

Buyers Beware: D.C. Circuit Lowers the FTC Burden to Obtain Preliminary Injunction

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A split panel of the D.C. circuit recently overturned a district court decision denying the Federal Trade Commission's (FTC's) request for a preliminary injunction (PI) to block the *Whole Foods/Wild Oats* merger. The panel's decision makes clear that, at least in the D.C. Circuit, the FTC need not establish that a merger is likely "substantially to lessen competition" in order to justify a PI while the FTC initiates and completes administrative litigation. In fact, the D.C. Circuit's opinion suggests that the FTC might be entitled to a PI without having to prove a "relevant market," making it substantially easier for the FTC to get a PI temporarily enjoining a merger. Although the decision relates only to the PI standard, and not to the FTC's ultimate burden of proving an antitrust violation, it has the practical effect of lowering the FTC's ultimate burden in most merger cases. After the FTC obtains its PI, in order for the merging parties to close, they must defeat the FTC in a lengthy administrative trial. Most merging parties cannot afford to wait for lengthy administrative litigation to run its course, so most mergers blocked at the PI stage are abandoned.

Background

The FTC filed a complaint in the summer of 2007 seeking a PI to block the merger of Whole Foods and Wild Oats, two supermarket chains specializing in providing organic products. The district court denied the FTC's request for a PI following a multiple-day hearing at which substantial fact and expert testimony was presented. The district court concluded that the evidence presented by the merging parties overwhelmingly supported the conclusion that competition from standard grocery stores is sufficient to prevent the merged entity from raising prices for organic specialty products above competitive levels. The district court's decision was based largely on its conclusion that the "relevant market" for assessing the effects of the merger was broader than the market—"premium, natural, and organic supermarkets"—urged by the FTC.

The FTC appealed to the D.C. Circuit. The Circuit court, however, refused to enjoin the merger pending the appeal. Consequently, the merger closed and integration of the two supermarkets commenced in August 2007.

D.C. Circuit Panel Decision

A split panel of the D.C. Circuit reversed in a decision that produced three separate opinions, including a separate concurring opinion and a strongly worded dissent.

The majority held that the district court misapplied the standard applicable to FTC requests for PIs. That standard requires courts to “weigh the equities” in deciding whether to issue a PI, something that the district court failed to do. According to the majority, the amount and nature of the evidence the FTC must prove to establish a right to a preliminary injunction are assessed on a “sliding scale” that takes into account the balance of the equities. Because the equities generally tip in favor of the FTC according to the panel majority, the FTC typically will only be required to demonstrate “serious questions” going to the merits. The FTC may be able to meet that standard without having to prove a specific “relevant market” in which to measure competitive effects—which is typically the first step in any substantive antitrust merger analysis.

Because the district court hearing focused largely on issues of market definition, however, the panel felt constrained to review and decide the market definition issue in this case. The majority concluded that the district court failed to give sufficient credence to FTC evidence and arguments suggesting that the relevant market here was limited to “premium, natural, and organic supermarkets.” Despite defense evidence suggesting that so-called “marginal customers” (who are often the focus of antitrust analysis) would have switched to standard grocery stores in response to a price increase by the merged entity, the panel held that the existence of certain “core customers” who would not switch to standard grocery stores was sufficient to justify a PI while the FTC pursues administrative litigation challenging the merger.

The circuit court remanded the case to the district court to make findings regarding the “weight of the equities” and to fashion relief, if appropriate. A concurring opinion by Judge Tatel instructed the district court to disregard the “private equities” of the merging parties unless Whole Foods or Wild Oats could establish that the merger would also produce “public equities,” such as increased employment. The majority and concurring opinions strongly imply that it will be a rare case indeed in which the “equities” will favor the merging parties.

What Next?

It is not clear how the next chapter of this litigation will unfold. Whole Foods may ask for a rehearing *en banc* before the entire D.C. Circuit or even seek certiorari from the Supreme Court. The issue decided by the D.C. Circuit panel is sufficiently important and sufficiently novel that the case may well catch the attention of the entire D.C. Circuit or the Supreme Court.

If the FTC seeks a preliminary injunction on remand, the remedy (and the weight of the equities) will be influenced by the fact that the merger already closed (nearly a year ago) and substantial integration has already occurred. Although the district court will have wide discretion to impose whatever relief it deems necessary—up to and including unwinding the already completed merger—it is unlikely that the FTC will seek or the court will order much more than that the parties cease further integration until any administrative litigation is concluded. Having clarified its low legal burden to block mergers, one wonders whether the FTC will risk a decision by the district court—which has already decided against the FTC once—that undermines in some way the panel’s decision, or whether it will instead seek a settlement with the merging parties prior to remand in order to lock in its legal gains.

If the FTC decides to pursue the case further, it will need to prove through administrative Part III litigation that the transaction is likely substantially to reduce competition in order to unwind the merger of the two supermarket chains.

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