As the commentary to the Restatement notes, allowing lessened diversification in certain circumstances,

given the variety of defensible investment strategies and the wide variation in trust purposes, terms, obligations, and other circumstances, diversification concerns do not necessarily preclude an asset allocation plan that emphasizes a single category of investments as long as the requirements of both caution and impartiality are accommodated in a manner suitable to the objectives of the particular trust.¹⁸⁶

But permitting reduced diversification under a broad principle is not the same as mandating sharply narrowed diversification, the action taken by the Pennsylvania legislature. The legislature substituted its own judgment for that of the Hershey Trust and other similarly situated trusts, as well as for that of the Attorney General and the judiciary, in requiring charitable trusts controlling private companies to, in effect, retain control of those companies. That is the return to the “legal list” of permissible investments.¹⁸⁷ Perhaps no

184. Leslie Joyner Bobo, *Nontraditional Investments of Fiduciaries: Re-Examining the Prudent Investor Rule*, 33 EMORY L.J. 1067 (1984); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996).

185. RESTATEMENT (THIRD) OF TRUSTS § 227 (1992).

The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust. (a) This standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust. (b) In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

Id.

186. *Id.* at cmt. g. For commentary on this, see Thomas Troyer et al., *Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds*, 74 GEO. L.J. 127 (1985).

187. And, of course, trustee fidelity to the state statute is mandated not only by the law of Pennsylvania but enshrined in the Restatement of Trusts as well. “In investing the funds of the trust, the trustee (a) has a duty to the beneficiaries to conform to any applicable statutory provisions governing investment by trustees” RESTATEMENT (THIRD) OF TRUSTS § 228 (1992). Historically, Pennsylvania was not alone in restricting trustee investments. The Restatement notes that:

other state legislature has gone so far as Pennsylvania in redrawing the boundaries of charitable fiduciary law. The Pennsylvania statute even applies to transactions where the trust's sale of a public company, and its purposes in selling, are not challenged under the terms of the deed of trust.

Even states that have regulated certain types of social investments by charitable fiduciaries do not appear to intervene as far as the "Hershey bill" in Pennsylvania. Arguably, the Pennsylvania legislature has acted to require a particular type of social investment screen in Hershey-type scenarios—barring or substantially hindering transactions by charitable trusts in selling controlled public companies without mandated consideration of "the special relationship of the asset and its economic impact as a principal business enterprise on the community in which the beneficiary of the trust is located and the special value of the integration of the beneficiary's activities with the community where that asset is located" and setting a very high standard for judicial approval of such sales.¹⁸⁸ Few state social investing statutes seem to go as far as the Pennsylvania law.¹⁸⁹

Arguably, the statute also derogates from a significant trend to gradually bring trustees' fiduciary duties into line with the duties of directors of nonprofit corporations, more analogous to the business judgment rule. We are left with a situation that Evelyn Brody described in an analogous context: "Worse than no legislation might be bad legislation, and the entire sector, as visible and large as it has become, remains politically vulnerable."¹⁹⁰

Yet, in one respect, as my colleague Peggie Smith points out, the statute may well have redeeming value. The notice required to the Attorney General and to affected parties under Pennsylvania's "Hershey bill" is analogous to the notice that must be provided to affected workers, community and state leaders under the Worker Adjustment Retraining and Notification Act ("WARN"), codified in 1988 at a time of extensive plant closings in steel and other

[A] few states have considerably more restrictive statutory rules governing trust investments. Such rules, usually called "legal lists," and even some constitutional provisions, have limited trustees to such specified investments as government securities, first mortgages on land, and, in more recent years, prescribed types of corporate bonds and possibly some prescribed types of corporate stocks. Other rules have simply prevented investment in the shares and bonds of private corporations. . . . Although now in general disfavor, versions of these restrictive rules survive in several states today. *Id.* In general, however, these are of limited applicability. They have reflected the residual "surviv[al]" of lists, as the Restatement indicates, rather than its resurgence through legislative action. *Id.* at cmt. b.

188. Brody, *Whose Public*, *supra* note 4, at 61.

189. On social investing, see generally AMY L. DOMINI ET AL., *THE SOCIAL INVESTMENT ALMANAC: A COMPREHENSIVE GUIDE TO SOCIALLY RESPONSIBLE INVESTING* (Henry Holt ed., 1992).

190. Brody, *Fiduciary Law*, *supra* note 4.

industries.¹⁹¹ While the statute seems to overreact to the Hershey dispute in ways that may prove damaging in other ways, the provision of notice of a significant economic disruption to those affected and those that serve them is unassailable.

III. A COMPARATIVE PERSPECTIVE ON HERSHEY

Conflicts between the investment decisions of charitable trustees and the community impact of those decisions are not only the province of American charities, regulators, courts and legislators. Great Britain and other countries have faced these conflicts as well, and a look at how another country has faced these issues may be instructive.¹⁹²

By the late 1990s, decisions by Britain's competition regulators had resulted in a significant change in the British brewing and pub industry. A number of lightly capitalized brewers that both produced spirits and owned small chains of pubs found it increasingly difficult to compete with large, national breweries that were also pub owners, and with a growing group of "super-regional" brewers and pub owners as well. Among the breweries facing difficulties was Mansfield Brewery, located in England's north Midlands and a storied name in English brewing tradition.¹⁹³

Nothing so far would bring Mansfield Brewery within the scope of our inquiry—except that in the late 1990s Mansfield was 48% owned and thus

191. See GUILD LAW CENTER FOR ECONOMIC AND SOCIAL JUSTICE, *LITIGATING THE WARN ACT: A PRACTITIONER'S GUIDE* (2003). For a recent article on WARN Act issues, see Tonya M. Cross, Comment, *Failure to WARN: A Proposal that the WARN Act Provide a Compensatory, Make-Whole Remedy for UnWARNed Employers*, 40 SAN DIEGO L. REV. 711 (2003).

192. Research for this section was conducted in the summer of 2002 at the Liverpool University Law School and its Charity Law Unit, and in interviews in London. For stimulating discussions in Liverpool on the role of charitable trustees, the community impact of charitable decision-making, Mansfield Brewery and other British charity law matters, I am grateful to Professor Jean Warburton, Warren Barr (Director, Charity Law Unit), Karen Atkinson, also of the Charity Law Unit, and Roger Morris of the Holt Charitable Trust. In London and Sheffield, I am grateful to Lindsay Driscoll, David Emerson, Richard Fries, Mark Littlewood, Stephen Lloyd, Gareth Morgan and Nigel Siederer for stimulating discussions on these matters as well.

193. For background on the Mansfield Brewery sale and dispute, see *Public Trustee v. Cooper*, 1999 WL 1425717, at *3-4 (Ch. Dec. 20, 1999). For useful commentary on investment decisions by charitable trustees and related important issues in the British context, see Jean Warburton, *Trusts: Still Going Strong 400 Years After the Statute of Charitable Uses*, in *EXTENDING THE BOUNDARIES OF TRUSTS AND SIMILAR RING-FENCED FUNDS* 163 (David Hayton ed., 2002); see also *Dilemma to Keep Wolves From Door*, THE TIMES (London), Sept. 18, 1999, at 27; Jason Nisse & Dominic Walsh, *Dispute Looms As Wolves & Dudley Targets Rival*, THE TIMES (London), Sept. 17, 1999, at 1.

controlled in a trust arrangement comprised of two charitable funds.¹⁹⁴ One of those funds, designated as the “charitable fund,” was created “for the benefit of charitable purposes and institutions ‘connected with the prevention, treatment or relief of mental illness or other forms of sickness or ill-health.’”¹⁹⁵ The other, designated as the “provident fund,” was formally established for the benefit of the Mansfield Brewery’s past and current employees.¹⁹⁶ The charitable fund controlled 30% of the Mansfield shares, and the provident fund controlled 18%.¹⁹⁷

Both funds were originally created because the descendant of the majority owner had no family and was mentally ill and wanted “to prevent the independence of the family business . . . and the well-being of its employees from being placed in jeopardy on his death through the enforced sale of his . . . controlling interest” in order to pay death taxes.¹⁹⁸ The two funds that were created each included a provision barring disposal of shares absent “special circumstances which make it desirable to do so.”¹⁹⁹ Two men long associated with the brewery and the controlling families served as trustees of each fund and as directors of the company, and one was also a partner in an investment banking firm that was later asked to represent the brewery in explorations of a sale²⁰⁰—positions of overlapping control that would raise substantial questions later.

The results of the government’s anti-competition enquiry and “beer orders” of the late 1980s led to “an aggregate shift of competitive strength from the business of producing and selling beer to the business of retailing beer. . . . [I]f the company was to prosper in the long run, it could do so only by expanding its retail business substantially and by improving the quality of that business.”²⁰¹ But, the trustees of the funds controlling the brewery were

194. *Cooper*, 1999 WL 1425717, at *1.

195. *Id.* at *2.

196. *Id.* Later, however, opponents of the sale of the brewery would charge that this was a matter of form, and that the actual goal of the provident fund was “not to benefit the beneficiaries, but as a simple mechanism to prevent funds leaving the company” Statement of Alan Meade, House of Lords Debate (Trustee Bill) (Nov. 8, 2000), at www.publications.parliament.uk/pa/cm199900/cmhansrd/vo001108/debtext/011108-11.htm#011108-11_spnew1 (last visited Nov. 10, 2003).

197. *Id.* at *3. Originally the trust had included a “personal fund” that provided for the benefit of the mentally ill family settlor during his lifetime, but at his death in 1997 the holdings of the personal fund were divided between the charitable fund and the provident fund. *Id.* at *2-3.

198. *Id.* at *1.

199. *Id.* at *3. See also Bart Peerless, *Case Comment: The Public Trustee and Another v. Paul Cooper: Resolving Conflicts in Private Trusts*, 5 PRIVATE CLIENT BUSINESS 2001, at 305-309.

200. See *Cooper*, 1999 WL 1425717, at *3.

201. *Id.* at *4. Could the brewery itself take over others in order to grow and survive? Morgan

unwilling to make the capital investments necessary for that expansion, for they did not want to see “a substantial dilution of [their control] equity holdings, . . . since to do so would reduce the influence of the [funds] over the company and . . . involve the loss of the ability to generate a control premium on a sale”²⁰²—similar to the Hershey Trust’s unwillingness to gradually reduce its shareholdings in Hershey Foods because of the risk of giving up a control premium. In late 1998, another actor entered the scene, in another move eerily analogous to the role of the Pennsylvania Attorney General in urging investment diversification upon Hershey in 2002: England’s key charity regulator, the Charity Commission, began to “express concern to the trustees . . . at the fact that i[t]s eggs were all in the single basket” of Mansfield Brewery.²⁰³

Based on those developments, the trustees of the charitable and provident funds decided to explore the market for sale of the shares they controlled. In response, Wolverhampton & Dudley, a larger and stronger brewery, made a strong bid for Mansfield in the early fall of 1999. Mansfield’s employees, their union and local residents formed a “Save Mansfield Brewery” campaign, protesting against the marketing of the brewery, asserting that the charitable provident fund held for their benefit “would not be serving its beneficiaries if it put the brewery’s future at risk,”²⁰⁴ questioning the legitimacy of the trustees’ process, and alleging multiple conflicts of interest.²⁰⁵

The Mansfield charitable fund accepted the Wolverhampton bid; its position was that acceptance of the bid was in the best interests of the charitable purposes and beneficiaries of the charitable fund. The provident fund decided to follow suit, believing that “the commercial environment within which Mansfield was operating had become much more difficult and . . . a regional brewer of the size of Mansfield could not survive in the long run,”²⁰⁶ and not wanting to be left in the position of a powerless minority shareholder. The risk to Mansfield of the prevailing commercial environment,

Stanley thought not: “Regional brewers are on the whole overexposed to poor quality pub assets and a declining beer segment, and consolidation offers a short-term, though defensive, remedy. We believe Mansfield is too small to be a predator in the ‘eat or be eaten scenario.’” *Id.* at *14. Perhaps presaging later concerns about investment banks and their research roles, Justice Hart notes dryly: “I would comment that without knowing from what particular point in the food chain Morgan Stanley was itself making that comment, it is difficult to know how much weight to place upon it.” *Id.*

202. *Id.* at *5.

203. *Id.*

204. Nisse & Walsh, *supra* note 193.

205. *Cooper*, 1999 WL 1425717, at *6.

206. *Id.* at *8.

the need for expansion in order to survive, the difficulties of expansion both because of market pressures and the unwillingness of the trustees to dilute their holdings did, in the opinion of the trustees, constitute the “special circumstances” necessary to sell their shares.²⁰⁷

The provident fund considered the position of the protesting brewery workers, concluding that it would “make little difference who owns Mansfield” to the 3,500 Mansfield employees that worked in the pubs; that the prospects for non-brewery administrative and sales staff (about 370) “are better within a larger group . . . than within Mansfield as it now is”; and that for the 130 brewery workers, “the longer-term prospects are uncertain whoever owns the brewery . . . [and] the undertakings as part of the [Wolverhampton] offer . . . provide . . . some security over the short term.”²⁰⁸

Having determined that accepting the takeover bid was in the best interests of the fund’s employee beneficiaries, the provident fund promptly sought judicial approval of its determination. In late 1999, the Chancery Division of the High Court of Justice issued a lengthy and detailed judgment dealing, in part, with the community impact of trustees’ investment decisions.

The court noted that “it has not and cannot be disputed that the terms of [Wolverhampton’s] offer represent in financial terms the best offer for their shares that the claimants can in current conditions expect to receive.”²⁰⁹ It differentiated between the duties of the charitable fund trustees and the provident fund, providing a clear statement of the duties of each.

The Charitable Fund trustees owe duties to no one but their charitable objects and have no powers to benefit any but their charitable objects. . . . [I]t is the duty of the trustees to take all reasonable steps to maintain and enhance the value of their funds. This would normally require them to consider diversification. However, by restricting the trustees’ powers to sell their . . . shareholding, the framers of the settlement were seeking to achieve an object which, potentially at least, might conflict with the irreducible primary duty to act only in the interests of the charitable objects. However much it might have been desired, the trust could not be designed so as to include as an express object the furtherance of some non-charitable object; nor, even with the knowledge that such was the ulterior motive behind the provision, can it be construed by the court as having that effect. It is, in my judgment, clear that, in forming their opinion as to the existence of

207. *Id.* at *8-9.

208. *Id.* at *8. The provident fund also determined that “if the Trustees realise a very large sum of cash from the sale of the Mansfield shares in financial terms all employees who do not lose their jobs are likely to benefit and there will be greatly increased funds to assist those employees who do lose their jobs.” *Id.* at *8-9.

209. *Id.*

special circumstances, the Charitable Fund trustees are primarily and perhaps conclusively confined to investment criteria.²¹⁰

Thus, although the question of the charitable fund was not formally before the court, Justice Hart viewed the charitable trustees as guided in law by a duty to act only in the interest of their charitable objects, and entirely justified in their decision to sell their shares in the company.

And were the provident fund trustees, whose formation document clearly specifies employees, former employees, families and descendants as beneficiaries, also justified in finding the “special circumstances” necessary to sell their shares in the company, potentially leading to the termination of employees and the loss of benefits?

Justice Hart noted that the provident trustees were a “different set of trustees charged with a different set of dispositive powers and duties,” including specific powers and duties to act for current and past employees that arose out of “a paternalistic concern for the welfare of the company’s employees.”²¹¹ Thus, according to Justice Hart, the provident fund’s attorney “was entirely correct to advise the . . . trustees that the considerations which they should have in mind were wider than those applicable in the case of the charitable fund.”²¹² Does that mean that the interest of the employees or of the community in which they live constitute a major or the deciding factor in the trustees’ decisions? Justice Hart ruled that the provident trustees “should . . . treat as a highly material factor the interests of the class of employees and ex-employees of the company,” a higher consideration than that to be given to employees by the charitable trustees.²¹³

But it is not the only or decisive consideration. And it does not convert the provident fund from one that benefits the employees into “a free-standing and enforceable non-charitable purpose trust, the purpose being to preserve the independence of the company so long as its current employees could derive benefit from it.”²¹⁴ Benefit to the employees rather than preserving the independence of the company was the “root purpose of the [original] Settlement.”²¹⁵

What about the impact on the community of the brewery’s sale or even its closure, particularly related to the broader interests of the employee

210. *Public Trustee v. Cooper*, 1999 WL 1425717, at *13 (Ch. Dec. 20, 1999).

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Public Trustee v. Cooper*, 1999 WL 1425717, at *13 (Ch. Dec. 20, 1999).

beneficiaries? This argument had been raised, “eloquently” according to Justice Hart,²¹⁶ by the representative employee in the proceedings:

The Company is an important employer for the town of Mansfield, especially after the job losses caused by pit closures in the 1980s and now when further serious job losses are imminent in the local textile business. It is also indirectly responsible for providing additional work opportunities locally, because of its reliance on other local businesses for goods and services. I think it is fair to say that the Company is regarded with a certain amount of pride within the town and that the people of Mansfield regard the Company as their own. The loss to the community if the Company were to lose its identity or, worse still, be asset-stripped and closed down goes far beyond financial loss. I accept of course that the community of Mansfield itself is not a beneficiary of the Provident Fund; but the beneficiaries of the Provident Fund are members of that community and I consider it important to try to convey to the Court the fact that what is in the interests of those beneficiaries cannot be seen solely in financial terms.²¹⁷

Justice Hart declined to take a broader view of the role of community interests in the provident trustees’ duties. While “[a] wider meaning of the concept of independence of the company asks one to look at the company, not from the point of its ownership but as a socioeconomic institution supporting, reflecting and informing the lives of those who depend upon it,” he declined to allow those considerations to rise to “construct[ing] the [special circumstances] proviso . . . [as] a ‘purpose trust’” intended to preserve the independence of the company as its main goal. Instead, he continues to view the fund as “purely investment-related,”²¹⁸ although because of the powers and duties in their trust instrument the provident trustees should treat “the interests of the class of employees and ex-employees” as a “highly material factor.”²¹⁹

Based on these considerations, the court approved the provident trustees’ decision to find the requisite “special circumstances” and sell their holdings. There was “a rational basis” for the trustees’ conclusions. The trustees’ decision could only be challenged under a reading of the trust that the court was unwilling to make: “Only if the trustees’ duties extended to deploying their trust fund through thick and thin in support of the current business unit in its current form, rather as if they were trustees of a maintenance fund for a historic building, could the trustees . . . have safely discounted such advice [received].”²²⁰

216. *Id.* at *14.

217. *Id.*

218. *Id.*

219. *Id.* at *13.

220. *Public Trustee v. Cooper*, 1999 WL 1425717, at *15 (Ch. Dec. 20, 1999). After lengthy consideration, the court also held that conflict of interest did not vitiate the Trustees’ decision nor should

Thus in an English case that is somewhat analogous in terms of the effects on employees and community of the sale of a company that is controlled through trust, the English court reaffirmed that the fundamental investment duties of a charitable trustee are to obtain the best financial return for the trust in furtherance of its charitable objects. As the court noted,

the trust could not be designed so as to include as an express object the furtherance of some non-charitable object [such as preserving the company]; nor, even with the knowledge that such was the ulterior motive behind the provision, can it be construed by the court as having that effect. . . . [T]he Charitable Fund trustees are primarily and perhaps exclusively confined to investment criteria.²²¹

The provident trustees were in a somewhat different position with somewhat broader considerations. While also primarily concerned for investment performance, they “should . . . treat as a highly material factor the interests of the class of employees and ex-employees of the company.”²²² The trustees did this, finding that in the circumstances there was a confluence of interest between the investment interests of the fund and the interests of the employees. The court declined to effectively convert the fund into a “purpose trust” with an overriding goal of preserving the independence of the company.

For the English court, the aspect of *Mansfield* that focused on a charitable trust was the easiest facet of the case. Because the charitable fund had a broad charitable purpose, the court thought it was reasonably clear that its decisions should not be substantially influenced by employee and community impact. Had the *Hershey Trust* deed been so broad, a similar result might have been legally required, but the purpose and beneficiary restriction of the *Hershey Trust* deed to the *Hershey School* complicates matters, though not so far as the provident fund in the *Mansfield* case. At least in *Mansfield*, the core beneficiaries of the provident fund were employees, past and present—and yet, even here, the most that the court allowed was that the trustees “should . . . treat as a highly material factor the interests of the class of employees and

it require the court to withhold its approval for the Trustees’ decision to sell the brewery shares. *Id.* at *16-20. Justice Hart concludes:

I have been fully satisfied that all those involved in the decision-making process of the Provident Settlement trustees have been fully conscious of the momentous nature of the decision which they have had to take; that they have been correctly advised as to the nature of the fiduciary discretion vested in them; and that they have taken every relevant factor into account and have not been swayed by any improper or irrelevant considerations. *Id.* at *20.

221. *Id.* at *13.

222. *Id.*

ex-employees of the company.”²²³ The court did not allow the sale decision to be overturned based on any effective conversion of the fund into what it terms a “purpose trust” that has as its primary or sole goal the preservation of the company.

Of course, analogies and comparisons are difficult in these cases that involve different facts and different legal systems.²²⁴ Although Mansfield employees and their investment banking consultants disagreed, it seemed clear to the various trustees (including a government and independent trustee) that Mansfield could not long survive as an independent company. The court not only found a rational basis for that view, but substantively concurred in it. No such crisis was facing Hershey. In effect, the survival of the company, the varying duties and beneficiaries under the funds, and a control premium were at stake for the trust entities in Mansfield, while a control premium and the duties of trustees—but not the survival of the company itself without merger or takeover—seemed to be at stake in Hershey.

It is also difficult to discount the importance of a sort of localism in Hershey that is entirely absent in Mansfield. In England, the charity regulatory authority, the Charity Commission, is a national body, and the Mansfield case was heard not by a local court but by a national court sitting in London. Although the Charity Commission does not normally take as detailed a role in charity cases as did the Pennsylvania Attorney General in Hershey, where the charitable trustees brought the matter to them the Commission was “satisf[ied] . . . that the course that they were taking was a proper one.”²²⁵ And the national court, the High Court of Justice, while displaying sympathy for the plight of the Mansfield employees and the effects of a possible closure of the brewery on the Mansfield community, certainly seems not to have approached the matter in a way similar to the Dauphin County Orphans’ Court.

In Mansfield, the court allowed the provident fund trustees to join the charitable fund trustees in selling a combined 48% of the company to the Wolverhampton & Dudley brewery. Mansfield Brewery passed rapidly under the control of Wolverhampton, with an understanding that a portion of the jobs at the Mansfield brewery site would be maintained for two years. Wolverhampton began to cut jobs at Mansfield in late 2000 and early 2001,²²⁶

223. *Id.*

224. For one article that points out the analogies between Hershey and Mansfield, see Mark Court, *Charity Begins with Takeover Battles*, THE TIMES (London), Sept. 4, 2002, at 27.

225. *Public Trustee v. Cooper*, 1999 WL 1425717, at *6 (Ch. Dec. 20, 1999).

226. *Is This End for Brewery?*, MANSFIELD TODAY, Jan. 16, 2001, at <http://www.mansfieldtoday.com>.

amidst plans to close the Mansfield brewery as the consolidations feared by workers came to pass. Those plans were formally announced by Wolverhampton in April 2001. As Wolverhampton's managing director explained: "It's simply that we have four breweries and we have really got business for two."²²⁷ The reaction was swift and expected from Mansfield: "The people who made that decision [to sell Mansfield] should be shocked and dismayed that they have destroyed an industry that was a successful business in Mansfield."²²⁸

In early 2001, Wolverhampton itself came under a hostile bid from a European owner of thousands of English pubs, raising hopes that the suitor would agree to sell the Mansfield plant back to a local consortium and that the brewery would reopen. Disappointment in Mansfield followed once again, as the bid for Wolverhampton failed.²²⁹

On December 15, 2001, Wolverhampton closed the Mansfield brewery after 146 years of operations, as the head brewer at the Mansfield plant bravely raised a glass for news cameras outside the Mansfield site. Several dozen employees had already left the company. Some of those remaining left in December; others took jobs at a nearby distribution site.²³⁰ Wolverhampton put the ten acre brewery site up for sale in early 2002, and there were hopes that it would be turned into a hotel, because it stood close to the Mansfield town center, a key point in the economic life of the town.²³¹ Those plans failed too, and in early 2003 the brewery site was sold to a Manchester-based land development firm. Shortly thereafter, cranes appeared on the site and

co.uk/viewarticle2.aspx?ArticleID=338598&SectionID=722 (last visited Oct. 26, 2003).

227. *Buy-Out Bid to Save Brewery*, MANSFIELD TODAY, Apr. 24, 2001, at <http://www.mansfieldtoday.co.uk/viewarticle2.aspx?ArticleID=337890&SectionID=722> (last visited Oct. 26, 2003).

228. *Id.*

229. *Mansfield Brewery Could Be Saved From Closure and Back in Local Hands by September*, MANSFIELD TODAY, July 4, 2001, at <http://www.mansfieldtoday.co.uk/viewarticle2.aspx?ArticleID=3378575&SectionID=722> (last visited Oct. 26, 2003); *see also Brewery Owners Urge the Rejection of Take Over Bid*, MANSFIELD TODAY, July 4, 2001, at <http://www.mansfieldtoday.co.uk/viewarticle2.aspx?ArticleID=337857&SectionID=722> (last visited Oct. 26, 2003); *The Last Chance Saloon*, MANSFIELD TODAY, Aug. 9, 2001, at <http://www.mansfieldtoday.co.uk/viewarticle2.aspx?ArticleID=339560&SectionID=722> (last visited Oct. 26, 2003).

230. *End of an Era as Brewery Closes Tomorrow*, MANSFIELD TODAY, Dec. 20, 2001, at <http://www.mansfieldtoday.co.uk/viewarticle2.aspx?ArticleID=338236&SectionID=722> (last visited Oct. 26, 2003); *Last Drop for Mansfield Brewery*, MANSFIELD TODAY, Dec. 14, 2003, at <http://www.mansfieldtoday.co.uk/viewarticle2.aspx?ArticleID=338668&SectionID=722> (last visited Oct. 26, 2003).

231. *Hotel Idea for Brewery Site*, MANSFIELD TODAY, Feb. 8, 2002, at <http://www.mansfieldtoday.co.uk/viewarticle2.aspx?ArticleID=338549&SectionID=722> (last visited Oct. 26, 2003).

removed several tall storage tanks, prominent symbols on the Mansfield skyline for decades.²³²

IV. CONCLUSION: HERSHEY, REPRESENTATION, VOICE AND AMERICAN PHILANTHROPY

Throughout the Hershey dispute there was a useful conflict between the considerations and responsibilities that the law required of the Hershey Trust, and the considerations the law imposed upon or enabled the Attorney General and the judiciary to raise. Balancing the trustee's correct legal emphasis on the interests of the beneficiary, here the Milton Hershey School, are the different legal responsibilities of the Attorney General, as the *parens patriae* representative of broader public and community interests. Again the state law in question is reasonably clear: The Attorney General is both empowered and required to represent the broader public interest in the administration of charitable trusts and other nonprofit institutions. And, given a history of detailed supervision of the Hershey Trust and perhaps lack of trust in the Attorney General's motivations, the court acted understandably in its activist approach to the Hershey matter.

Despite recent, sometimes intense, criticism of the role of political officials such as attorneys general at the state level, as well as state judges, in the regulation and oversight of nonprofit institutions,²³³ a substantial role for the state Attorney General and the local court worked reasonably well in *Hershey*. It is inevitable that there will be flaws in this system of counterweights that enables representation both of the interests of specific legal beneficiaries and of the broader public. Several such flaws arose in *Hershey*, but they are not necessarily significantly damaging to the process of interest balancing that occurs in such cases under the political and regulatory structure we have devised to handle these issues. Such issues may, in fact, point up the utility and flexibility of the process we have employed.

In the Hershey matter, for example, defining the broader *parens patriae* interests represented by the Attorney General became highly problematic from the start. Early in the sale process, the Attorney General's office appeared to have called for further diversification of the Trust's assets as an expression of its *parens patriae* role and responsibility in safeguarding the assets of

232. *Brewery Landmarks Coming Down*, MANSFIELD TODAY, Mar. 18, 2003, at <http://www.mansfieldtoday.co.uk/viewarticle2.aspx?ArticleID=337856&SectionID=722> (last visited Oct. 26, 2003).

233. See, e.g., Walker & Grossman, *supra* note 138; Brody, *Fiduciary Law*, *supra* note 4; Brody, *Whose Public*, *supra* note 4; Sidel, *supra* note 4.

charitable trusts. In turn, the Attorney General's emphasis on diversification raised for the Trust board the issue as to whether it was complying with its fiduciary duty to its beneficiary by not at least exploring a sale of its remaining Hershey Foods holdings at a price the market would allow.²³⁴ Asset diversification is clearly one aspect of the public interest served by a state official, such as an Attorney General, who serves to regulate and oversee the charitable trust and broader nonprofit sector.

Later, however, the definition of public interest changed, in a process not unrelated to community protest over the explorations of a sale. Within a few days after the sale exploration was announced, and as community opposition to a possible sale mounted, the Attorney General's definition of the *parens patriae* interest it was defending came to embody both the broader public interest in the administration of a charitable entity, and the specific public interest that a defined community—the Hershey workers and families, residents of Derry Township, institutions in central Pennsylvania—might have in the decisions of the Trust.

These definitions of public interest in the administration of charitable trusts are clearly influenced by politics, and the Hershey matter is no exception. But that is not necessarily a fatal or even a substantial flaw in the structure for charitable administration that we have devised and followed. Political dialogue and representation—in this case the active oppositional role of the community, and even the political aspirations of the state Attorney General—helped to spur a flexible consideration of the appropriate *parens patriae* role of the Attorney General at different points in a rapidly moving and fluid process, rather than allowing the definition of *parens patriae* interests to be immutably fixed or remain unaffected by the views of the very public that the *parens patriae* is supposed to represent. Without political dialogue and the role of political representation, the legal responsibility of the Trust to consider, first and foremost, the interest of the defined legal beneficiary, the Milton Hershey School, might not have been effectively balanced by a state regulator and state judge.

In recent years state attorneys general have come under intense criticism for the efficacy of their roles in regulating and overseeing charitable institutions, including charitable trusts. The criticisms are many-fold: attorneys general are underfinanced, understaffed, and, according to some,

234. A perhaps less charitable interpretation of these events might be that the encouragement to diversify expressed by the Attorney General's office could have merely been the rationale needed by the Trust Board that, bumping up against its threshold to lose control of Hershey Foods and concerned about the potential lost of "control premium," was merely looking for a reasons to put the company up for sale.

underconcerned with nonprofit abuses. At the same time, the critics charge, they are overly political, pursuing cases that bring political advantage, ignoring cases that do not, a criticism imbued with a strong sense that political and public dialogue is inappropriate to the regulation and oversight of the nonprofit sector. And politics, as the critique goes, comes to affect the legal decisions as to where the public interest lies, what interest attorneys general and other state regulators pursue in exercising the *parens patriae* role.

The Hershey dispute may initially be viewed as validating many of those criticisms: the public interest represented by the Attorney General did change, from a policy of generally encouraging trust asset diversification to one of implacable opposition to a sale. And there can be little doubt that politics, especially the specter of factory closings and significantly increased unemployment, were relevant to the Attorney General's role.

On the other hand, the system did work. It provided a framework for a dynamic reconsideration of what the *parens patriae* interest really is, informed not entirely by isolated regulators conferring with legal texts but necessarily, forcefully informed by public attitudes, the views of those directly affected, and broader representational forces. While that process occurred during, and appears to have been influenced by, a political and electoral process, that political process served as a transmission belt for public attitudes to be conveyed, for more information to be ascertained, and ultimately for a result to be achieved that directly addressed the questions of fiduciary duty and trustee responsibility with which the Hershey Trust Board wrestled. Here the changing nature of public interest under *parens patriae*, and the influence of political dialogue, was not an unfortunate concomitant or product of the process—it was integral to it, and, I would argue resulted in a better and more informed solution.²³⁵

Yet the same solicitude does not apply to the inflexible legislative approach taken. Rather than evincing responsiveness and continuing debate based on a sense of public interest and opinion, the legislature's approach fixed an inflexible test and standard for the divestiture of investment assets by certain charitable trusts, one not particularly amenable (unlike the roles of the

235. Nor would other solutions to the problem of public and community interest necessarily have worked much better. One such potential solution has been a charities commission or some other group of disinterested legal, accounting and nonprofit experts, either as direct regulators of state nonprofit activities (including those of charitable trusts), or as a useful advisory analog to the work of the attorneys general or other state regulators. See Karst, *supra* note 4. Another solution much discussed in recent years has been the potential for more sectoral self-regulation by the nonprofit sector itself of its own activities, and less regulation and oversight by state officials.

Attorney General and the court) to dynamic reconsideration in the light of different facts in different cases.

The legislative solution may “save” Hershey Foods by requiring a charitable trustee to take into account a far broader range of criteria in making investment decisions, perhaps ameliorating the useful role of the attorneys general and the courts in the process of considering options and choices. But it does so inflexibly, and it dilutes the key role of the charitable trustee to seek benefit for defined, legal beneficiaries. It gives pause, rather than encouragement, to the process of forming and expanding charitable trusts, reducing the flexibility we should be encouraging in growing our nonprofit sector. In this it may “save” a specific institution, Hershey Foods, while inflicting longer-term damage on the charitable trust sector, reducing flexibility in the formation of nonprofit institutions by making charitable trusts less appealing.

As the company, trust, school and town that Milton Hershey built approached its one hundredth anniversary in March 2003,²³⁶ Hershey tried to look toward the future. Many in the town commented on a new community spirit that they saw after years of conflict between the town, the Hershey Foods Corporation, the Hershey Trust, the Milton Hershey School, and the thousands of employees, School alumni, citizens, investors and others with a deep attachment and interest in the future of Hershey.²³⁷ Like the Hershey Trust, Hershey Foods sought to put the struggle behind it, sharply ramping up marketing efforts,²³⁸ introducing new products²³⁹ and raising prices,²⁴⁰ searching for international alliances to bolster its long-weak overseas sales,²⁴¹ bidding farewell to the director who had sat on both the Trust and Foods boards and supported the sale of the company,²⁴² and announcing \$500 million

236. Brett Marcy, *Party Planning Regains Upbeat Tone: Hershey Plant's Centennial Looms*, PATRIOT-NEWS (Harrisburg), Dec. 6, 2002, at B1.

237. Bill Sulon, *They Had Issue: Wounds Heal at Hershey Foods after Labor, Company Sale Spats*, PATRIOT-NEWS (Harrisburg), Dec. 29, 2002, at E1; Brett Marcy, *Hershey's "Sense of Community" Grows*, PATRIOT-NEWS (Harrisburg), Dec. 29, 2002, at A1.

238. See, e.g., Bill Sulon, *On Broadway: Hershey Store Opens to Rave Reviews*, PATRIOT-NEWS (Harrisburg), Dec. 9, 2002, at A1.

239. Bill Sulon, *Hershey Foods Plan to Unveil New Candies*, PATRIOT-NEWS (Harrisburg), Dec. 14, 2002, at A12.

240. Bill Sulon, *Hershey to Raise its Prices*, PATRIOT-NEWS (Harrisburg), Dec. 12, 2002, at D1.

241. Courtney Schlisserman, *Hershey Says 2003 Sales Will Be Less Than Expected*, BLOOMBERG NEWS, Dec. 13, 2002, available at LEXIS, Bloomberg File.

242. Bill Sulon, *Hershey Director Resigns: Candy Maker Seeks to Fill Seat on Board*, PATRIOT-NEWS (Harrisburg), Jan. 3, 2003, at D1. The director, Robert Hillier, remained quietly defiant: “I was disappointed. . . . I felt it was an attractive deal, and the attorney general’s people basically told us we ought

in stock repurchases intended, after so much bitter struggle, to continue to give the Hershey Trust opportunities to diversify its portfolio.²⁴³ As the struggles of 2002 gave way to rebuilding, the abortive Hershey sale was largely considered a debacle both for the Trust and Hershey Foods,²⁴⁴ as well as signifying the continuing power of workers in corporate control battles.²⁴⁵ Its effects will continue to be felt, in law and business far beyond the boundaries of Hershey, Pennsylvania, for decades to come.

to consider the sale of the company. It all got caught up in politics.” *Id.*

243. See John Crudele, *Hershey Buyback Looks Sweet*, N.Y. POST, Dec. 19, 2002, at 38, *see also* articles and documents cited *supra* note 128.

244. See, e.g., John Helyar, *What Went Right*, FORTUNE, Dec. 30, 2002, at 162 (“An uprising of little people thwarting a big deal? A righteous holler defeating the almighty dollar? Sweet.”); Bill Sulon, *Bid to Sell Hershey Earns Magazine’s Dubious Honor*, PATRIOT-NEWS (Harrisburg), Jan. 7, 2003, at A1; *The Worst Manager*, BUS. WK., Jan. 13, 2003, at 78 (noting that the Trust “managed to embitter nearly everyone involved in its short-lived attempt to sell the company.”).

245. Tom Walker, *Productivity Rise in 2002 Bodes Well*, ATLANTA J.-CONST., Dec. 31, 2002, at D2.