DIVIDEND DENIED: WASHINGTON STATE COURT TEMPORARILY BLOCKS ALBERTSONS' SHAREHOLDER DIVIDEND, FURTHER COMPLICATING POTENTIAL ALBERTSONS-KROGER MERGER

On November 3, 2022, the Superior Court of Washington granted the Washington Attorney General's request for a temporary restraining order ("TRO") against the $4 billion special dividend that Albertsons Companies, Inc. ("Albertsons") planned to issue to its shareholders on November 7, 2022. The company intended to process the payout prior to its proposed acquisition by The Kroger Company ("Kroger"). The move by the Washington Attorney General further complicates the already highly scrutinized proposed merger between the companies.

BACKGROUND

On October 14, 2022, Kroger and Albertsons, the first and second largest American grocery stores whose brands include Harris Teeter, Ralph's, Smith's, Safeway, and Vons, announced their plan to merge. Under the proposed agreement, Kroger would acquire all the outstanding shares of Albertsons' common and preferred stock for around $34.10 per share, placing the value of the deal at around $24.6 billion. Kroger would also be assuming $4.7 billion of Albertsons' debt. The parties indicated that they expect the deal to close in 2024.

Aware of the scrutiny the merger would garner, the two companies highlighted a "fix-it first" remedy to resolve any antitrust and labor concerns. Albertsons planned to spin off a subsidiary that would operate as a standalone company. The standalone company would be comprised of 100 to 375 stores in markets where the parties have significant overlaps.[1] The parties hoped that the divestiture would alleviate the regulatory concerns of state attorneys general and the Federal Trade Commission ("FTC"). Additionally, a special pre-closing cash dividend of up to $4

1 Press Release, Kroger, *Kroger and Albertsons Companies Announce Definitive Merger Agreement* (Oct. 14, 2022), *available at* https://ir.kroger.com/CorporateProfile/press-releases/press-release/2022/Kroger-and-Albertsons-Companies-Announce-Definitive-Merger-Agreement/default.aspx; Russell Redman, *Kroger, Albertsons to Merge in $24.6 Billion Deal*, Supermarket News (Oct. 14, 2022), *available at* https://www.supermarketnews.com/retail-financial/kroger-albertsons-merge-246-billion-deal.

billion, approximately $6.85 per share, would be paid to Albertsons' shareholders on November 7, 2022. The special dividend would be paid with $2.5 billion cash on-hand, along with $1.5 billion being borrowed.

Response From Labor Unions And Congress

The United Food Commercial Workers International Union (the "UFCW") stated in a press release that the proposed merger would have "serious implications for hundreds of thousands of [] UFCW members and America's families who are more concerned than ever about inflation's impact on the price of their food and groceries, prescription drugs, and gas."[2]

The announcement also drew immediate reactions from Congress. In a letter to the FTC on October 18, Senators Amy Klobuchar (D-MN), Richard Blumenthal (D-CT), and Corey Booker (D-NJ) wrote, "[L]ast week the nation's two largest grocery chains, Albertsons and Kroger, announced a proposed $25 billion merger. This merger raises considerable antitrust concerns. The grocery industry is essential to daily life, and Americans need the benefits that robust competition brings, namely lower prices, higher quality, and innovation. As you are aware, the grocery industry has become increasingly consolidated. . . . Given the increases in food prices recently, we question whether the divestitures that the agency secured when approving [the Albertsons-Safeway] deal were sufficient, especially since Albertsons' was allowed to buy back many of the stores that the FTC required it to sell."[3] Senators Bernie Sanders (I-VT) and Elizabeth Warren (D-MA) also penned a letter to the FTC, joined by Representative Jan Schakowsky (D-IL) on October 25, which contained similar concerns.[4]

Senator Mike Lee (R-UT) released a press release that read, "Utahns, like all Americans, are suffering from skyrocketing food prices. As the senior Republican member of the Senate Antitrust Subcommittee, I will do everything in my power to ensure our antitrust laws are robustly enforced to protect consumers from anticompetitive mergers that could further exacerbate the financial strain we already feel in the grocery store checkout aisle."[5]

State Attorneys General Enter The Fray

On October 26, state attorneys general from the District of Columbia, Arizona, California, Idaho, Illinois, and Washington sent a letter to the Chief Executive Officers of Albertsons and Kroger, urging the companies to hold off on the special dividend payout until the FTC had reviewed the proposed merger.[6]

---

2 Press Release, United Food and Commercial Workers International Union, *UFCW Statement on Proposed Kroger-Albertsons Merger* (Oct. 14, 2022), *available at* https://www.ufcw.org/press-releases/ufcw-statement-on-proposed-kroger-albertsons-merger/.

3 Letter from U.S. Senator Amy Klobuchar, U.S. Senator Richard Blumenthal, and U.S. Senator Cory Booker to Chair Lina M. Khan (Oct. 18, 2022), *available at* https://www.klobuchar.senate.gov/public/_cache/files/2/b/2b61dbcf-3bb9-49d2-a8e9-3622b1c1f9a9/7A05803C37BA9F78A1B037066B860D13.quill---letter-l7137---letter-to-ftc-chair-khan-re-albertsons-kroger-merger-002-.pdf.

4 Letter from U.S. Senator Elizabeth Warren, U.S. Senator Bernard Sanders, and U.S. Representative Jan Schakowsky to Chair Lina M. Khan (Oct. 25, 2022), *available at* https://www.warren.senate.gov/imo/media/doc/2022.10.25%20Letter%20to%20FTC%20re%20Kroger-Albertsons%20Merger1.pdf.

5 Press Release, Senator Mike Lee, *Sen. Lee Plans Oversight of Grocery Mega-Merger* (Oct. 14, 2022), *available at* https://www.lee.senate.gov/2022/10/sen-lee-plans-oversight-of-grocery-mega-merger.

6 Letter from Attorney General Karl A. Racine, Attorney General Rob Bonta, Attorney General Mark Brnovich, Attorney General Bob Ferguson, Attorney General Kwame Raoul, and Attorney General Lawrence G. Wasden to Chair Lina M. Khan (Oct. 26, 2022), *available at* https://oag.ca.gov/system/files/attachments/press-docs/Letter%20to%20Albertsons%20Kroger%2010-26-22%20FINAL.pdf.

On November 1, Washington Attorney General Bob Ferguson filed a lawsuit in Washington to block the special dividend payout, arguing Albertsons and Kroger agreed to restrain trade and engaged in unfair methods of competition under Washington law. The complaint states, "[T]he Pre-Closing Dividend [] will have a substantial and foreseeable effect on Washington State trade and commerce, will negatively impact and restrain competition in the retail grocery market in Washington State, and will negatively impact the labor market in Washington and limit opportunities for workers throughout Washington State, including in King County."[7] The complaint points to the 2014 acquisition of Safeway by Albertsons to support its theory of harm to consumers. When Albertsons acquired Safeway, 26 Washington stores were divested. Haggen, who bought the 26 divested stores, filed for bankruptcy months after the divestiture and filed suit against Albertsons, claiming Albertsons had "overstocked perishable inventory, understocked stable inventory, removed purchased fixtures, provided inaccurate pricing information, cut off advertising, lied about the merchandising data system, and misappropriated Haggen's store opening plan."[8] Additionally, Comvest, the private equity owner of Haggen, paid itself a $20 million dividend out of the $430 million divestiture deal. Comvest also structured the deal to extract and separate the real estate assets from the grocery operating business. Ultimately, Albertsons repurchased 14 stores it had previously divested when Haggen filed for bankruptcy, and Haggen's remaining 15 supermarkets were also acquired by Albertsons, further reducing competition in the Washington grocery market. The complaint also notes that of the remaining 12 stores that Albertsons did not re-acquire, nine of the divested stores are no longer operating, leaving only three of the divested stores as non-Albertsons-owned supermarkets.

On November 2, attorneys general from California, Illinois, and the District of Columbia filed a lawsuit in the U.S. District Court for the District of Columbia, claiming that the Albertsons' payout tied to the Kroger transaction violates Section 1 of the Sherman Act. Similarly, this complaint argues that the special dividend will leave Albertsons "just battered enough for Defendants to argue later (to regulators or a court) that it is a 'flailing' or 'failing' firm that Kroger should be allowed to acquire lest it go out of business . . . ."[9]

In the midst of these pending lawsuits, a TRO was granted on the $4 billion special dividend payout in Washington on November 3, rendering Albertsons unable to proceed with the payout as planned for November 7.

In its response to the granting of the TRO, Albertsons explained that a special dividend was needed in this case because "[t]he size of the dividend reflects the Company's strength, rather than the illogical and damaging accusation that it is an attempt to weaken the Company."[10] Paying a special dividend prior to the merger would allow Albertsons to return cash to its shareholders and maintain a positive financial position. Albertsons has said it will face lawsuits from shareholders if it

---

7 Complaint, *Washington v. Albertsons*, No. 22-2-18046-3 SEA (King County Super. Ct., Wash. Nov. 1, 2022).
8 *Id.*
9 Complaint, *District of Columbia v. Kroger*, Case No. 1:22-cv-3357 (D.D.C. Nov. 2, 2022), ECF No. 1.
10 Press Release, Albertsons Companies, *Albertsons Companies Issues Statement Regarding the Temporary Restraint of its Special Dividend Payment as a Result of Washington State Court's Temporary Restraining Order* (Nov. 3, 2022), *available at* https://www.albertsonscompanies.com/newsroom/press-releases/news-details/2022/Albertsons-Companies-Issues-Statement-Regarding-the-Temporary-Restraint-of-its-Special-Dividend-Payment-as-a-Result-of-Washington-State-Courts-Temporary-Restraining-Order/default.aspx.

doesn't pay the dividend on November 7. The TRO will remain in effect until the preliminary injunction hearing on November 10.

KEY TAKEAWAYS

First, the deal comes at a bad time. With inflation soaring, the potential merger of the two largest American supermarkets has terrible optics. Critics note that the merger could affect grocery prices long term and have an effect on the grocery store labor market, despite the companies' pleas that it will decreases prices. Additionally, with midterm elections in full swing, this transaction is an easy target for candidates running for re-election.

Second, with all the attention on the FTC and Antirust Division of the Department of Justice, state attorneys general are monitoring this transaction closely and flexing their enforcement muscles. While this merger will certainly face scrutiny at the FTC, several states are also taking actions to stop this merger from happening.

Third, the state attorneys general have taken a unique approach to hindering consummation of the merger (we have rarely seen antitrust enforcers seek to block a unilateral decision of a company—in this case to issue a dividend—as violation of the antitrust laws). By attacking the dividend payment, the state attorneys general are trying to prevent Albertsons from later asserting a "failing firm" defense.

Finally, the failures of the previous divestiture and remedies casts a dark cloud over the current transaction, even eight years later. The issue is a stark reminder of the negative impact that previous deals among the parties, or even in the same space, can have on future transactions. This trend is even more prominent today as the U.S. antitrust agencies, particularly the Antitrust Division, look skeptically at remedies.

CLIFFORD CHANCE

CONTACTS

Timothy Cornell
Partner

T +1 202 912 5220
E timothy.cornell@cliffordchance.com

Brian Concklin
Partner

T +1 202 912 5060
E brian.concklin@cliffordchance.com

Peter Mucchetti
Partner

T +1 202 912 5053
E peter.mucchetti@cliffordchance.com

Leigh Oliver
Partner

T +1 202 912 5933
E leigh.oliver@cliffordchance.com

Sharis Pozen
Partner

T +1 202 912 5226
E sharis.pozen@cliffordchance.com

Eva Kurban
Associate

T +1 202 912 5074
E eva.kurban@cliffordchance.com

Jordan Passmore
Associate

T +1 202 912 5416
E jordan.passmore@cliffordchance.com

Sung Shin
Law Clerk

T +1 202 912 5505
E sung.shin@cliffordchance.com