

Challenge to Supermarket Merger Highlights FTC's New Focus on Labor Markets

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On February 26, 2024, after a 16-month investigation, the Federal Trade Commission (FTC) [sued The Kroger Company and Albertsons Companies, Inc.](#) in the U.S. District Court of Oregon to try to block their \$24.6 billion merger.

The complaint alleges several harms to consumers resulting from loss of head-to-head competition between Kroger and Albertsons in local markets for grocery stores, which plaintiffs contend cannot be resolved through a proposed divestiture. It also alleges harms to unionized grocery store workers, highlighting the Biden administration's continued focus on labor markets.

The suit was joined by eight states — Arizona, California, Illinois, Maryland, Nevada, New Mexico, Oregon and Wyoming — and the District of Columbia.

Background

Albertsons and Kroger are the two largest “traditional” supermarket chains in the U.S., with a combined 5,000 stores, 4,000 retail pharmacies and 700,000 employees across 48 states. The proposed transaction, announced in October 2022, is the largest supermarket merger in U.S. history. The FTC and participating states filed their case in Oregon, presumably in search of an enforcement-friendly venue following a string of trial losses by the FTC and the Department of Justice in antitrust enforcement actions.

Earlier in February, the attorneys general of Colorado and Washington each sued to block the transaction. Both states allege similar traditional anticompetitive effects as a result of the loss of head-to-head competition between the firms, as well as the increased risk of coordinated effects among remaining supermarket chains. Both states also make claims about the transaction's impact on labor markets.

Washington alleges [harms to labor markets for specialized fuel center and pharmacy employees](#), as well as to union workers through the ability of Kroger to close unionized stores and re-open them as non-union stores.

Colorado alleges [harms to Colorado food suppliers](#) due to their having decreased leverage in negotiations with the merged chain, which would enjoy increased purchasing power. The Colorado complaint also bases claims on “no-poach” and “non-solicitation” agreements allegedly made between Kroger and Albertsons during a union strike in January 2022, contending that these agreements are *per se* unlawful.

Traditional Retail Theories of Harm

With a focus on potential harmful effects on American consumers and workers, the FTC and participating states note in their complaint that prices of groceries have increased over the past four years. They also describe a broader trend of “significant consolidation in the United States grocery industry,” including through several acquisitions by Kroger and Albertsons, such as Albertsons' 2015 acquisition of Safeway and its 2014 purchase of United Supermarkets.

The plaintiffs allege a straightforward horizontal theory of harm. They assert that Kroger and Albertsons are “unique” in their scale and size, as the two largest supermarket chains in the U.S.

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Limiting the relevant market to “traditional” supermarkets — carving out limited assortment stores, premium natural and organic stores, dollar stores, e-commerce retailers and club stores — the plaintiffs focus on potential anticompetitive effects in “local markets” based on core-based-statistical areas (*i.e.*, metropolitan/micropolitan areas) and rural geographies, citing the radius of several miles that the companies focus on in their internal competitive analyses and in securities filings. In these local markets, plaintiffs allege high combined market shares and presumptively illegal increases in market concentration across over 1,500 overlapping local markets, based on Herfindahl-Hirschman Index calculations.

To support their assertions of anticompetitive harms likely to result from elimination of head-to-head competition between the chains, plaintiffs point to ordinary-course documents describing competition on pricing and promotions, store conditions such as refurbishments, customer services including store hours, pick-up centers, and in-store services such as deli counters, bakeries, Starbucks counters, floral counters and pharmacy services. Without this head-to-head competition, plaintiffs allege the combined entity would have less incentive to continue to improve their offerings to customers.

Labor-Based Theories of Harm

Notably, the plaintiffs spend nearly half of the complaint detailing alleged harms to grocery store workers, and specifically the unionized workers employed by Kroger and Albertsons, who the plaintiffs allege have a strong preference to remain with union employers.

The complaint defines the relevant labor market as union grocery store labor within localized areas defined by collective bargaining agreements (CBAs). Because unions play competing grocery chains against one another, plaintiffs allege a hypothetical monopsonist for union labor within a local CBA area would undertake a “SSNIPT” (*i.e.*, a small but significant non-transitory worsening of employment terms) with respect to its CBAs.

Again citing real-world examples of competition between the companies, the plaintiffs allege that the merger would increase the combined firm’s negotiating leverage, and prevent unions such as the United Food and Commercial Workers (UFCW) from playing Albertsons and Kroger against one another to secure better terms of employment for their members, including through credible strike threats. Plaintiffs allege this would result in the ability of the combined firm to reduce or refuse to increase wages and worker benefits, and to degrade or refuse to improve working conditions or commit to fewer workplace protections.

Specifically, the plaintiffs cite improvements in CBAs that resulted from a January 2022 strike in Colorado, contrasted with

an Oregon strike in 2019 where Kroger and Albertsons allegedly “successfully coordinated.” Notably, [UFCW was a vocal critic of the transaction](#), and its members formally voted to oppose the proposed transaction in May 2023.

This case is unprecedented in its focus on unionized labor as a relevant market, but builds upon labor-based theories of harm put forth in DOJ’s successful lawsuit to block Penguin Random House’s proposed acquisition of Simon & Schuster. There, DOJ focused on impact on the market for authors in the form of compensation, rather than an impact on book pricing to consumers.

Surprisingly, the FTC did not pursue claims based on harm to food suppliers as claimed in the Colorado lawsuit. That was [a concern raised in a letter to the FTC](#) from Senators Elizabeth Warren, Mazie Hirono, Bernard Sanders and Cory Booker, and Representatives Summer Lee and Alexandria Ocasio-Cortez in December 2023, complaining that the combined entity’s market power would cause food suppliers to themselves consolidate or collude to counterbalance the increased bargaining power of the merged firm.

Inadequacy of the Firms’ Proposed Divestiture

In September 2023, 11 months after announcing their deal, Kroger and Albertsons said that they had entered into a divestiture agreement with C&S Wholesale Grocers, LLC to sell a number of assets in an attempt to resolve competition concerns, contingent on the closing of the main transaction.

They proposed selling 413 stores and other assets across 17 states and the District of Columbia. In their complaint, the plaintiffs argue that this divestiture is inadequate for several reasons:

1. In many local markets where the firms overlap, C&S is not acquiring any assets.
2. The divestiture does not include any full, intact business units, as it lacks banners, distribution centers, IT, corporate contracts, loyalty programs, private-label products, and other resources that the chains rely on today, and the assets included are insufficient to operate a supermarket business that would substantially replace Kroger or Albertsons.
3. The proposed divestiture would “inextricably entangle[]” the combined firm and C&S for years as transition planning would require extensive coordination on pricing and promotional activities for a number of years.
4. C&S is poorly positioned to operate the divested stores, as a wholesaler with only 23 supermarkets and one retail pharmacy and no prior plans to expand into retail. Further, the plaintiffs argued that C&S faces no financial downside from failure to operate the acquired stores, as any losses would be mitigated by the value of the real estate assets it agreed to acquire.

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The plaintiffs go on to cite failed divestitures in Albertsons' 2014 acquisition of United Supermarkets and 2015 acquisition of Safeway, where Albertsons sold stores to smaller supermarket operators to address anticompetitive concerns, and those stores ultimately closed or were re-purchased by Albertsons. Several of those previously divested stores are part of the proposed divestiture package to C&S, according to the complaint.

Similar issues were reportedly raised during the review of Walgreen's proposed acquisition of Rite Aid in 2017, where Walgreens agreed to divest 865 Rite Aid stores and certain other assets to Fred's Inc., a smaller pharmacy chain, to address FTC concerns. Ultimately, [Walgreens abandoned that transaction](#), reportedly due to the pending threat of an FTC lawsuit, as the FTC did not see Fred's Inc. as a sufficient divestiture buyer. Instead of acquiring the company, Walgreens opted to buy 2,186 individual Rite Aid stores, distribution centers and related inventory.

With increasingly aggressive enforcement under the Biden administration, merging firms have taken to pursuing fix-it-first strategies like Kroger's and Albertsons' that create litigation challenges for the government, which is forced to prove that proposed divestitures are insufficient to address alleged anti-competitive harms. The DOJ recently lost its suit to block

UnitedHealth's acquisition of Change Healthcare and settled a challenge to ASSA ABLOY's acquisition of Spectrum Brands in the face of proposed divestitures. See our December 13, 2023, article, "[As US Antitrust Agencies Double Down on Merger Enforcement Approach, New Deal Strategies Emerge.](#)"

Conclusion

The FTC's traditional retail theories of harm are fairly straightforward and well-trod territory, consistent with prior supermarket precedents. Kroger and Albertsons may be counting on a court agreeing that their fix is sufficient to address concerns about losing head-to-head competition, but the fix will not resolve the alleged labor concerns. There, the outcome likely will turn on the strength or weakness of the plaintiffs' evidence that the predicted harms are not speculative, but are likely to be borne out.

The companies' [merger agreement has a termination provision](#) allowing for extensions of up to 270 days, putting the drop-dead date in October 2024. This suggests that Kroger and Albertsons are in it for the long haul and will see the litigation through to trial and, if necessary, appeal.