

ARIZONA STATE UNIVERSITY

CORPORATE & BUSINESS LAW JOURNAL FORUM

VOLUME 6

SEPTEMBER 2024

NUMBER 3

COMMENTARY

Grocery Competitors Look to Unite: A Look at the Kroger and Albertsons Merger

BY CAMERON WASHBURN*

On October 14, 2022, Kroger and Albertsons announced a \$25 billion merger.¹ A merger provision required Albertsons to pay its shareholders \$4 billion in dividends.² November 2, 2022, the attorney generals for Washington D.C., California, and Illinois filed a temporary restraining order to block the \$4 billion dividend payout, effectively blocking the merger.³ If dividends were dispersed among shareholders, Albertsons' operations would be cash-deficient in sustaining growth, jeopardizing jobs, and inhibiting groceries in isolated areas.⁴ Thus, Albertsons would need to be acquired by another corporation like Kroger.

The Federal Trade Commission (FTC) seeks to block this merger because it could violate the Clayton Act. The FTC is a federal agency empowered to enforce fair market competition. The FTC's mission statement is as follows, "protecting the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education."⁵ The FTC is empowered to enforce fair market competition through federal statutes. The Clayton Act is one of those statutes,

* J.D. Candidate, Class of 2022, Sandra Day O'Connor College of Law at Arizona State University

¹ *Kroger, Albertsons \$25 billion merger fraught with roadblocks*, REUTERS (Feb. 26, 2024, 10:12 AM), <https://www.reuters.com/markets/deals/kroger-albertsons-25-billion-merger-fraught-with-roadblocks-2024-02-26/>.

² Siddharth Cavale, *Three attorney general file lawsuits seeking to block Albertsons' \$4 bln payout*, REUTERS (Nov. 2, 2022, 2:18 PM), <https://www.reuters.com/markets/deals/exclusive-three-attorneys-general-file-lawsuit-blocking-albertsons-4-billion-2022-11-02/>.

³ *Id.*

⁴ *Id.*

⁵ *The Antitrust Laws*, U.S. DEP'T OF JUSTICE ANTI TRUST DIV. (Dec. 20, 2023), <https://www.justice.gov/atr/antitrust-laws-and-you#:~:text=It%20prohibits%20certain%20actions%20that,monopoly%20in%20a%20relevant%20market.>

which states that the FTC "prohibits certain actions that *might* restrict competition, like tying agreements, predatory pricing, and *mergers* that could lessen competition."⁶

The primary concern is whether the proposed merger might restrict competition to violate anti-trust law. "The goal of the Clayton Act is to maintain a fair marketplace where various companies can compete . . . and protects individuals and small businesses from being unfairly treated by large companies."⁷

With this merger, Kroger and Albertsons seek to increase competition against dominant market shareholders. Kroger and Albertsons claim they will lower grocery costs, increase job security, and compete with Walmart and Costco.⁸ The cost of groceries, without this merger, has risen since 2021. Phoenix reflects similar trends across the country. Since 2021, grocery prices in Phoenix have increased from an average of \$156.10 to \$184.20 in 2024.⁹ Factors that have contributed to his increase, not the merger of Kroger and Albertsons, are the pandemic, failures in supply change, and wars worldwide.

Kroger and Albertsons could violate the Clayton Act because each corporation holds a significant market share. In 2021, Kroger ranked third among grocery store revenues in the United States, and Albertsons ranked eighth in revenues.¹⁰ In 2021, prior to the year of the announced merger, Kroger's revenue was \$148.26 billion.¹¹ In 2021, Albertsons revenue reached \$76.77 billion.¹² Kroger and Albertsons are direct market competitors. Allowing this merger could lessen competition incentives to compete with one another, increase grocery prices because price competition is eliminated, and eliminate jobs by selling unneeded stores.

Approval of the Kroger and Albertsons merger would allow the companies to compete in a top-heavy grocery market. The concerns of unfair market competition and increases in grocery prices are unfounded myths. With this merger, Kroger and Albertsons would compete with Walmart, Costco, and Amazon, creating jobs and lower grocery prices.¹³ In

⁶ *Id.*

⁷ *Id.*

⁸ Kae Gibson, *Kroger-Albertsons merger trial starts. Here's what to know.*, CBS NEWS (Aug. 26, 2024, 3:16 PM), <https://www.cbsnews.com/news/kroger-albertsons-merger-trial-starts-heres-what-to-know/#>.

⁹ Rey Covarrubias Jr., *Spending more at the grocery store? Why metro Phoenix food prices continue to rise*, ARIZ. REPUBLIC (Feb. 21, 2024, 6:02 AM), <https://www.azcentral.com/story/news/local/arizona/2024/02/21/grocery-costs-are-up-in-metro-phoenix-heres-how-much/72660458007/#>.

¹⁰ *Top 50 food and grocery retailers by sales in 2021*, SUPERMARKET NEWS (July 6, 2021), <https://www.supermarketnews.com/finance/top-50-food-and-grocery-retailers-by-sales-2021>.

¹¹ *Revenue of Kroger*, COMPANIES MARKET CAP, <https://companiesmarketcap.com/kroger/revenue/>.

¹² *Revenue of Albertsons*, COMPANIES MARKET CAP, <https://companiesmarketcap.com/albertsons/revenue/>.

¹³ Dave Michaels, *Kroger and Albertsons Defend Merger With Food Prices in Political Crosshairs*, WALL ST. J. (Aug. 26, 2024, 3:56 PM), https://www.wsj.com/us-news/law/kroger-and-albertsons-defend-merger-with-food-prices-in-political-crosshairs-3b57da33?mod=Searchresults_pos10&page=1.

2023, Walmart earned \$611 billion in revenue.¹⁴ Walmart, Costco, and Amazon dominate the grocery market, leaving Kroger and Albertsons effectively "weak." Denying this merger is only delaying an inevitable result: Kroger acquires Albertsons later when each company is more desperate or because of diminishing economic opportunity, Walmart, Amazon, or Costco acquire the companies. Would the latter scenario violate the Clayton Act?

This merger could balance the playing field more than eliminate competition. Kroger and Albertsons could create jobs and lower grocery prices. The paranoia of rising costs because of this merger is blind to other market influences that impact grocery prices more than Kroger and Albertsons merger. Kroger and Albertsons will compete more effectively for market share with Costco and Walmart through this merger.

The federal court in Oregon is hearing this merger. For the next two weeks, the court will decide whether the Federal Trade Commission (FTC) can block Kroger and Albertsons from joining forces. This merger has the potential to drag on longer than anticipated.

¹⁴ *Earnings Release*, SEC (Feb. 21, 2023), <https://www.sec.gov/Archives/edgar/data/104169/000010416923000010/earningsreleasefy23q4.htm#:~:text=Each%20week%2C%20approximately%20240%20million,approximately%202.1%20million%20associates%20worldwide.>