

FTC Puts Labor Focus In Merger Basket For 1st Time

By **Bryan Koenig**

Law360 (February 27, 2024, 8:31 PM EST) -- Higher consumer prices and reduced choice are no longer the only reasons the Federal Trade Commission will challenge mergers after the agency contested Kroger's planned \$24.6 billion purchase of Albertsons based in part, for the first time ever, on allegations the deal will reduce competition for employees.

The challenge **announced Monday**, contesting the grocery megamerger through the FTC's in-house process and in Oregon federal court, attacked the deal based on two major theories: It will lead to increased prices and reduced choice through the elimination of head-to-head grocery store competition in overlapping geographic markets, and it will reduce bargaining leverage for the union representing Kroger and Albertsons' nearly 700,000 combined employees nationwide.

The customer-side allegations follow the standard formula of decreased competition to lure in shoppers, with a specific attack on what the FTC said is an insufficient plan to divest as many as 600-plus stores in areas where both companies have locations. But in a move never before seen are allegations that the deal would reduce the leverage of the United Food and Commercial Workers union, which represents both companies' workers, when negotiating new collective bargaining agreements. An FTC spokesperson confirmed to Law360 that this case represents the first time the agency has brought a merger challenge with a labor focus.

"It's really notable and important that workers' well-being is finally being taken into account when we look at a merger," said Rakeen Mabud, the chief economist and managing director of policy and research at the Groundwork Collaborative, a self-identified progressive economic advocacy organization.

The labor focus is one the agency's Democrats have been moving towards. Joel Mitnick, a partner at Cadwalader Wickersham & Taft LLP and a former FTC trial attorney, said that even before FTC Chair Lina Khan took the reins, the commission's Democrats "have for several years prior been emphasizing the role of competition in merger analysis as it relates to protecting labor."

In an email, Mitnick pointed specifically to the grocery case's closest parallel: the U.S. Department of Justice's **successful 2022 challenge** to Penguin Random House LLC's purchase of Simon & Schuster, based on fears the deal would limit authors' ability to leverage rival publishers against each other in search of the best book deal, particularly for anticipated bestsellers.

"That both consumer welfare and labor protection are the twin bases of the FTC's case against Kroger/Albertsons is merely the next logical step in that progression," Mitnick said.

An Outgrowth of Labor Concerns

It may be too early to predict when or if the FTC or its sister competition enforcer, the DOJ's Antitrust Division, will bring other labor-side claims in a merger case. But observers see the grocery claims, which in federal court are backed by a contingent of state attorneys general, as an outgrowth of a highly aggressive Biden-era approach to merger and antitrust enforcement, one that has emphasized the protection and promotion of labor as part of broader efforts across the administration to safeguard workers.

"They've made a lot of noise about it," Alden Abbott, a senior research fellow at George Mason University's Mercatus Center and a former FTC general counsel, said of enforcers' labor-side focus in recent years.

Jeffery M. Cross, a litigation partner at Smith Gambrell & Russell LLP and adjunct professor at The John Marshall Law School, traces the labor-side claims to a major **November 2022 policy statement** in which the FTC's Democrat commissioners envisioned a sweeping use of their powers to target "unfair methods of competition" under Section 5 of the FTC Act. That statement, according to Cross, appears to go well beyond a focus on how anti-competitive conduct and mergers would impact consumer prices and experiences.

"They clearly had something else in mind. And to me, it's labor," Cross said.

Cross and others liken the labor focus here to efforts by the FTC and DOJ to target other competitive aspects of employment, such as alleged "no-poach" deals to restrict hiring that the Justice Department has been trying, **and so far failing**, to prosecute criminally.

"They've had some difficulty with some cases that are explicitly about no-poach agreements," Susman Godfrey LLP partner Barry Barnett. "This is another way to make that activity relevant."

The federal and administrative complaints, Barnett noted, specifically mention that Kroger and Albertsons stores will try to "poach" employees from one another. The merger challenge, he said, appears to be an effort in part to preserve that dynamic. The companies argue for their part that the deal will reduce prices and benefit union labor.

The FTC's complaints, which follow other challenges to the deal from private plaintiffs and the attorneys general of Colorado and Washington, also focus heavily on how the UFCW uses existing competition between the companies to leverage better union contracts.

"Today, in many markets where both defendants employ union workers, the unions that represent grocery workers leverage the fact that Kroger and Albertsons are separate companies competing for customers and workers to negotiate better terms of employment for union grocery workers," the FTC said in its district court complaint, seeking to pause the deal at least until the administrative case can challenge its merits. "The proposed acquisition would eliminate that competition, likely leading to lower wages and reduced benefits, opportunities, and quality of workplace conditions and protections for thousands of defendants' employees."

Test Case for New Guidelines

Protecting labor was also a major part of the DOJ and FTC's new merger guidelines, **finalized in December** as a linchpin to enforcer efforts to enshrine a more aggressive tack against corporate concentration. Abiel Garcia, a Los Angeles-based partner at Kesselman Brantly Stockinger LLP and a former antitrust attorney in the California attorney general's office, said the new challenge's labor-side language hews closely to the guidelines and could be an important test case as enforcers vie for court acceptance of their more aggressive features.

"They're looking to get support from the courts for their guidelines. And I think this is the case they're going to try to do it with," Garcia said.

The labor-side emphasis is not without its critics. Abbott, for instance, argues that U.S. antitrust law is supposed to be customer-facing, and that grocery store workers likely have many other places to turn for employment, reducing any effects the merger may have on union leverage. While the FTC appears to want to safeguard unionized labor, Abbott said, "That's not what the antitrust laws are supposed to be doing."

Anthony M. Sabino, a professor in the Department of Law at The Peter J. Tobin College of Business at St. John's University and an adjunct professor at St. John's University School of Law, similarly argued that protecting employees is properly the purview, and expertise, of the U.S. Department of Labor and similar government bodies.

"The FTC does not enjoy a clear congressional mandate to involve itself in such questions, whereas the other agencies are duly authorized to do exactly that," Sabino said in an email. "In short, the FTC must remain within the bounds of its explicit authority, and not aggrandize to itself additional powers."

Despite parallels to the Penguin-Simon & Schuster case, Sabino argues not to read too much into the similarities in the buyer-side, or monopsony, cases because the markets are strikingly different markets, and authors negotiating with only a handful of major publishers have leverage entirely different from grocery store workers.

"The danger of monopsony for labor is less than of a concern in a Kroger-Albertsons merger than it was for the rejected Penguin-S&S combination," Sabino said. "That is a genuine distinction that I humbly submit the FTC is overlooking, in its fervor to make labor a major issue in its opposition."

Sabino added that labor is outside the FTC's specific expertise and the agency should leave oversight to other agencies.

Litigate-The-Fix and Other Considerations

As much as the case is about labor, it's also about more traditional consumer-facing concerns and the FTC's assertion that the companies can't adequately maintain competition with its plan to sell off at least 413 stores and maybe another 237 stores in overlapping areas to C&S Wholesale Grocers LLC.

The FTC has to attack that divestiture based on U.S. antitrust law's focus on direct competitive overlap when contesting mergers between two companies. While The Kroger Co. and Albertsons Cos. have national scope, U.S. merger reviews usually only look at where they compete head-to-head in specific markets, here principally for shoppers in distinct physical locations.

"This is going to be a kind of hyperlocal" market analysis, Garcia said. "I'm not driving across town because my grocery store [raised] prices for eggs by a dollar."

The divestiture plan, the FTC said in the federal court complaint, does not fix those concerns, including because C&S currently has a minuscule supermarket footprint of just 23 supermarkets and only one retail pharmacy.

"Divesting these individual assets to a grocery wholesaler with limited experience operating retail supermarkets will fail to mitigate the substantial harm to consumers and workers from lost competition between Kroger and Albertsons," the FTC said.

"C&S would be acquiring a patchwork of assets cobbled together by Kroger's antitrust lawyers, not a standalone business likely to succeed. The proposed divestiture ignores hundreds of affected markets that serve millions of consumers, as well as the merger's destruction of labor market competition," it continued.

Arindam Kar, a shareholder at Polsinelli PC who specializes in antitrust matters, said the FTC's position against the divestiture isn't surprising — the FTC and in particular the DOJ have taken a highly skeptical view of most divestitures that they say often don't adequately protect competition.

"The FTC learned hard lessons about the efficacy, or lack thereof, of divestitures from the 2009 Wild Oats-Whole Foods transaction and the 2015 Albertsons-Safeway transaction. Both agencies have been rather clear about their respective, presumptive skepticism of divestitures and the ability to retain vibrant competition in a relevant market," Kar said in an email.

C&S itself defended its capabilities in a statement.

"C&S is deeply committed to our transformation strategy, which includes the expansion of our retail footprint. The purchase of these stores will enable C&S to be one of the leading grocery retailers in the United States," the company said in a statement that also pointed to its "experienced management team with an extensive background in food retail and distribution" and its strong track record as a grocery wholesaler and important part of the supply chain.

For Kroger and Albertsons, the elephants in the room are Amazon.com, Walmart and Costco, which the merging companies have repeatedly cast as much larger, nonunion shops they, unionized workplaces, must come together to successfully compete against.

The FTC, for its part, argued in the federal court complaint that the relevant market should be limited to supermarkets, asserting, for instance, that online delivery services "are partners to, not substitutes for, brick-and-mortar retailers."

Critics of the agency, however, contend it's missing crucial competition, which would dramatically water down Kroger and Albertsons' market power.

"The idea that this market is uncompetitive is preposterous. Recent years have seen Amazon with its Whole Foods and Walmart enter the competition, not just as additional players but with innovations like home delivery or curbside pickup," Jessica Melugin, director of the Center for Technology and Innovation at the conservative-leaning Competitive Enterprise Institute, said in a statement. "The FTC using its limited resources to block this merger is purely ideological and of no benefit to consumers, already struggling with food costs."

Cross said market definition will likely be an important part of the case to come.

"What the relevant market is, is always a contest in merger law," he said.

The FTC is represented in-house by James H. Weingarten and Charles Dickinson.

The states are represented by their respective attorneys general.

Albertsons is represented by Debevoise & Plimpton LLP.

Kroger is represented by Weil Gotshal & Manges LLP and Arnold & Porter Kaye Scholer LLP.

C&S is represented by Sullivan & Cromwell LLP.

Correction: A previous version of this article misstated a source's name. The error has been corrected.

The administrative case is In the Matter of Kroger Company/Albertsons Companies Inc., case number D-9428 before the Federal Trade Commission. The district court case is Federal Trade Commission et al. v. Kroger Co. et al., case number 3:24-cv-00347, in the U.S. District Court for the District of Oregon.

--Additional reporting by Henrik Nilsson, Thy Vo, Greg Lamm and Nadia Dreid. Editing by Jay Jackson Jr.