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MARCH 2009

FTC Enjoins CCC and Mitchell Merger in First Post-*Whole Foods* Court Victory

In an 85-page March 2009 opinion, Judge Rosemary M. Collyer of the U.S. District Court for the District of Columbia enjoined the merger of CCC Information Services, Inc. ("CCC") and Mitchell International, Inc. ("Mitchell"), the two largest companies that provide software systems used by insurers and automotive repair shops to estimate accident repair costs and replacement values for insurance claims.[1] As a result of the injunction, CCC and Mitchell abandoned their transaction.

The decision, which marks the first merger win in district court for the Federal Trade Commission ("FTC") since 2002,[2] illustrates several important points that companies and their counsel should consider in planning transactions:

- District courts, particularly in the wake of *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) – cited here 18 times – likely will accept that the standard for obtaining a preliminary injunction under Section 13(b) of the FTC Act is less strenuous than the usual standard for obtaining a preliminary injunction.

- *Whole Foods* makes avoiding a preliminary injunction an uphill battle when the FTC establishes a *prima facie* case based on market shares. Although rejecting the FTC's contention that a "3-to-2" merger always should be enjoined, and rejecting the FTC's unilateral effects theory, the court concluded that whether the mergers' proponents sufficiently rebutted a coordinated effects case was "ultimately not for this Court to decide" where the FTC provided "credible evidence that coordination is possible, and even likely." That "'adjudicatory function is vested in the FTC in the first instance.'"[3]

- A "fix" to a transaction proposed by the parties (here, a licensing arrangement) likely will be met with skepticism, particularly when company and consultant documents (including those of investment bankers) suggest limited effectiveness.

- A defendant in an FTC preliminary injunction hearing will likely be fighting a two-front war: one in the district court and another in a fast-tracked FTC administrative proceeding. Indeed, here, the FTC's administrative proceeding was scheduled to commence a mere two weeks after the district court's opinion was issued.

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1 *FTC v. CCC Holdings Inc*. (Civ. Action No. 08-2043, D.D.C. Filed March 18, 2009) (RMC) ("Op." or "*CCC/Mitchell*"), *available at* https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv2043-86.

2 The FTC last obtained a preliminary injunction blocking a merger in *FTC v. Libby, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002).

3 Op. at 67-68 (*quoting Whole Foods*, 548 F.3d at 1042 (Tatal, J., concurring)).

Section 13(b)'s Lower Injunction Standard. In April 2008, CCC and Mitchell entered into a merger agreement valued at $1.4 billion. The FTC sought an injunction to block the merger pending a full administrative hearing, arguing that the merger ought to be enjoined because it combined two of only three substantial providers of software in the U.S. market for partial loss estimating software ("Estimatics") and in the U.S. market for total loss valuation software ("TLV"). The Court found "the evidence more complicated and uncertain," but nonetheless determined that the FTC's allegations of coordinated anticompetitive effects had "raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[4]

Notably, the Court accepted that prior D.C. Circuit decisions in *Heinz* and *Whole Foods* settled that Section 13(b) of the FTC Act implements a lower preliminary injunction test than what applies in other actions:

> "[L]ikelihood 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. The analysis of likelihood of success "measure[s] the probability that, after an administrative hearing on the merits, the Commission will succeed" in proving that the effect of a merger "*may* be to substantially lessen competition or tend to create a monopoly." *Heinz*, 246 F.3d at 714 (emphasis added).[5]

Merging parties thus will continue to confront different preliminary injunction standards depending on which antitrust enforcement agency challenges their transaction: the FTC (which enforces Section 13(b)); or the Department of Justice (which does not).

Rebuttal of *Prima Facie* Case. After *Whole Foods*, many antitrust commentators questioned whether a merger's proponents could offer rebuttal to an FTC *prima facie* case of illegality based on a substantial increase in concentration. *United States v. Banker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990), opened the door for parties to offer substantive rebuttal, but the more recent *Whole Foods* decision suggested that courts would be reluctant to accept such arguments when the FTC advances serious and substantial arguments.

CCC/Mitchell suggests that courts, post-*Whole Foods*, will seriously entertain arguments for rebutting an FTC *prima facia* case, but that *Whole Foods* does put a thumb on the scale in the agency's favor. The FTC's *prima facie* case established the two relevant product markets, Estimatics and TLV systems, in a U.S.-wide geographic market. The Court found both markets sufficiently highly-concentrated, determining that CCC, Mitchell and a third company, Audatex, were the only significant competitors in each market.[6] Although seemingly a classic "3-to-2" merger, the court seriously entertained the defendants' arguments for rebutting the FTC's *prima facie* case – in one case holding for the FTC, but in another for the mergers' proponents:

1. After dispatching the parties' low entry barrier argument as inconsistent with the companies' own documents,[7] the Court considered the defendants' argument that so-called "coordinated" effects were unlikely. With high fixed costs and low marginal costs, defendants and their economist argued, two remaining major competitors would have incentives to compete vigorously. The FTC, by contrast,

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[4] Op. at 2, 12 (citing *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C.Cir. 2001) (internal citations omitted in original) and *Whole Foods*, 548 F.3d at 1035 (D.C. Cir. 2008) (Brown, J.); *id.* at 1042 (Tatel, J., concurring)).

[5] Op. at 12-13 n.11.

[6] Op. at 30.

[7] Op. at 31-48.

stressed the relative homogeneity of product bundles, the stable yet declining nature of the market, and familiar competitive dynamics. Although acknowledging that "[t]he Defendants' arguments may ultimately win the day when a more robust collection of economic data is lain before the FTC,"[8] the Court concluded that the questions raised by the FTC "are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and determination by the FTC.'"[9] The FTC's evidence demonstrated that:

> [w]ith only two dominant firms left in the market, the incentives to preserve market shares would be even greater, and the costs of price cutting even riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom.[10]

This was sufficient to create such a question and, given the balance of equities, to obtain a preliminary injunction.

2. By contrast, the Court rejected the FTC's unilateral-effects arguments. Notably, the court largely dismissed the economic analyses presented as unsupported by robust data.[11] This continues a trend (also illustrated by the Department of Justice's defeat in the *Oracle* case) of courts treating government attempts to demonstrate unilateral anticompetitive effects with skepticism. It also shows that, even after *Whole Foods*, the FTC's *prima facie* case can be rebutted when the FTC's underlying economic case is weak and unilateral effects are not strongly supported by company documents.

Litigating the "Fix." As in the FTC's last success in obtaining a preliminary injunction, *FTC v. Libbey, Inc.*,[12] the merging parties tried to rebut the FTC's *prima facie* case by demonstrating that voluntary commitments – a proposed "fix" to any competitive problem – would lower entry barriers and thus prevent anticompetitive effects. As in *Libbey*, the defendants did not succeed. Specifically, the parties proposed to remove restrictions on a small rival's (Web-Est) access to a database; with full access, the defendants argued, the rival could seriously take on the remaining two major firms.

The Court found the Defendants' argument lacking. Rejecting the argument that the fix would mark a "game changer" in the industry,[13] the court identified other barriers Web-Est must overcome: further financial investment, the ability to compile and integrate large volumes of data and information, and the incumbent's reputational advantage. These barriers, the Court concluded, would not be surmountable within a reasonable period of time to allay competitive harm – particularly when contemporaneous documents suggested that Web-Est's impact would not be felt for years and when the merged firm and Web-Est would have a continuing relationship.[14] *CCC/Mitchell* thus illustrates that litigating a proposed "fix" is an uphill battle even when a court is willing to entertain the argument that the fix is relevant to the analysis.

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[8] Op. at 68.

[9] *Id.* (*quoting Heinz*, 246 F.3d at 714-15).

[10] Op. at 67.

[11] Op. at 73-76.

[12] 211 F. Supp. 2d 34 (D.D.C. 2002). Similarly, in a U.S. Department of Justice merger challenge in 2000, Defendants were unsuccessful. *U.S. v. Franklin Electric Co.*, 130 F. Supp. 2d 1025 (W.D. Wis. 2000).

[13] Op. at 49-50.

[14] Op. at 41, 53-54.

Two-Front War. *CCC/Mitchell* also illustrates that merging parties should now assume simultaneous proceedings, in both the district court and before an administrative law judge. In mid-2008, the FTC (seemingly abandoning prior practice), began the practice of fast-tracking administrative challenges to mergers while simultaneously seeking preliminary injunctions in district court.[15] This new procedure, naturally, places more pressure on merging parties: whether a preliminary injunction is avoided or granted, an administrative determination of illegality may quickly follow. Here, although that added pressure may not have been necessary (because the FTC obtained its preliminary injunction), it may have had some effect: confronted with an FTC administrative hearing scheduled to begin within two weeks following the preliminary injunction's issuance, CCC and Mitchell (also under financial pressure) promptly abandoned their transaction.[16]

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In *Whole Foods*, the FTC obtained a victory that held out the promise that district courts would order preliminary injunctions when potentially meritorious, yet unproven, substantive antitrust arguments stood behind the agency's *prima facie* case. *CCC/Mitchell* illustrates that promise's partial realization. Although the court rejected a facially-weak FTC unilateral effects argument, the court issued an injunction when company documents and plausible economic analysis supported a coordinated effects case. Accordingly, *CCC/Mitchell* signals that parties seeking successful litigation of merger cases against the FTC must have the facts behind them, in addition to the willingness and ability to see the transaction through the long haul.

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[15] For example, the FTC used simultaneous administrative and federal court proceedings in challenging Inova Health System Foundation's acquisition of Prince William Heath System, Inc. Order Denying Respondents' Motion to Stay Administrative Proceedings: Policy Statement, *Inova Health System*, FTC Docket No. 9326 (May 30, 2008) *available at* http://www.ftc.gov/os/adjpro/d9326/080530orderdenying.pdf. In addition, the agency expedited administrative discovery and hearing procedures in connection with the now-settled *Whole Foods* case. Scheduling Order, Whole Foods Market, Inc, and Wild Oats Markets, Inc., FTC Docket No. 9324 (Sept. 10, 2008), *available at* http://www.ftc.gov/os/adjpro/d9324/080910schedulingorder.pdf

[16] The administrative complaint was dismissed without prejudice on March 13, 2009, following a joint motion of the parties (FTC complaint counsel and the merger partners) informing the FTC that the merger agreement had been terminated and the Hart-Scott-Rodino filings had been withdrawn.