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Two Courts Block Kroger-Albertsons Merger

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Within hours of each other, an Oregon federal district court followed by a Washington state court enjoined the $24.6 billion merger of the Kroger and Albertsons grocery chains. The Oregon court adopted the controversial 2023 Merger Guidelines' market concentration presumption and largely accepted the Federal Trade Commission's (FTC) and its expert's arguments for a narrow grocery market. In a loss for the FTC, the Oregon court declined to find that the proposed transaction was likely to substantially harm competition in the labor market alleged.

The Washington court similarly relied on structural presumptions based on market concentration calculations, though it did not expressly adopt or reject the 2023 Merger Guidelines. The Washington attorney general (AG) did not assert harm to any labor market, and accordingly, that court did not address the proposed transaction's impact on labor.

While the decisions are notable for their narrow market definition limited to traditional grocery stores, they are most noteworthy for their embrace of a post-merger market share as low as 30% as "unacceptable" or a "threat," the Oregon court's express acceptance of the 2023 Merger Guidelines' market concentration presumption, and the Oregon court's rejection of the FTC's labor market harm theory because of the lack of the type of economic evidence used in the evaluation of traditional sell-side markets. Also potentially problematic were the courts' skeptical approaches to the merging parties' proposed divestiture package and buyer.

Market One: Traditional Grocery Stores

Both courts held the enforcement agencies established their *prima facie* case that the Kroger/Albertsons merger would substantially lessen competition or tend to create a monopoly in the submarket limited to traditional grocery stores.

The courts defined the traditional grocery submarket as stores with a large footprint, a large number of grocery products, and a large number of services like deli and gas — essentially a one-stop shop. Excluded from the market were value stores, which have low prices and limited services and SKUs; club stores, which have a membership model, larger size products, and limited service and SKUs; dollar stores, which are generally smaller and lack fresh foods, service, and many SKUs; and natural, gourmet or limited assortment stores, which are generally smaller and focus on differentiated and organic brands. Embracing the 2023 Merger Guidelines' approach, the courts applied the 1962 *Brown Shoe Co. v. United States* factors. According to the two courts, the fact that certain retailers may draw some customers away from and that they may compete in some sense with the merging parties does not suggest that the retailers should be in the same relevant market because those retailers

also differ generally in terms of price, customers preferences, and format.

The courts held that the enforcement agencies met their *prima facie* burden of showing the merger would substantially lessen competition. The courts sided with the agencies' experts and methods and found unpersuasive the defendant experts' critiques. The Oregon court expressly accepted the 2023 Merger Guidelines' market concentration thresholds for triggering a presumption of illegality, while the Washington court remained uncommitted because it found that the presumption applied under either the 2010 or 2023 guidelines. Both courts relied on the 1963 *Philadelphia National Bank* case's 30% market share as a competitive threat.

The courts viewed Kroger and Albertsons as particularly close competitors to each other based largely on their internal documents and rejected their rebuttal arguments. For example, the courts were not persuaded that the merger would (1) allow the retailers to better compete against larger competitors like Wal-Mart or (2) generate substantial efficiencies that would be passed on to consumers. Both courts rigorously reviewed and found the proposed divestitures inadequate to restore the competition that would be lost, accepting the agencies' arguments that the selected buyer was not sufficiently experienced or prepared.

Therefore, the courts held that the FTC and Washington AG were likely to succeed on the merits and granted the injunction.

Market Two: Union Grocery Store Labor

The Oregon court rejected the FTC's standalone argument that an injunction should be issued based on harm in the union grocery store labor market.

Unlike the *Tapestry/Capri* court, which declined to reach the labor market arguments in connection with that transaction, the Oregon court carefully reviewed the agency's labor market theory. Although the court, in *dicta*, was willing to accept a labor market limited to only unionized grocery workers, in the end it rejected the FTC's request for an injunction because the agency was unable to provide sufficient economic evidence of the type used in the sell-side grocery market.

Although the parties have abandoned the proposed transaction, with Albertsons suing Kroger in Delaware Chancery Court, the Oregon and Washington courts' decisions are a significant win for the Biden administration, at a minimum, with respect to its approach to defining the narrowest market possible and the burden of establishing an appropriate divestiture remedy. When considered along with the *Tapestry/Capri* court's embrace of the 2023 Merger Guidelines' market concentration presumptions, there is an increased risk of future courts applying the 2023 standard. These two wins, however, may also act as additional impetus to growing calls for the withdrawal or revision of the 2023 Merger Guidelines.

And while the court ultimately did not grant an injunction on the basis of a labor theory, the Oregon court's labor market discussion confirms the concerns raised by commentors regarding the 2023 Merger Guidelines' emphasis on the theory.

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