

August 6, 2008

## **WHOLE FOODS: WHERE DOES THE FEDERAL TRADE COMMISSION GO FROM HERE?**

Whole Foods has closed its acquisition of Wild Oats, but it may not have much time to enjoy its purchase. The Federal Trade Commission had sought a preliminary injunction to block the merger to give it time to conduct a trial on the merits, but the district court denied the motion. The Court of Appeals for the District of Columbia Circuit denied an injunction pending appeal, and on August 28, 2007, Whole Foods and Wild Oats merged. Eleven months later, the D.C. Circuit reversed the denial of a preliminary injunction and remanded the case for further proceedings. *FTC v. Whole Foods Market, Inc.*, No. 07-5276 (D.C. Cir. July 29, 2008). The case, however, is far from moot, as the government can seek to unwind consummated mergers and has been successful in doing so in the past.

The D.C. Circuit majority acknowledged that the district court had applied the correct legal standard under § 13(b) of the Federal Trade Commission Act (15 U.S.C. § 53(b)). The § 13(b) standard is more favorable to the FTC than the traditional four-part equity test, and the D.C. Circuit took particular care to emphasize those aspects of the standard that favor the FTC (e.g., no need to show irreparable harm; likelihood of success balanced against the equities on a "sliding scale"). The court also emphasized that the district court must not require the FTC to prove the merits. The tone of the opinion suggests that the majority believed the standard – albeit the correct one -- was applied too strictly.

It also held that the district court erred as a matter of law in its approach to market definition. The FTC argued that the appropriate relevant market in which to analyze the merger was limited to premium natural and organic supermarkets; Whole Foods contended the market included all supermarkets. The district court had focused on the customers likely to leave Whole Foods in the event of a price increase – the so-called "marginal" customers – and concluded that there was enough evidence to show that Whole Foods and ordinary supermarkets were in the same antitrust market. It ignored, however, that there might be a group of "core" customers for whom ordinary supermarkets were not a realistic alternative. The D.C. Circuit held that these core customers might define a market and that the district court erred in rejecting that possibility. It therefore reversed the district court's decision that the FTC had shown no likelihood of success on the merits and remanded for further proceedings.

The D.C. Circuit's ruling is significant in several respects. First, it reaffirmed the vitality of the special injunctive standard in § 13(b) and underscored one overriding practical implication: whether a merger is enjoined by a federal court may well depend on whether the merger is challenged by the FTC, relying on the favorable § 13(b) standard, or by the Department of Justice, which is subject to the standard four-part test. A further consequence is that mergers challenged by DOJ will be resolved more quickly, since DOJ often agrees to consolidate the preliminary injunction hearing with a trial on the merits. For the FTC, the two are separate, with the merits trial being an administrative trial before an administrative law judge, whose decision is reviewed by the Commission; the Commission's decision is then subject to review in the appropriate circuit court of appeals.

The D.C. Circuit's ruling that a market may be defined by core customers is also likely to affect the way mergers are challenged and defended, since the FTC and DOJ's own *Merger Guidelines* focus on the marginal customer. The issue may become more important as new technologies reach the market, customers abandon the old technologies, and a significant number don't consider the old technology as a realistic substitute any more; for example, while some people might be willing to go back to listening to cassette tapes in their cars, others – the core customers – would never give up their CDs, and so might define a market for in-dash CD players.

Finally, the question this Alert started with: where does the FTC go from here? It's actually Whole Foods' move, with the possibility of rehearing, rehearing en banc, and even Supreme Court review. But if the ruling is upheld, the FTC will get back to the district court, and assuming the district court decides the FTC is entitled to injunctive relief, the nature of that relief is hard to predict. Whole Foods will likely have continued to integrate Wild Oats into its operations during the pendency of the litigation. The district court could order that further efforts be halted, that Whole Foods take steps to preserve the "divestability" of the Wild Oats assets, including maintaining the trademarks and even brand awareness (perhaps requiring that some stores be rebranded as "Wild Oats" stores), and so on. And only then would the trial on the merits begin.

Regardless of the outcome with respect to the Whole Foods-Wild Oats merger itself, one thing is certain: if the D.C. Circuit's decision stays on the books, the FTC's merger enforcers are likely to be confident of their abilities to win preliminary relief and to be aggressive in their case selection.

If you have any questions regarding the foregoing, please feel free to contact one of the attorneys listed below.

Kathleen M. Beasley  
214.651.5697

[kathleen.beasley@haynesboone.com](mailto:kathleen.beasley@haynesboone.com)

Ron Breaux  
214.651.5688

[ron.breaux@haynesboone.com](mailto:ron.breaux@haynesboone.com)

David R. McAtee II  
214.651.5374

[david.mcatee@haynesboone.com](mailto:david.mcatee@haynesboone.com)

Veronica G. Kayne  
202.654.4517

[veronica.kayne@haynesboone.com](mailto:veronica.kayne@haynesboone.com)

Barry McNeil  
214.651.5580

[barry.mcneil@haynesboone.com](mailto:barry.mcneil@haynesboone.com)

Bill Morrison  
214.651.5018

[bill.morrison@haynesboone.com](mailto:bill.morrison@haynesboone.com)

Alison L. Smith  
713.547.2673

[alison.smith@haynesboone.com](mailto:alison.smith@haynesboone.com)

James R. Wade  
202.654.4543

[jim.wade@haynesboone.com](mailto:jim.wade@haynesboone.com)