

Case Notes

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COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Federal Trade Commission v. Whole Foods, 533 F.3d 869, (D.C. Cir. 2008)

In an epic 2-1 decision, the D.C. Circuit Court of Appeals overruled a district court decision to block an application for a preliminary injunction by the Federal Trade Commission (“FTC”) to prevent Whole Foods from merging with Wild Oats. The court ruled that the district court evaluated the incorrect market for grocery store customers and did not analyze the FTC’s evidence properly. The case has now been remanded back to district court for review. On November 21, 2008, the Court of Appeals later denied Whole Foods’ petition for an en banc re-hearing.

In August 2007, a district court denied the FTC’s 15 U.S.C. §53(b) request for an injunction, rejecting the FTC’s market definition of “premium, natural, and organic supermarkets” (“PNOS”) and stated that Whole Foods and Wild Oats compete within the broader market of grocery stores. The Court of Appeals, however, stated that the lower court incorrectly analyzed the markets affected by PNOs. Rather, the Court of Appeals agreed with the FTC that a PNOS market caters to a core group of more affluent and educated customers who “have decided that natural and organic is important.” These “core” customers only prefer specialty organic stores like Wild Oats or Whole Foods, versus “marginal” customers who will shop at both organic and conventional grocery stores. Despite the FTC’s appeal, Whole Foods completed the \$656 million deal, closing at least twenty Wild Oats stores and re-branding dozens of others. If the district court agrees with the FTC on review, the ruling may cast a pall over companies’ desires to integrate.

The Court of Appeals decision to require the district court to apply the new standard is a momentous victory for the FTC. Furthermore, the decision questions the district court’s place in evaluating the merits of mergers, putting additional pressure on judges to limit the scope of their analysis to the merits of preliminary injunction requests. Because of this case, district court judges may be more hesitant to deny an FTC injunction request. If so, it may put far more pressure on merging companies to present solid, pro-competitive evidence at the district court level and force the FTC to reply. Since the case will not be heard before the entire D.C. Circuit, it is expected to head to the Supreme Court. Should that happen, it would be the first merger case to be heard before the Supreme Court it at least three decades.

SUPREME COURT AGREES TO HEAR ORAL ARGUMENTS IN BANKING PRACTICES CASE

In early January, the Supreme Court agreed to hear oral arguments by New York Attorney General Andrew Cuomo, in an effort to determine whether states can enforce their anti-discrimination laws against federally chartered banks, such as J.P. Morgan & Co. and Wells Fargo. The complaint is founded on a provision of the National Bank Act, 12 U.S.C. § 484(a), and 12 CFR §7.4000, which prohibit states from exercising “visitorial powers” against national banks. In *Cuomo v. The Clearing House Assoc., L.L.C.*, the question before the Court is whether the provisions prohibiting the use of “visitorial powers” also prohibit the New York Attorney General from enforcing state fair lending and anti-discriminatory laws against national banks.

Cuomo’s claim began as part of an investigation conducted in 2005 by his predecessor, Eliot Spitzer. After reviewing data submitted by lenders, in accordance with

the federal Home Mortgage Disclosure Act (“HMDA”), 12 U.S.C. §§ 2801-10, Spitzer launched this investigation in an effort to uncover evidence of possible racial discrimination in the residential lending programs of several national banks. A review of this data revealed glaring disparities that, unless justified, were in violation of the Equal Credit Opportunity Act and New York State Executive Law §296-a. Spitzer sent letters to several of these national banks, stating that the racial disparities were “troubling on their face.” The letters requested that lenders voluntarily submit non-public information relating to the banks’ mortgage policies, along with information concerning loans for real property in the State of New York.

The Office of Comptroller of the Currency (“OCC”), responded to this inquiry by seeking an injunction of the Attorney General’s investigation. The Comptroller’s argued that the visitorial powers provision, if broadly interpreted, precluded Spitzer from requiring banks’ compliance with the requests for information in Spitzer’s letter, as well as with state and federal laws addressing activities authorized by the National Banking Association. In *Office of Comptroller of the Currency v. Spitzer*, 396 F. Supp. 2d 383 (S.D.N.Y. 2005) and *Clearing House Ass’n, L.L.C. v. Spitzer*, 394 F. Supp. 2d 620 (S.D.N.Y. 2005), the court granted the declaratory and injunctive relief sought by the claimants in both cases. On appeal, the court affirmed the injunctive relief granted in *OCC v. Spitzer*, but vacated the *Clearing House* judgment for permanent injunctive relief. See *Clearing House Association, L.L.C. v. Cuomo*, 510 F. 3d. 105 (2d. Cir. 2007). The question of whether New York and other states can enforce their fair lending and anti-discriminatory laws against federally chartered national banks will now be determined by the Supreme Court of the United States in the coming months. **BLB**