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Cirroc, the Unfrozen Caveman Lawyer from Saturday Night Live, consistently employed the same successful litigation tactic. While confessing confusion about many aspects of modern life, he could still say, "there is one thing I **DO** know . . ." as a lead-in to his argument that his client was entitled to a favorable judgment. There was some question following the D.C. Circuit's splintered decision in *FTC v. Whole Foods*[2] about how much value the case might have as precedent and whether it would affect how district court judges decide FTC preliminary injunction cases. Like Cirroc, we still are not sure how to reconcile the statutory language and case law, but after the recent district court decision in *FTC v. CCC Holdings*,[3] "there is one thing we **DO** know . . ."—at least in the D.C. Circuit, the FTC probably can get a preliminary injunction if it can make out a prima facie structural case, almost whatever the facts. The court in *CCC Holdings* (1) unambiguously followed *Whole Foods* (despite there being no majority opinion), (2) received the message that lower courts really should apply "serious questions" as the standard for FTC requests for a preliminary injunction, and (3) concluded that this standard sets a relatively low bar for the FTC to obtain a preliminary injunction.

Although *CCC Holdings* reaffirms that district courts should not be a "rubber stamp," the "serious questions" standard, as applied in that case, may mean that the FTC will almost always win. This result likely will increase divergence in merger enforcement between the FTC and the DOJ, and not just on those few cases that actually go to litigation. Merging parties should not face different outcomes depending on the agency that happens to investigate their transaction, but this is increasingly where we are headed.

I. A CLOSE CASE?

When U.S. District Judge Rosemary Collyer of the District of Columbia recently granted the FTC's motion for a Preliminary Injunction ("PI") under Section 13(b) of the FTC Act to enjoin the proposed merger between CCC Information Services, Inc. and Mitchell International, Inc., the ruling was bound to be significant simply because the FTC and the DOJ go to court on mergers so infrequently. The decision in *CCC Holdings* is

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

[3] FTC v. CCC Holdings Inc., Civ. Action No. 08-2043 (RMC), 2009 WL 723031 (D.D.C. March 18, 2009).

particularly noteworthy, however, both because it is the FTC's first such victory in seven years and because it is the first case to rule on an FTC request for a PI since the D.C. Circuit's decision last year in *Whole Foods*.

In *Whole Foods*, Judge Brown and Judge Tatel concurred in the judgment to reverse the lower court's denial of an injunction to block the merger of Whole Foods and Wild Oats, but with both judges seeming to affirm a fairly low threshold for the FTC to get a PI. On the other hand, Judge Kavanaugh dissented, expressing concern that the plurality had erroneously applied a "watered down test" for issuing a PI in FTC merger cases. He also suggested that the precedential value of the decision was "muddied" because his colleagues had issued individual opinions concurring only in the judgment.

Judge Collyer does not seem to have had any difficulty interpreting and applying *Whole Foods*. The decision in *CCC Holdings* closely tracks Judge Brown's opinion from *Whole Foods* and follows the admonition there that the FTC normally will be entitled to a PI under Section 13(b) as long as it can raise "serious questions" about the merits of a merger. In short, Judge Collyer clearly understood *Whole Foods* to say that district courts are to take the "serious questions" standard seriously.

Although Judge Collyer's decision to grant the PI in *CCC Holdings* is significant, many aspects of the case are unremarkable. The FTC charged that the merger represented a "merger to duopoly" that would hinder competition in two markets: electronic systems used to estimate the cost of collision repairs ("estimatics") and software systems used to value vehicles that have been totaled, also referred to as total loss valuation ("TLV") systems. Within these markets, the FTC alleged that the combined entity would possess "far more" than half of the sales of estimatics and for TLV systems. The FTC maintained that the merger would eliminate head-to-head competition between the two companies and create a combined firm with monopoly or near-monopoly market power. So characterized, the FTC's request for a PI in this case is not surprising and is consistent with past agency challenges alleging that a merger would result in an unlawful duopoly, such as *Heinz*, *Swedish Match*, *Cardinal Health*, and *Staples*.[4]

Still, Judge Collyer's decision to grant the PI seems to have been a close call. The FTC expended most of its effort trying to make out a unilateral effects case, which the court rejected due to the lack of evidence of any unique customer preference for the products of the merging parties. This left the FTC's coordinated effects claim, which relied predominantly on structural presumptions as a result of high market concentrations. As the court put it: "The FTC repeatedly proclaimed that this transaction represents a 'merger to duopoly,' that is, a 3-to-2 merger, as if that settles the question."[5]

[4] FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998); FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

[5] *CCC Holdings*, 2009 WL 723031, at *14.

Although the court concluded that the FTC had "established a strong prima facie case" based on structural presumptions, it noted that this was "just the beginning of the inquiry"[6] because the burden then shifts to the defendants.

The defendants argued that the FTC's concerns were negated by likely entry or expansion by firms on the periphery of the relevant markets as well as a number of other significant obstacles to coordination. Aspects of the opinion reflect the court's apparent hesitation about the strength of the FTC case on both of these points. With respect to entry, the defendants argued that either of two new technologies—web-based software or "predictive analytics" (an internal method of calculating estimates using insurance company's own empirical data)—might supplant the defendants' products and would provide strong competition post-merger. Acknowledging these points, the court observed that "[w]ith the movement towards web-based platforms well underway . . . and the potential emergence of predictive analytics in the not too distant future, the FTC may be chasing yesterday's technology, when all is said and done."[7] And yet Judge Collyer ultimately concluded that the evidence of potential new entry was "too speculative to rely upon"[8] and not sufficient to rebut the FTC's prima facie case.

The defendants also argued that the transaction would not make coordinated interaction among the remaining market participants more likely. In particular, the defendants pointed to the product heterogeneity, the lack of price transparency, and the complexity and lack of standardization with respect to pricing and products. After addressing each of these points, the court recognized that "[d]efendants have made a strong argument that despite [some FTC evidence suggesting incentives to coordinate], the market dynamics create a number of incentives to compete, and indeed, have maintained a competitive marketplace to this day."[9] The court nonetheless concluded that "the FTC has responded with substantial evidence of significant barriers to entry as well as credible evidence that coordination is possible, and even likely, in these markets."[10]

In sum, Judge Collyer found the evidence was "more complicated and uncertain"[11] than the structural presumptions would suggest, but:

> Whether the Defendants' argument that the unique combination of factors in these markets negates the probability that the merger may tend to lessen competition substantially, or whether the FTC is correct that the market

[6] *Id.* at *15.

[7] *Id.* at *27, n.39.

[8] *Id.* at *27.

[9] *Id.* at *34.

[10] *Id.*

[11] *Id.* at *1.

dynamics confirm the presumptions that follow its prima facie case, is ultimately not for this Court to decide.[12]

Thus, the "Defendants' arguments [might] ultimately win the day," but under Section 13(b) Judge Collyer needed only to determine that "the FTC has raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC'" to conclude that a PI should issue.[13]

In coming to this conclusion, Judge Collyer relied heavily on the D.C. Circuit's decision four months earlier in *Whole Foods*. It is perhaps not surprising that the opinion in *CCC Holdings* would look to *Whole Foods* as it is the most recent circuit court merger case, but the unusual procedural history of *Whole Foods* left some question at the time what lower courts would make of the decision and whether they would rely on it.

II. *WHOLE FOODS* AS PRECEDENT

Prior to *CCC Holdings*, the precedential value of *Whole Foods* was in question because there is no majority opinion in the case. When the D.C. Circuit first announced the decision in *Whole Foods* in July 2008, Judge Brown filed the opinion of the court in favor of the FTC. Judge Tatel filed a concurring opinion, and Judge Kavanaugh dissented. Then in November 2008, as part of its denial of rehearing *en banc*, the D.C. Circuit issued an amended decision in which there was no longer a majority opinion for the court. Judge Tatel withdrew his concurrence in Judge Brown's opinion and concurred only in the judgment. Judge Kavanaugh remained the sole dissenter. Thus, *Whole Foods* has three separate opinions, two of which concur only in the judgment.

Significantly, Judge Kavanaugh revised his dissent, and devoted a part of a new section to taking issue given the opinions of Judge Brown and Judge Tatel for "dilut[ing] the standard for preliminary injunction relief in antitrust merger cases."[14] He maintained that the plurality's reliance on a "serious questions" standard is inconsistent with the statutory language of 13(b), which requires that courts consider "the Commission's likelihood of ultimate success." The plurality, he concluded, may have in effect "giv[en] the FTC far greater power to block mergers than the statutory text or Supreme Court precedent permit."[15]

In addition, Judge Kavanaugh criticized the opinions of Judge Brown and Judge Tatel for not offering clear guidance with the absence of a majority opinion for the court. Judge Kavanaugh predicted that "[a]t a minimum, this confused decision will invite

[12] *Id.* at *34.

[13] *Id.* (citations omitted).

[14] *Whole Foods*, 548 F.3d at 1059 (Kavanaugh, J., dissenting).

[15] *Id.* at 1063.

years of uncertainty and litigation over what the holding of this case is"[16] and further that the "splintered panel opinions will create enormous uncertainty, debate, and litigation over the meaning and effect of this decision."[17]

The precedential value of *Whole Foods* also was a consideration in the denial of *en banc* review, at least for two judges. Concurring in the denial, Circuit Judge Ginsburg (joined by Chief Judge Sentelle) issued a statement that "there being no opinion for the Court, [the] judgment sets no precedent beyond the precise facts of this case."[18] At least based on the decision in *CCC Holdings*, Judge Kavanaugh's predictions seem overstated and Judge Ginsburg's justification for denying rehearing *en banc* seems misplaced.

Judge Collyer's opinion reflects none of the suggested uncertainty and certainly seems to find precedential effect in the *Whole Foods* decision beyond its precise facts. She repeatedly cites *Whole Foods*—predominantly Judge Brown's opinion[19]—as precedent for the legal standard she applies, and nowhere mentions any concern about the absence of an opinion for the court limiting its value. In particular, the *CCC Holdings* decision clearly relies in part on *Whole Foods* for the proposition that the FTC normally will be entitled to a PI under Section 13(b) if it "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination."[20] Under those circumstances, the FTC has met its burden of demonstrating a likelihood of success on the merits and is entitled to a presumption that the public equities favor a PI unless the merging parties are able to show "that, contrary to traditional antitrust theory, the public equities weigh in favor of the merger."[21] Only in such a case would the FTC need to show a greater likelihood of success on the merits—i.e. greater than simply raising "serious questions"—to be entitled to an injunction.

III. SERIOUSLY: "SERIOUS QUESTIONS" OR "LIKELIHOOD OF SUCCESS"?

Of course, this "serious questions" language did not originate with *Whole Foods*. Both *Whole Foods* and *CCC Holdings* cite principally to the D.C. Circuit's earlier decision in *FTC v. Heinz*[22] for the "serious questions" formulation of the FTC obligation under Section 13(b). As evidenced by Judge Kavanaugh's dissent in *Whole Foods*, however, the *Heinz* decision left some doubt about whether the "serious questions" language was just

[16] *Id*. at 1061, n.8.

[17] *Id*. at 1063.

[18] *Id*.

[19] By one count, Judge Collyer cites to Judge Brown's opinion in *Whole Foods* 18 times. *See* Neal R. Stoll and Shepard Goldfein, *In the Event of a Tie, Federal Trade Commission Wins*, 241 N.Y.L.J. 3 (2009).

[20] *CCC Holdings*, 2009 WL 723031, at *1 (citations omitted).

[21] *Id*. at *6 (citations omitted).

[22] *Heinz*, 246 F.3d 708.

another way of saying that the FTC had to show a "likelihood of success on the merits" or, alternatively, if "serious questions" was the standard itself.

Further, *Heinz* clearly did not settle the question of how low a threshold the "serious questions" standard really set for the FTC. In the wake of Heinz, the FTC won a preliminary injunction to block Libbey Inc.'s proposed acquisition of Anchor Hocking Corp. in 2002, [23] but the FTC then suffered a string of defeats at the district court level, including its original challenge to the Whole Foods acquisition of Wild Oats.[24] In part, this trend may have reflected an appreciation by district court judges that, as a practical matter, a PI often is a final decision rather than preliminary relief for merger cases.[25] Because of the difficulty in holding a pending transaction together for the duration of an FTC administrative trial (especially when the transaction sometimes already has been pending for a year by the time of the PI decision), parties often abandon their deals if they lose the PI. (This is what happened in *CCC Holdings*; the parties abandoned their merger two days after the district court's grant of the PI.) As a result, trial courts may have been reluctant to grant a PI under Section 13(b) too easily even with the *Heinz* decision as precedent. [26]

The D.C. Circuit's initial majority decision in *Whole Foods* seemed to make clear that *Heinz* meant what it said about "serious questions" being the standard under Section 13(b), that this set a fairly low threshold for the FTC, and that the FTC largely could meet this threshold on the basis of structural presumptions. In fact, the strength of Judge Kavanaugh's dissent regarding the factual record in *Whole Foods* arguably reinforces this point. Despite his critiques of the FTC case, Judge Brown and Judge Tatel both found the FTC's arguments strong enough to satisfy the "serious questions" standard. Although the later absence of a majority opinion in the amended decision left it unclear what courts would make of *Whole Foods*, the decision in *CCC Holdings* now appears to put that question to rest, at least for one district court judge.

Judge Collyer did not shy away from addressing the defendants' (and, indirectly, Judge Kavanaugh's) arguments that the "serious, substantial questions" language in *Heinz* and *Whole Foods* means nothing more than that the FTC must show a "likelihood of success on the merits." Judge Collyer responded:

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[23] FTC v. Libbey Inc., 211 F. Supp. 2d 34, 55 (D.D.C. 2002).

[24] FTC v. Whole Foods, 502 F.Supp. 2d *1 (D.D.C. 2007), *rev'd*, 548 F.3d 1028 (D.C. Cir. 2008).

[25] *See, e.g.*, FTC v. Western Refining, 2007 WL 1793441 *51 (D.N.M.), 2007-1 Trade Cases ¶ 75,725 (observing that "[t]he need for caution in issuing a preliminary injunction is particularly important in the merger and acquisition context, because 'the grant of a temporary injunction in a Government antitrust suit is likely to spell the doom of an agreed merger'") (*quoting* FTC v. Great Lakes Chem. Corp., 528 F.Supp. 84, 86 (N.D.Ill. 1981)).

[26] According to recent remarks by one FTC commissioner, a majority of FTC commissioners believed that lower courts were applying a higher a standard under Section 13(b) and "deciding cases on the merits instead of assessing whether there was a fair ground for [administrative litigation]." *See* Interview with J. Thomas Rosch, ANTITRUST, Spring 2009 at 34, 36.

> While Defendants' statement is literally true, precedents irrefutably teach that in this context "likelihood of success on the merits" has a less substantial meaning than in other preliminary injunction cases. *Heinz* not only emphasized this point but *Whole Foods* makes clear that *Heinz* remains good law.[27]

And in relying heavily on *Whole Foods* throughout the decision, *CCC Holdings* suggests in turn that *Whole Foods* is good law.

However garbled the transmission may have been, Judge Collyer seems to have received the message from *Whole Foods* that "serious questions" is the standard under Section 13(b) and that the D.C. Circuit intends for district courts to apply it as formulated.[28] Thus, in *CCC Holdings* the court found that the FTC had established a prima facie structural case based on market concentrations. And although the defendants had presented a "strong argument" why coordination was unlikely, the court concluded that the FTC had responded to the defendants' rebuttal arguments with "credible evidence that coordination is possible, and even likely."[29] As a result, the FTC had met its burden to raise "serious questions" under *Heinz* and *Whole Foods*, and was entitled to a PI unless the parties could demonstrate that public equities favored the merger. Not surprisingly, the court ruled that they could not.

IV. GREATER AGENCY DIVERGENCE

Because *CCC Holdings* seems to establish *Whole Foods* and its favorable PI standard for the FTC as good law (and at a minimum gives the FTC an entry in the "win" column, the first in seven years), the case undoubtedly will make the FTC more optimistic about its prospects in merger litigation going forward. However, the DOJ cannot fully share in this optimism and likely will not perceive the same benefit from the decision in its merger litigation chances. This will lead to greater divergence in enforcement between the agencies. To the extent other cases follow the lead of *CCC Holdings* in applying Section 13(b), the divergence is apt to be amplified.

Purely as a technical matter, the decisions in *Whole Foods* and *CCC Holdings* do not apply to the DOJ, because those cases were interpreting only Section 13(b) of the FTC Act. The DOJ is also empowered to seek PIs, but under a different statute, 15 U.S.C. § 25, which gives the DOJ the power to institute proceedings in equity to prevent and restrain violations of Section 7 of the Clayton Act. Because the DOJ proceeds in equity, courts typically apply traditional equitable principles to DOJ PI actions including, to varying degrees, a requirement that the DOJ show a "likelihood of success on the merits." Although there is some variation by circuit, at least one court has held that the

[27] *CCC Holdings*, 2009 WL 723031, at *6, n.11.

[28] Admittedly, this might be elevating form over substance, but we note that, in her first articulation of the FTC's burden to obtain a PI under Section 13(b), Judge Collyer omits any reference to "likelihood of success on the merits" and simply states the "serious questions" test. *Id.* at *1.

[29] *Id*. at *34.

DOJ is required to show "a reasonable likelihood of success on the merits" at which point irreparable harm should be presumed, but that "[t]o warrant [such a] presumption . . . the Government must do far more than merely raise sufficiently serious questions with respect to the merits to make them a fair ground for litigation.[30]

Even if, as the DOJ maintains, the PI standards for the two agencies are (or should be) the same,[31] the DOJ—unlike the FTC—often will not be litigating only a PI. The FTC, as was the case in *CCC Holdings*, usually seeks a PI in advance of securing permanent relief through administrative litigation. The DOJ, which lacks the ability to pursue cases through administrative litigation, frequently litigates the PI hearing in a consolidated action with a trial on the merits.[32] In these circumstances, the DOJ must prove the Section 7 violation, does not get the benefit of any public equities presumption, and clearly must do much more than just raise "serious questions" as the FTC can do under *Heinz*, *Whole Foods*, and *CCC Holdings*.[33]

The fact that district court judges have the authority under FRCP 65(a)(2) to advance the trial on the merits and consolidate it with the hearing on the PI (before or even after the beginning of the PI hearing) amplifies this difference between the agencies. The DOJ cannot know in advance if it will litigate just a PI or if must pursue a trial on the merits. This is in contrast to the FTC, which post-*CCC Holdings* may make litigation decisions with reasonable confidence that it will obtain a PI as long as it can meet the "serious questions" standard, which carries with it the presumption that the equities favor an injunction). The DOJ, by contrast, must heavily discount its litigation prospects to account for two factors: (1) the possibility that its requests for PIs will not benefit from the same favorable standard that the FTC gets under Section 13(b) as reflected in *Whole Foods* and *CCC Holdings*; and (2) the possibility that it may have to litigate the merits and actually prove a violation of Section 7 of the Clayton Act rather than meet a comparatively lower PI standard, whether keyed off a threshold showing of "likelihood of success on the merits" or "serious questions."

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[30] United States v. Siemens Corp., 621 F.2d 499, 505-506 (2d Cir. 1980).

[31] ANTITRUST DIVISION MANUAL, Ch. IV.B.2.b, U.S. Dep't of Justice (Dec. 2008) ("In light of the concurrent jurisdiction of the Department of Justice and the FTC to enforce Section 7 of the Clayton Act, the Division should argue that the authority of the Department of Justice to seek preliminary relief under Section 15 of the Clayton Act (15 U.S.C. § 25) should be interpreted in a manner consistent with 15 U.S.C. § 53(b)."). *See also* Mem. of United States in Support of Emergency Motion for a Temporary Restraining Order and Preliminary Injunction at 9, United States v. Microsemi, No. 08-1311 (E.D. Va. Dec. 12, 2008) (arguing that, where the hardships favor relief, the DOJ need only raise serious, substantial questions).

[32] *See, e.g.*, United States v. Oracle, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); United States v. Sungard Data Sys., 2001-2 Trade Cas. (CCH) ¶ 73,493 (D.D.C. 2001).

[33] *See* Interview with J. Thomas Rosch, ANTITRUST, Spring 2009 at 38. ("I agree that you cannot in good conscience tell a client that one is likely to fare as well before a federal district court in a 13(b) preliminary injunction action as in a permanent injunction proceeding brought by the Antitrust Division before a federal district court. But that difference is, as I say, attributable to the difference in standards applicable in the two federal district court proceedings: the district court in the FTC's preliminary injunction proceeding, as a matter of Congressional intent, is only able to determine whether or not there's a fair grounds for litigation, not decide the merits.").

V. PRACTICAL CONSEQUENCES

The importance of the *CCC Holdings* decision therefore is not merely academic, and the resulting agency divergence is not merely procedural. It may be outcome-determinative in some cases. Because many mergers are abandoned if the agencies get a PI, the greater ease with which the FTC can get a PI under *Whole Foods* and *CCC Holdings* may mean that the agency draw will dictate the ultimate fate of some mergers. Some cases that the DOJ would not win if it sought a PI or (even more so) litigated on the merits might still be blocked and abandoned if sued by the FTC under Section 13(b).

Although this disparity obviously already existed to some degree, the decision in *CCC Holdings* adds to the divergence between the agencies, to the extent it helps confirm that the FTC has a relatively low burden to meet under Section 13(b). Perhaps more significant, as a practical matter, is the tendency of the *CCC Holdings* case to give the FTC greater confidence about its ability to obtain preliminary relief. In this way, the divergence between the agencies affects a much broader universe of cases than just those few mergers that get litigated.

The effect of different PI standards (in fact or in practice) has broader implications for merger enforcement because the agencies' expectations about litigation outcomes directly affect a number of pre-complaint decisions in those mergers subject to in-depth agency review. Specifically, litigation expectations affect the agencies' willingness to file suit in the first place, their receptivity to settlements or restructuring of transactions, and even the overall aggressiveness of the agency's review.

As a result of this dynamic, even many cases that do not get litigated may face a different result depending on the reviewing agency. Parties may restructure or abandon a transaction in the face of agency intent to seek a preliminary injunction, which may be more likely at the FTC. Alternatively, the DOJ may be willing to accept a settlement (or take no action) based on its litigation prospects where the FTC could (and therefore might be more inclined to) obtain an injunction, which might cause the deal to fall apart or the parties to agree to a more substantial restructuring.

Whether or not one favors more aggressive merger enforcement, it is difficult to come up with any policy justifications for having real or perceived differential enforcement between the agencies.

One lasting legacy of Judge Collyer's decision in *CCC Holdings* is that it may provide traction to previous efforts to clarify this area of the law. In 2007, the Antitrust Modernization Commission issued three recommendations for administrative action and legislative change so that merging parties faced similar procedural approaches and burdens, regardless of which agency sought an injunction.[34] To date, no action has been taken, but the decisions in *Whole Foods* and *CCC Holdings* could provide a sufficient

[34] ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 138 (2007).

catalyst to revisit these recommendations in the near future, particularly if other lower courts follow Judge Collyer's lead and issue PIs even when the FTC can do no more than raise "serious questions" about the merits of a transaction.