

How Lucia, Jarquesy Could Affect Grocery Merger Challenge

By **Zack Kobrin, James Morsch and Brian Drockton** (September 26, 2024)

In 2022, The Kroger Co., one of the largest grocery retailers in the U.S., announced its intention to merge with rival Albertsons Cos. Inc. in a \$24.6 billion deal. Kroger and Albertsons claim that the merger will lower consumer prices and improve efficiency while creating a combined entity better positioned to compete against the likes of Walmart Inc., Costco Wholesale Corp. and Amazon.com Inc.

However, the Federal Trade Commission has moved to block the deal, citing concerns that it could stifle competition under antitrust laws, increase prices and lead to adverse consequences for grocery store workers.

The merger would see the two of the largest U.S. grocery store chains join forces. The FTC has taken the position that the merger would eliminate fierce competition between rivals, and has adopted a dual approach to block the merger, pursuing both federal court action and its administrative tribunal.

As these efforts continue, this article explores that strategy and its potential outcomes.

Currently, in the U.S. District Court for the District of Oregon, the FTC is seeking a preliminary injunction to halt the merger while the administrative case proceeds to determine whether the merger violates the antitrust laws.

This approach is grounded in Section 13(b) of the Federal Trade Commission Act, which allows the FTC to seek temporary relief in federal court to prevent potentially anticompetitive mergers while simultaneously initiating administrative proceedings to prove the merger violates the Clayton Act and Section 5 of the FTC Act.

The federal court action, in which the attorneys general of Arizona, California, Illinois, Maryland, Nevada, New Mexico, Oregon, Wyoming and the District of Columbia have all joined the FTC, provides an immediate legal remedy for the FTC, intended to stop the merger while the administrative review unfolds.

Because that review can take years to reach a conclusion, many merging parties have abandoned their proposed mergers once the FTC secures an injunction in court.

Faced with that prospect, Ohio-headquartered Kroger filed an action in the U.S. District Court for the Southern District of Ohio seeking to enjoin the FTC's administrative action. Kroger's lawyers requested a preliminary injunction to block the agency from continuing its administrative proceedings while Kroger's constitutional challenge is considered by the court.

A hearing on this preliminary injunction is scheduled for Oct. 4, although the FTC has moved to transfer the case to Oregon.



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Kroger's constitutional challenges to the FTC's administrative review are twofold. First, it argues that the administrative law judge presiding over the administrative proceeding lacks authority to adjudicate the merits of the FTC's merger challenge because the ALJ enjoys two layers of for-cause protection from presidential removal, thereby violating Article II of the U.S. Constitution.

Second, Kroger contends that, because the administrative action involves the adjudication of private rights — specifically, Kroger's property and contract rights — by an executive agency rather than an Article III court, the entire proceeding violates its due process rights.

Since the FTC, unlike the U.S. Department of Justice, which also handles merger enforcement, is explicitly authorized by statute to initiate both court and administrative proceedings, a court ruling in Kroger's favor could have significant implications for future mergers challenged by the agency.

Adding to the political confusion surrounding this case, on Sept. 23, the attorneys general of Ohio, Alabama, Georgia, Iowa, Louisiana, Montana, Nebraska, Oklahoma, South Carolina, Tennessee, Texas and West Virginia filed a brief in support of Kroger's constitutional challenge in the Southern District of Ohio.[1]

These attorneys general echoed the position of Kroger and asserted that the FTC's administrative law tribunal violates the Constitution's separation of powers because, among other reasons, the FTC's ALJs enjoy unconstitutional protections from removal and undermine the president's authority.

The FTC's dual-track enforcement strategy is not uncommon in antitrust cases. Federal courts offer immediate relief, while administrative proceedings allow for a more in-depth analysis of the competitive dynamics of the merger by ALJs with expertise in competition matters.

To critics like Kroger, those administrative proceedings are stacked in the FTC's favor and painfully slow. For that reason, Kroger is seeking to bar the FTC from moving forward in front of the ALJ.

While Kroger's motion is a long shot, the U.S. Supreme Court's recent decisions in *SEC v. Jarkesy* and *Lucia v. SEC*, relied upon by Kroger could lead to a reevaluation of the FTC's reliance on administrative processes in complex merger cases.

Lucia and Axon Cases

In the 2018 decision in *Lucia v. SEC*, the Supreme Court addressed the constitutionality of the process for appointing ALJs at the U.S. Securities and Exchange Commission.

The court ruled that ALJs are officers of the United States under the appointments clause of the Constitution, Article II, Section 2, meaning they must be appointed by the president, a court of law or a department head.

The case arose when Raymond Lucia, an investment adviser, challenged the legitimacy of the ALJ presiding over his SEC enforcement proceeding. Lucia argued that the ALJ had been improperly appointed by SEC staff rather than the president or SEC commissioners.

The court, in a 7-2 decision, ruled in Lucia's favor, holding that because ALJs exercise

significant authority comparable to other officers, they cannot be treated as mere employees. Lucia was thus entitled to a new hearing before a properly appointed ALJ.

A similar challenge to the FTC's ALJ appointment process is ongoing in *Axon Enterprise Inc. v. FTC*. The case reached the Supreme Court last year on the question of whether constitutional challenges can be heard in federal court prior to agency proceedings. In a unanimous ruling, the court held that the FTC Act does not displace district court jurisdiction over far-reaching constitutional claims, meaning that constitutional analysis can proceed before an agency decision.

This ruling suggests that Kroger's request for a preliminary injunction from the federal court in Ohio barring the FTC's administrative challenge to the Albertsons merger could be granted pending that court's decision on its constitutional challenges.

Although Kroger's constitutional challenges may be long shots, the Supreme Court clearly is more sympathetic these days to arguments that property rights should be adjudicated in court rather than in administrative proceedings.

Jarkesy and Its Implications

The June 27 Supreme Court ruling in *Jarkesy v. SEC* relied on by Kroger could also have significant implications for FTC administrative proceedings. The case involved the SEC's use of ALJs to adjudicate securities fraud claims.

The U.S. Court of Appeals for the Fifth Circuit, and later the Supreme Court, highlighted several constitutional concerns. Notably, the Supreme Court affirmed that defendants in the SEC's case were entitled to a jury trial under the Seventh Amendment, as the fraud claims were legal in nature and historically heard by juries.

According to *Jarkesy*, whether a claim is legal in nature, and therefore implicates a party's right to a jury trial, depends on the substance of the suit — i.e., the cause of action and the remedy sought. The Supreme Court emphasized that the remedy is often decisive, particularly when it involves civil penalties, which are designed to punish or deter wrongdoers.

While the FTC specifically seeks civil penalties, particularly in cases where parties violate final orders, the agency might argue persuasively that the remedies it seeks in merger cases like Kroger's aim to restore the status quo rather than to punish the merging parties.

Moreover, the relief sought is inherently equitable, not legal, in nature because it seeks to enjoin a merger rather than award damages suffered as a result of a successful tie-up.

Further adding to the difficulty of Kroger's argument is that the basis of the FTC's challenge to the proposed merger are the Clayton and FTC Acts, statutes that do not have obvious corollaries at common law.

In *Jarkesy*, the Supreme Court noted that the statutory claims at issue were akin to common law fraud claims where the right to a jury traditionally applies. The antitrust claims the FTC is seeking to adjudicate in its administrative proceedings against the merger have no obvious common law analogs.

The FTC also argues that the rights it is seeking to vindicate in the administrative proceedings are public in nature and therefore do not implicate the right to a jury. Given

these arguments, the odds are stacked against Kroger prevailing on its Seventh Amendment challenge.

Nevertheless, the language of the Jarkesy opinion could pose a challenge to the broader use of ALJs across agencies.

Justice Sonia Sotomayor, in her dissent, pointed out that the court's ruling could affect nearly 200 statutes authorizing dozens of agencies to use ALJs. While that result is not likely to come out of Kroger's challenge to the FTC's authority to challenge its merger in administrative proceedings, the ruling could still have an important impact on the FTC's use of ALJs in other administrative proceedings that it initiates in the future.

How the FTC Uses Administrative Proceedings

In antitrust proceedings, the FTC utilizes ALJs as key figures in adjudicating disputes involving alleged violations of antitrust laws. These proceedings are initiated when the FTC believes that a company or individual has engaged in anticompetitive behavior that violates statutes such as the FTC Act or the Clayton Act.

The ALJs serve as quasi-judicial officers who conduct formal hearings to review the evidence and legal arguments presented by both the FTC (acting as the prosecutor) and the respondent (the party accused of antitrust violations).

ALJs operate much like judges in a federal case, overseeing discovery and prehearing motions. They conduct adjudicative hearings where they hear witness testimony and evaluate documentary evidence. Following the hearings, ALJs issue an initial decision that includes findings of fact, conclusions of law, and their recommended order or remedies.

This ruling is then submitted to the FTC commissioners who have the authority to affirm, reverse, or modify the ALJ's findings and conclusions. Then, as prescribed by statute, a party objecting to the commission's proceedings makes its claims first within the commission itself, and then (if needed) in a federal court of appeals. For that reason, administrative proceedings can take years before any court is involved.

Implications for the FTC and State Antitrust Enforcers

If Kroger succeeds in challenging the constitutionality of the FTC's administrative process, it could have a significant impact on the agency's enforcement of antitrust laws. Shifting more cases to federal court could undermine the FTC's aggressive enforcement agenda. Federal courts have been less receptive to nontraditional theories of antitrust harm, as seen in recent losses by both the FTC and the Department of Justice's Antitrust Division in merger and conduct cases.

Moreover, coupled with the recent decision in *Loper Bright Enterprises v. Raimondo*, where the U.S. Supreme Court struck down Chevron deference, federal courts may be less inclined to follow the guidance of the FTC or to credit decisions arising out of the FTC's own administrative framework. This shift appears to have already begun at the SEC, where more cases are now being filed directly in federal court. Only time will tell whether something similar occurs in merger enforcement cases initiated by the FTC.

As illustrated by the Kroger-Albertsons merger cases, the FTC and the DOJ's Antitrust Division are not the only regulators with an interest in the \$24.6 billion deal. In addition to the nine states that have joined the FTC's action to stop the merger, several states,

including Washington and Colorado, have also independently sued to stop the merger.

While the large number of states joining the FTC's action may carry some weight in federal court, there is a serious question of whether state judges assigned to the cases brought by Washington and Colorado and pending in state courts have the authority to enter what effectively would amount to a nationwide injunction to halt the deal.

That said, if the FTC fails to stop Kroger and Albertsons from combining, such a ruling would not preclude the states from moving ahead with their own challenges to the merger and perhaps more limited injunctive relief focused on the competitive effects the merger could have on consumers and workers in those particular states.

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[1] <https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/2024-9-23-Amicus.aspx>.