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VIEWPOINT:

The FTC's Quixotic Pursuit of the Whole Foods/Wild Oats Merger

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The FTC's Quixotic Pursuit of the Whole Foods/Wild Oats Merger

By

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A little over two months ago, the U.S. Federal Trade Commission's (FTC) challenge of the acquisition by natural and organic foods retailer Whole Foods of its rival Wild Oats seemed all but dead in the water. On August 16, 2007 the United States District Court for the District of Columbia denied the FTC's request for a preliminary injunction against the merger. While the FTC immediately appealed the decision, the U.S. Court of Appeals for the District of Columbia found that the Commission had failed to make a strong showing that it was likely to prevail on the merits of its appeal and allowed the parties to close their merger, which they did on August 28.

Yet, to the surprise of most observers, the FTC is not showing any signs of letting up its fight against the grocery stores' combination. On October 22, 2007, it opposed a motion by Whole Foods to dismiss the Commission's appeal as moot. Yet the FTC's path seems rife with hurdles. Unraveling a completed merger can be technically challenging and the Commission is generally reluctant to force parties to undo a transaction that is already closed. In addition the Court of Appeals' refusal to enjoin the merger during the pendency of the appeal strongly signals that it believes the District Court's ruling was correct and should stand.

Why then is the Commission pursuing an appeal that is widely viewed as a long shot? Its motivations are likely twofold. First, from a procedural standpoint, the

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Commission wishes to preserve its prerogatives as having primary initial responsibility for deciding the legality of mergers under the antitrust laws. Second, from a substantive point of view, it hopes to contain the risk that courts will use this case as precedent to define retail markets broadly, and thereby, restrict the Commission's ability to challenge mergers between retailers in the future.

The first issue arises from the unique procedural scheme that governs FTC challenges to mergers. While the U.S. Department of Justice's only option to halt a merger is to sue in federal court, the Commission has the alternative of conducting an administrative trial under Part 3 of its Rules of Practice. At that stage, the Commission's application for an injunction during the pendency of an administrative proceeding should be granted "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."² In the FTC's view, the District Court improperly insisted that the Commission prove its case on the merits and thereby "usurped the adjudicative role of the Commission."³ Against the backdrop of increasing judicial scrutiny of its decisions at the district court level, the Commission seems determined to put its foot down and protect its turf.

The Commission is also likely worried that it is losing a crucial market definition battle. The cornerstone of its complaint against the Whole Foods/Wild Oats merger was its contention that the relevant product market is "premium natural and organic supermarkets," as distinct from conventional supermarkets. On that definition, Whole

² 15 U.S.C. § 53(b)(2).

³ Federal Trade Commission's Opposition to Motion to Dismiss the Appeal As Moot, October 22, 2007.

Foods' acquisition of Wild Oats eliminated its main and, in many parts of the United States, its only competitor. However, few are those whom the Commission has convinced and it will have a difficult task changing the many skeptics' minds. Few would argue against the FTC's view that the parties have been working from the same playbook in the way they have differentiated their product offering from conventional supermarkets. In addition, Whole Foods' CEO's brash rhetoric certainly pitted Wild Oats as his company's closest and only real rival, which, on the surface, seemed like an endorsement of the Commission's market definition. By contrast, the evidence that conventional supermarkets actively and effectively compete with Whole Foods and Wild Oats appears strong. After the Court of Appeals' decision not to enjoin the merger pending its appeal, the FTC most likely appreciates that its chances of obtaining a reversal are minimal. Nonetheless the prospect that a defeat would leave intact precedent that would make further retail/supermarket challenges extremely difficult makes this a gamble worth taking. The fact that this precedent was essentially decided on an incomplete record almost certainly is adding fuel to the FTC's desire to press onward.

One cannot underestimate the stakes for the FTC in this case, in terms of the preservation of its prerogatives and its ability to challenge mergers in the retail sector going forward. That said, the FTC's market definition in this case has found very little support among the many experts who have commented on the case. While a long shot, the Commission stands a better chance of prevailing on the District Court's failure to give its case proper deference at the administrative stage.