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Likelihood of Success is Still Part of the Law, Even for the FTC Under Section 13(b)

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The confusion following in the wake of the now infamous trio of opinions in *Federal Trade Commission v. Whole Foods Market, Inc.*[2] has allowed some to argue that the FTC faces a lesser burden under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to show likelihood of success than is faced by DOJ under Section 15 of the Clayton Act, 15 U.S.C. § 25 or private litigants under traditional equity standards. But the legislative history and prior case law make clear that the FTC is on exactly the same footing as other litigants, no better and no worse. Given the tortured evolution of the law on this point, it may well be time for Congress to adopt the recommendation of the Antitrust Modernization Commission and clarify that the same standard likelihood of success applies to all preliminary injunction litigants.[3]

I. CONGRESS DID NOT INTEND TO GIVE THE FTC A LOWER BURDEN ON LIKELIHOOD OF SUCCESS RELATIVE TO THE BURDEN REQUIRED OF PRIVATE PARTIES

When Congress enacted Section 13(b) of the FTC Act in 1973, there were two tests applied by federal courts in deciding whether to grant a preliminary injunction: the "equity" test, which applied to private parties; and the "statutory" or "public interest" test, a derivation of the equity test that applied to government agencies like the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC"). Although there were and are small differences between the federal circuits in how they define and apply these tests, the two tests were fairly well established in 1973 and remain largely unchanged today.

A review of the legislative history of Section 13(b) shows that Congress clearly intended that the FTC would be held to the same "statutory" standard applicable to other government agencies. There is no basis for concluding that Congress intended to

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[2] 548 F.3d 1028 (D.C. Cir. 2008).

[3] Antitrust Modernization Commission, report and Recommendations, 141 (April 2007) available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

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create a third test applicable only to the FTC that would require a lower likelihood of success than that required of other government agencies and private parties.

A. THE "EQUITY" TEST

The traditional test for preliminary injunctions derives from equity and requires the party seeking the injunction to show: (1) irreparable harm; (2) likelihood of success; (3) a favorable balance of harms; and (4) that the injunction is in the public interest. Although all circuits treat irreparable harm and/or likelihood of success as necessary prerequisites to relief, many circuits apply a flexible approach under which a particularly strong showing on one of the factors will reduce the movant's burden on others.

For example, many circuits adopt the Second Circuit's *Hamilton Watch* formulation where, if the movant can show that the balance of harms tips decidedly in the movant's favor, then likelihood of success may be satisfied by showing "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation."[4] In the interest of brevity, we will refer to these as "serious, substantial questions." Typically, for the balance of harms to tip "decidedly" in movant's favor, the potential harm to the movant must be grave and the harm to non-movant must be minimal or compensable by the posting of a bond.[5] The circuits differ in their interpretation of "serious, substantial questions" but all require some irreducible minimum, albeit unquantified, probability of success and none go so low as to find this minimum showing satisfied by the mere existence of factual disputes or the absence of certainty as the movant's failure, as the FTC recently advocated in *CCC Holdings*.[6]

B. THE "STATUTORY" OR "PUBLIC INTEREST" TEST

Where a government agency is authorized by statute to seek a preliminary injunction to enforce the law, the United States Supreme Court held in *Hecht v. Bowles* that, unless it is clear that Congress intended to limit the court's equity jurisdiction, the traditional equity considerations for preliminary injunctions should apply, but in view of the public interest that Congress chose to protect.[7] Thus, absent clear guidance from Congress, the federal courts will apply the full equity test even to government agencies. In recognition of the public interest, however, some federal courts apply a modified version of the traditional equity test known as the "statutory" or "public interest" test.

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[4] Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953).

[5] *See e.g.*, Coca-Cola Co. v. Gemini Rising, Inc., 346 F. Supp. 1183, 1193 (E.D.N.Y. 1972); *see also* Pratt v. Stout, 85 F.2d 172, 176 (8th Cir. 1936).

[6] *See* Plaintiff Federal Trade Commission's Post Hearing Brief in FTC v. CCC Holdings, Inc., 08-CV-20-43 (RMC) at 2, 13-15.

[7] Hecht Co. v. Bowles, 321 U.S. 321, 330 (1944).

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Under the statutory test, the government agency need not show irreparable harm once the agency shows a likelihood of success. The rationale is that irreparable harm to the public can automatically be presumed when the government is likely to show that a law is being violated. Additionally, the nature of the government's interest causes the balance of harms and public interest factors to merge into a single factor, the "balance of the equities." Thus, under the statutory test, the courts consider only two factors, likelihood of success and the balance of the equities. This streamlined test was often applied to requests for preliminary injunctions brought by the DOJ, SEC, and Commodity Futures Trading Commission ("CFTC") around the time that Congress enacted Section 13(b) of the FTC Act. This same test continues to be applied to those agencies today.

Under the statutory test, the required showing for likelihood of success is **not** reduced relative to the burden on private parties. In fact, it can be higher. For example, the Second Circuit, which decided *Hamilton Watch*, holds that government agencies may not rely on the serious, substantial questions approach for several reasons. First, the presumption of irreparable harm only applies if it is likely that the law is being violated, and the raising of serious, substantial questions is not sufficient to trigger that presumption. Second, even if the government agency could independently show irreparable harm, the balance of equities would not tip decidedly in favor of the government because preliminary injunctions sought by the government can be onerous, the government is not required to post a bond to protect the non-movant, and sovereign immunity denies the non-movant recourse if the government does not ultimately succeed on the merits.[8]

Although other circuits apply a flexible approach that would allow a government agency to show only serious, substantial questions, under either of the statutory or equity tests, the government agency does not get the benefit of the lower standard unless, like private parties, it also shows that the balance of harms tips decidedly in its favor.[9] Additionally, there is no difference in how the courts define "likelihood of success" or "serious, substantial questions" as between private parties and government agencies. Nor do the federal courts apply different standards to government agencies that solely perform a prosecutorial function, like the DOJ, and expert agencies that also perform an adjudicative function, like the SEC. Additionally, no distinction is made between government agencies that report to the executive branch, like the DOJ, and those that are independent, like the CFTC.

[8] SEC v. Unifund SAL, 910 F.2d 1028, 1039-40 (2d Cir. 1990); United States v. Siemens Corporation, 621 F.2d 499, 505-06. (2d Cir. 1980).

[9] *See e.g.*, United States v. Gillette, 828 F. Supp. 79, 86 (D.D.C. 1993) (reducing the DOJ's required showing on likelihood of success based on strong showings on the other factors, but finding that the DOJ failed to meet even the lower standard).

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C. THE LEGISLATIVE HISTORY OF SECTION 13(b)

The legislative history of Section 13(b) of the FTC Act clearly shows that Congress intended that the FTC be held to the "statutory" standard then applicable to other government agencies, and that Congress did not intend to create an entirely new standard that would lower the FTC's burden on likelihood of success relative to other government agencies and private parties. If anything, the legislative history shows that Congress intended to increase the courts' scrutiny of FTC requests for preliminary relief.

When Congress enacted Section 13(b), the FTC already had the power to seek preliminary injunctions against false advertising under Section 13(a) of the Act. Section 13(a) stated only that the FTC was required to make a "proper showing" to obtain a preliminary injunction. This "proper showing" language was not unique to the FTC but was the same language found in the statutes authorizing the SEC and CFTC to seek preliminary injunctions.[10] Whereas courts applied the statutory test when determining whether the SEC or CFTC made the "proper showing," the law was unsettled regarding the FTC's "proper showing." The Seventh Circuit had ruled in 1951 that the district court was only to determine whether the FTC had a "reasonable belief" that the law was being violated.[11]

Courts in the Second and Fourth Circuits subsequently questioned the validity of that ruling. The District of Maryland in *National Health Aids* suggested that the Seventh Circuit was confusing the requirement that the FTC have a "reason to believe" before **seeking** a preliminary injunction with the "proper showing" required to **obtain** a preliminary injunction, and held that the court should instead have based its determination on an analysis of "the general considerations that properly apply in the issuance of preliminary injunctions."[12] Later, in the *Sterling Drug* case in the Second Circuit, the FTC complained that the district court erred when it considered the FTC's likelihood of success and weighed the equities in denying the FTC's requested relief.[13] The Second Circuit noted the split between the Seventh Circuit's approach and the approach in *National Health Aids*, but ultimately did not reach the question because it concluded that the Commission did not even have a reason to believe that the advertisements were false. Nonetheless, the *Sterling Drug* court held that, whatever the standard, the courts must exercise independent judgment and not act as a rubber stamp.[14]

It was in light of this confusion in the case law that Section 13(b) was passed. The first draft of the statute proposed by the Senate was consistent with the language of

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[10] Section 21(d) of Exchange Act, 15 USC §78u(d); Section 13a-1 of the CFTC Act, 7 USC § 13a-1.

[11] FTC v. Rhodes Pharmaceutical, 191 F.2d 744 (7th Cir. 1951).

[12] FTC v. National Health Aids, 108 F. Supp. 340, 345 (D. Md. 1952).

[13] FTC v. Sterling Drug, Inc., 317 F.2d 669, 678 (2d Cir. 1963).

[14] *Id*. at 677.

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Section 13(a) in that it stated only that the FTC must make a "proper showing that [the requested relief] would be in the public interest." This language, however, was rejected by the House, and ultimately amended by the Conference Committee to its final form, which specified that FTC was required to make a "proper showing that, weighing the equities and considering the likelihood of success, such action would be in the public interest." Thus, in Section 13(b), Congress expressly defined the proper showing as requiring a likelihood of success and a favorable weighing of the equities, the two elements of the statutory test then applicable to other government agencies

The House Report explains that, in adding the new language to define the proper showing for Section 13(b), Congress was not intending to create "a totally new standard of proof" but that Congress' intent was to "maintain the statutory or 'public interest' standard which is now applicable."[15] Congress also stated that the new language was intended to codify the holdings of *National Health Aids* and *Sterling Drug* regarding the courts' duty to exercise independent judgment in reviewing the FTC's requested relief and that the new language was inserted to define the courts' duty in exercising that independent judgment. Congress warned, however, that the new language should not be misinterpreted to require the Commission to meet the full equity test applicable to private parties, which it stated was inappropriate for government agencies.

II. THE D.C. CIRCUIT DID NOT INTEND TO GIVE THE FTC A LOWER BURDEN ON LIKELIHOOD OF SUCCESS RELATIVE TO THE BURDEN REQUIRED OF PRIVATE PARTIES

The D.C. Circuit precedents follow Congressional intent. In *Weyerhaeuser*, the D.C. Circuit held that Section 13(b) was "not designed to innovate" but to codify the courts' "approach to cases in which government agencies, acting to enforce a federal statute, sought interim relief" and that "[m]ost importantly, the case law lightened the agency's burden by eliminating the need to show irreparable harm."[16]

The earlier *Beatrice* decision, which introduced serious, substantial questions to the court's Section 13(b) jurisprudence, was not to the contrary. Significantly, the *Beatrice* decision noted that even the FTC recognized that serious, substantial questions could satisfy the likelihood of success requirement under Section 13(b) only with a "requisite showing on the equities."[17] Given the *Beatrice* court's reliance on *Hamilton Watch*, the "requisite showing" must be understood to be a decided tip of the balance of the equities in the favor of the FTC.

Heinz, which is most often cited for the serious, substantial questions formulation, didn't even decide the issue of what the FTC needed to show to establish

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[15] H.R. Rep. No. 624, at 31, 93d Congress, 1st Session (Nov. 7, 1973).

[16] FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1082 (D.C. Cir. 1981).

[17] FTC v. Beatrice Foods Company, 587 F.2d 1225, 1229 (D.C. Cir. 1978).

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likelihood of success under Section 13(b). Instead of providing any analysis, the *Heinz* decision merely cited *Beatrice* and noted that the serious, substantial questions test applied by the court below was without objection by the appellees.[18]

The adoption of the serious, substantial questions language by *Beatrice, Weyerhaeuser*, and *Heinz* aligned the D.C. Circuit's Section 13(b) likelihood of success standard with the standard applied to all other preliminary injunction actions in the Circuit. Under the *Holiday Tours* opinion, decided the year before *Beatrice*, the D.C. Circuit adopted the *Hamilton Watch* approach, requiring that a private party must first show that the balance of the harms tips decidedly in its favor before the minimum showing of serious, substantial questions will satisfy likelihood of success. Under *Holiday Tours*, it is not enough for the balance of harms to favor the movant, as this is already required. Rather, the balance of equities must "tip sharply" in the movant's favor before it can rely on the lesser showing. The DOJ faces the same burden. The DOJ must make a strong showing on the balance of the harms before it may obtain a reduced burden on likelihood of success.[19]

III. THE *WHOLE FOODS* PLURALITY OPINIONS AND *CCC MITCHELL* HEAD IN A NEW DIRECTION

Despite what appeared to be firm foundation in the legislative history and early case law, the plurality opinions in *Whole Foods*, and the district court's opinion in *CCC Holdings*, veer off in wildly different directions. Judge Brown's opinion in *Whole Foods* finds that absent a balancing of the equities by the District Court, the FTC was entitled to a preliminary injunction unless it "entirely failed to show a likelihood of success."[20] On remand, she urged the district court to consider the balance of the equities "and see whether for some reason there is a balance against the FTC that would require a greater likelihood of success." [21] This amorphous standard begs the question "Greater than what?"

Assuming that Judge Brown was referring to serious, substantial questions, she succeeded in turning the *Holiday Tours* standard on its head. Instead of serious, substantial questions being the minimum showing of likelihood of success that applies in the rare cases where the balance of harms sharply tips in favor of the government, an even lower threshold becomes the norm that applies in all but those rare cases where "particularly strong" equities tip the balance in favor the defendant.[22] Although not without precedent in other Section 13(b) cases, Judge Tatel's approach in *Whole Foods* is even more divergent. Under Judge Tatel's approach, serious, substantial questions

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[18] FTC v. Heinz, 246 F.2d 708, 715 (D.C. Cir. 2001).

[19] See e.g., Gillette, 828 F. Supp. at 86.

[20] Whole Foods, 548 F.3d at 1035 (Brown, J.)

[21] *Id*. at 1041.

[22] *Id*. at 1035.

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becomes the **definition** of likelihood of success for the FTC, allowing the FTC to make the alternative minimum showing in all cases regardless of the balance of equities.

More concerning is *CCC Holdings*, in which the court held, in a footnote no less, that "serious, substantial questions" does not require actual likelihood of success because "precedents irrefutably teach" likelihood of success in Section 13(b) cases has a "less substantial meaning than in other preliminary injunction cases."[23] Unfortunately, the precedents are not cited. *Heinz*, it is said in the footnote, "emphasized this point." But as noted above, *Heinz* didn't even make a holding on what was necessary to satisfy likelihood of success under Section 13(b). Moreover, the serious, substantial questions language applied to Section 13(b) cases is the very same minimum showing of likelihood of success under *Holiday Tours*, the governing precedent for other preliminary injunction cases. No explanation is offered, nor can one be offered, for how the same standard can have two different meanings.

It is not clear how *CCC Holdings* defines "serious, substantial questions," but it appears from the briefs that the FTC believes that the Commission raises serious, substantial questions when there are any unresolved factual questions. In fact, the FTC argued in its post-trial brief in *CCC Holdings* that the existence of factual disputes satisfies serious, substantial questions and that anything short of the defendant proving the legality of the merger warrants the injunction.

Again, this flips the traditional equity formulation of likelihood of success on its head. Instead of requiring the movant to show that it is likely to succeed, the non-movant is required to show that it is **certain** to succeed. Moreover, this approach leaves the court with virtually no discretion as to whether to grant the preliminary injunction, leaving the courts as a mere rubber stamp for the FTC's request. This cannot be what Congress intended when it directed the FTC to seek injunctions in federal courts and instructed those courts to exercise independent judgment.

Such divergences from the traditional equity considerations on the likelihood of success factor and Congress's express intention that the courts would exercise independent judgment cannot be justified in the text of Section 13(b) or its legislative history. *Hamilton Watch* had been decided 20 years prior to Section 13(b). If Congress wanted to define the FTC's likelihood of success requirement as serious, substantial questions in all cases, or if it otherwise intended that likelihood of success would have a "less substantial meaning" when applied to the FTC than to private parties and other government agencies it could have expressed that intent in the statute or legislative history. As noted by the United States Supreme Court,

> "The grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge

[23] FTC v. CCC Holding Inc., 2009 WL 723031 at *10 n.11 (D.D.C. 2009)

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> sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law. These commonplace considerations applicable to cases in which injunctions are sought in the federal courts reflect a practice with a background of several hundred years of history, a practice of which Congress is assuredly well aware. Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles....Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction."[24]

IV. CONCLUSION

The Section 13(b) standard advocated by the FTC, and now being adopted by some judges is so extreme as to become outcome determinative. Moreover it creates a dual standard only applicable to mergers in industries subject to FTC rather than DOJ review. Rather than allow further confusion, Congress should step in, as recommended by the Antitrust Modernization Commission, and clarify that standard for the grant of a preliminary injunction currently applied in DOJ action be applied as well under Section 13(b).

[24] Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (internal quotations and citations omitted).

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