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## Court Clears Whole Foods Deal

**FTC Loses Appeal to Delay Acquisition of Wild Oats, But Other Options Remain**

By **DAVID KESMODEL**  
*August 24, 2007; Page A2*

A federal appeals court cleared the way for [Whole Foods Market Inc.](#) to complete its planned \$565 million purchase of rival grocer Wild Oats Markets Inc.

A three-judge panel in Washington yesterday rejected the Federal Trade Commission's request for a delay of a lower-court judge's ruling in favor of the acquisition, which the commission opposed on antitrust grounds. The agency last week sought the delay pending the outcome of an appeal.

Whole Foods, of Austin, Texas, and Wild Oats, of Boulder, Colo., are free to complete their deal. The FTC still could try to unravel the combination by pursuing an administrative court proceeding. However, such proceedings can take a year or longer, and by then Whole Foods and Wild Oats would be far along in combining their operations. The FTC, which didn't immediately comment on the appellate-court ruling, has said that only under unusual circumstances would it pursue administrative trials when a merger is already under way.

Yesterday's ruling appeared to cap what has been a bitter fight between the commission and Whole Foods, whose chief executive, John Mackey, publicly blasted the government in June for "bullying tactics" and failing to do its homework in evaluating the merger.

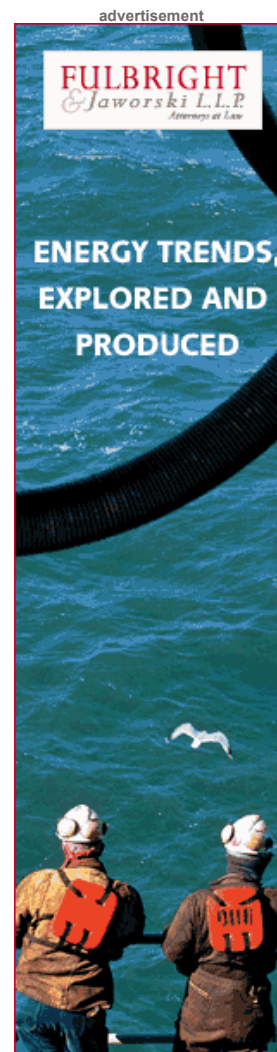
"We are pleased to have cleared what we expect to be our last legal hurdle," Mr. Mackey, who co-founded Whole Foods in 1980, said in a statement last night. "We look forward to closing this merger."

The appellate court ruled that, while the commission "has raised some questions about the district court's decision," it failed to make a strong case it could win on appeal.

In a 93-page ruling last week, the district-court judge, Paul L. Friedman, denied the government's request for a preliminary injunction to block the merger. He rejected the FTC's claim that the merger would curb competition and raise prices for natural and organic foods, noting that consumers now can purchase such items from a variety of retailers, including large conventional grocers such as [Safeway Inc.](#)

The FTC argued to the appellate court that Judge Friedman's

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ruling "utterly ignored the bulk" of its case, including internal statements by Mr. Mackey in which he said buying Wild Oats would avert "nasty price wars" and deter a major grocer from creating a competing natural-foods giant.

Paul Yde, a senior antitrust lawyer in the Washington office of Freshfields Bruckhaus Deringer and a former litigator for the FTC, said it was surprising that Judge Friedman gave little attention to Mr. Mackey's statements. However, he said, the ruling was "very clear and definitive in presenting the evidence favoring the Whole Foods defense," including ample evidence that Wild Oats isn't the company's only significant competitor.

The merger will create a more formidable foe for conventional grocers. Still, the companies are relatively small. They would have about 300 stores combined, compared with more than 2,000 at large rivals [Wal-Mart Stores Inc.](#) and [Kroger Co.](#) Whole Foods also reached a deal to sell 35 of the Wild Oats stores once it closes the acquisition.

Whole Foods announced plans to buy Wild Oats in February for \$18.50 a share. The FTC brought suit in June.

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PRICE 43.34  
CHANGE **-0.19**  
8/23

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PRICE 32.57  
CHANGE **-0.33**  
8/23

[Wal-Mart Stores Inc. \(WMT\)](#)

PRICE 43.17  
CHANGE **-0.58**  
8/23

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PRICE 26.40  
CHANGE **-0.01**  
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