

A Look at State AGs Supermarket Antitrust Enforcement Push

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Gone are the days when state attorneys general leave antitrust enforcement to their federal counterparts at the Federal Trade Commission or the U.S. Department of Justice Antitrust Division

State attorneys general have become considerably more active in the antitrust space over the past several years, and there seems to be no sign of slowing down.

Historically, state attorneys general left antitrust enforcement to either the FTC or DOJ due to their significant resources dedicated to enforcing antitrust laws compared to that of state attorneys general.

Today, dozens of states have poured resources into hiring their own antitrust lawyers. This shift began several years ago after states feared antitrust enforcement at the federal level would wane under the Trump administration.

As a result, state attorneys general have attempted to fill any gaps left by a real or perceived lack of federal antitrust enforcement. Within the vast realm of antitrust laws, state attorneys general have recently set their sights on mergers and acquisitions across many industries.

Indeed, we have seen state attorneys general jump into various high-profile antitrust matters, including actions against the NCAA and Live Nation Entertainment Inc. and its subsidiary Ticketmaster over alleged antitrust concerns. State attorneys general involvement in supermarket mergers has been another hot area for the states and the grocery industry.

In the supermarket context, states allege that these mergers eliminate competition while increasing prices on consumers. Companies rebut these claims, arguing that these mergers are necessary to allow them to effectively compete with other large grocery chains and discount retailers.

Kroger-Albertsons

In October 2022, Kroger announced it was purchasing rival grocer Albertsons Cos. in a deal worth nearly \$25

billion. The acquisition would create one of the largest grocery chains in the country with a combined 5,000 stores across 48 states.

However, the deal has been fraught with scrutiny from states and federal regulators alike.

On Jan. 16, 2024, the Washington attorney general's office filed a lawsuit to block the deal. The Colorado attorney general's office filed a similar lawsuit on Feb. 14. Similarly, on Feb. 26, the FTC filed its own lawsuit.

States including Arizona, California, Illinois, Maryland, Nevada, New Mexico, Oregon, Wyoming and the District of Columbia joined the FTC's suit.

A hearing in the FTC case is scheduled for Aug. 26, to address the FTC's request for a preliminary injunction to block the acquisition.

On April 26, King County, Washington Superior Court Judge Marshall Ferguson denied Kroger's motion to dismiss the Washington attorney general's lawsuit. Kroger's motion to dismiss the Colorado attorney general's lawsuit was also denied in June.

The lawsuits both seek to block the proposed merger by alleging violations of Washington's Consumer Protection Act and Colorado's State Antitrust Act, respectively.

The lawsuits also contest the FTC's position that a planned divestiture of over 413 stores nationwide would satisfy any anticompetitive concerns. Indeed, Washington Attorney General Bob Ferguson's complaint alleges the divestiture, with C&S Wholesale Grocers Inc. as the buyer, does not change the fact that one of the grocers would still enjoy a near monopoly in the state.

Kroger and Albertsons make up nearly 50% of all grocery stores in Washington. If approved, the deal would be the state's second recent major retail grocery store merger, after a 2015 merger involving Albertsons and Safeway.

One of the issues raised by Ferguson is that the divestiture to a primarily wholesale supplier could arguably set up many of the divested supermarkets to fail, allegedly endangering Washington jobs and diminishing choices for Washington shoppers.

The lawsuit alleges that C&S does not have a track record of successfully running hundreds of grocery stores and, importantly, has no experience in Washington.

As a result, the lawsuit alleges that the company is not a suitable buyer, and if the stores ultimately close, it will only further decrease competition in the state.

The Colorado attorney general's lawsuit echoes these same alleged sentiments. The Washington attorney general pointed to the Safeway Inc. merger as a recent example of a divestiture plan cleared by the FTC that is like the current proposed plan for Kroger and Albertsons. Yet after the Safeway merger, many of the divested stores filed for bankruptcy less than a year after the sale.

In addition to the allegations aimed at the proposed merger, the Colorado attorney general's complaint also includes allegations involving a no-poach and no-solicitation agreement between Kroger and Albertsons after a 2022 strike at King Soopers, a grocery store chain owned by Kroger.

The agreements ensured that the King Soopers employees would not be hired by Safeway, which is owned by Albertsons, and that Safeway could not solicit pharmacy customers from the Kroger-owned chain.

The Colorado attorney general is seeking \$1 million in civil penalties for these agreements and seeks to enjoin the companies from enforcing or further entering into such agreements.

While the no-poach aspect of the lawsuit should not directly affect the proposed Kroger-Albertsons acquisition, it is yet another example of aggressive antitrust enforcement by state attorneys general.

Prior to the suit, Kroger and Albertsons proposed to divest more than 413 stores nationwide to C&S Grocers. The FTC rejected the proposal, finding it would not allow C&S Grocers to meaningfully compete with Kroger's market share because it would have to stitch together parts into a functioning business. The states also appear to reject the divestment proposal.

While the attorneys general lawsuits could result in a trial, that outcome is unlikely. Kroger and Albertsons could choose to settle with those states while continuing to keep the larger, nationwide, acquisition intact. Of course, that also depends on the outcome of the joint FTC and attorneys general lawsuit.

Price Chopper-Tops Market

In 2022, the FTC approved a final order to allow Price Chopper and Tops Market Corp. to merge. The merger created a collective footprint of nearly 300 stores in the Northeast.

In 2021, the FTC had alleged that the merger would be anticompetitive in 11 markets in New York and Vermont. The New York Attorney General, Letitia James, also joined the FTC's investigation, and the merging parties agreed to divest 12 Tops supermarkets to C&S Wholesale Grocers to settle with the agency.

The 2021 order also required the parties to obtain approval from the FTC to sell or acquire in the affected markets and before selling any assets it acquires in the divestiture. James agreed to discontinue her investigation in an assurance of discontinuance on the same terms of the FTC's agreement.

While the Price Chopper and Tops Market merger was significantly smaller in scale than the proposed Kroger merger, the deal underscores states focusing on potential effects on local markets giving rise to state attorney general inquiries.

Even though the deal was relatively small, it arguably would have had a significant effect on New York markets. In the regions with divestitures, either the merger would have eliminated a direct competitor or left the city with a single supermarket choice.

Therefore, if a merger is perceived to have a strong effect in a particular state, a state attorney general is more

likely to intervene and investigate even if FTC enforcement alone arguably protects the local markets in a particular state.

Ahold-Delhaize

In 2016, Ahold and Delhaize merged in a \$28 billion deal to create one of the largest food retailers in the U.S. Prior to the merger, Dutch grocer Koninklijke Ahold NV operated around 650 stores under the banners Giant and Stop & Shop, while Belgian grocer Delhaize Group operated around 1,200 stores under the banners Hannaford and Food Lion.

The FTC investigated the proposed merger and alleged that it was anticompetitive in 46 local markets throughout Delaware, Maryland, Massachusetts, New York, Pennsylvania, Virginia and West Virginia.

As a result, the companies agreed to divest 81 stores to seven divestiture buyers and required parties to obtain approval from the FTC to sell or acquire in the affected markets for 10 years after the merger. Ahold took a 61% stake in the new company.

At the time of the merger, Ahold and Delhaize were behind only Kroger and Albertsons for highest grocery store count in the U.S. Together, Ahold-Delhaize now operates around 2,000 stores in the U.S. under the same banners.

In addition to the FTC's investigation, the attorneys general for Massachusetts, Pennsylvania, Virginia, Delaware, Maryland, West Virginia and the District of Columbia sued in the U.S. District Court for the District of Columbia alleging violations of the Clayton Act and applicable state antitrust laws.

The states and Ahold-Delhaize entered a final consent judgment, which settled under the same divestiture requirements as the FTC order. Again, state attorneys intervened in states in which there was the strongest likelihood of alleged anticompetitive behavior.

However, the situation here is significantly different than the Kroger and Albertson's proposed merger as the states here joined in the FTC's order and did not seek different remedies than those agreed on by the FTC.

The comparison between the Ahold-Delhaize merger and the Kroger and Albertsons merger shows that attorneys general may be more interested today in pursuing their own antitrust enforcement rather than simply following the FTC's lead on enforcement and remedies.

What to Expect

The evolution of antitrust intervention by state attorneys general is on full display in the Kroger and Albertsons proposed acquisition. In prior antitrust enforcement actions against supermarket mergers, state attorneys general followed the lead of the FTC by joining their investigations or lawsuits and settling for the same divestment remedies.

The Kroger and Albertsons acquisition presents perhaps the first time in a supermarket merger that state attorneys

sought to maintain their own separate antitrust suits.

The insistence by the Washington and Colorado attorneys general that their suits continue considering the FTC's enforcement action displays the ever-increasing likelihood that states will pursue their own investigations and lawsuits, either alongside or entirely separate from the FTC and DOJ.

Businesses and consumers should expect this shift in antitrust enforcement by state attorneys general to continue to grow across industries. Companies should expect to deal with state-level issues in addition to traditional enforcement by the FTC and DOJ.

As we are seeing today, multiple ongoing suits will highlight differing priorities between states as well as between states and federal agencies. Companies must be alert to differences and changes in state law enforcement while still handling traditional FTC enforcement.

All possible new and evolving challenges arising with increased state-level antitrust enforcement haven't been seen at this point, but companies should be mindful of possible state enforcement when looking to expand their business as state attorneys general increase their activity in the space.

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