

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ALBERTSONS COMPANIES, INC., ET
AL.,

Respondents.

No. 1 0 1 5 3 0 - 5

RULING

The State of Washington has filed an emergency motion for injunctive relief, seeking to extend a temporary restraining order barring respondent Albertsons' proposed payment of a \$4 billion special dividend pending the outcome of the State's appeal of a King County Superior Court order denying the State's motion for a preliminary injunction against the proposed dividend payment.

The underlying facts are summarized only briefly here. This matter concerns Kroger's proposal to acquire Albertsons through a merger. The two enterprises are direct competitors in numerous respects. Kroger operates 54 QFC supermarkets and 33 Fred Meyer retail stores in the Puget Sound area alone. Albertsons operates more than 200 Albertsons, Safeway, and Haggen grocery stores in Washington State. Kroger and Albertsons collectively own and operate nearly 350 grocery stores in Washington. The proposed merger therefore will affect thousands of workers and even more consumers in Washington.

Albertsons contemplated a return of capital to its shareholders in the form of either a tender offer (stock buy-back) or a special dividend. Albertsons would have preferred to execute a tender offer but the merger offer from Kroger raised concerns of a potential SEC violation. Albertsons thus decided to proceed with the special dividend so as not to interfere with its prospects for merger with Kroger.

Kroger and Albertsons addressed the special dividend in their negotiations. The merger agreement acknowledges that Albertsons may pay its shareholders a “Pre-Closing Dividend” in an amount of up to \$4 billion, which comes out to about \$6.85 per share. Albertsons will fund the dividend with \$2.5 billion of its \$3 billion cash on hand with the other \$1.5 billion funded by its line of credit. This will leave Albertsons with \$500 million in cash on hand and \$2.6 billion remaining in its line of credit. On October 14, 2022, Albertsons announced the planned merger with Kroger, expected to close in a year or so. Albertsons and Kroger also issued a joint press release announcing the merger agreement and Albertsons’ intent to pay the special dividend on November 7, 2022.

On November 1, 2022, the State filed a complaint for injunctive and other relief and a motion for a temporary restraining order (TRO).¹ The State contends, among other things, that payment of the proposed dividend, which the State alleges is the result of concerted action between the two companies, will constitute an unreasonable restraint of trade in violation of RCW 19.86.030 and an unfair method of competition in violation of RCW 19.86.020 of the Consumer Protection Act. In particular, the State asserts payment of the special dividend will leave Albertsons in a vulnerable position financially. Albertsons and Kroger counter that the decision to issue the dividend was Albertsons’ decision alone, intending to return value to its shareholders.

¹ A similar action was filed by the attorneys general of multiple states in the United States District Court for the District of Columbia. *District of Columbia v. Kroger Co.*, No. 1:22-cv-03357 (D.D.C.).

A superior court commissioner granted the TRO on November 3, 2022. On December 9 the superior court denied the request for preliminary injunction and ruled that the TRO would expire at 4:30 p.m. on Monday, December 19, 2022. The State then filed the instant emergency motion for injunctive relief, seeking to maintain the TRO while it seeks appellate review of the superior court's order denying a preliminary injunction. The State also filed a notice of appeal, which the clerk of this court redesignated a notice for discretionary review. RAP 2.3(a).²

Now before me for determination is the State's emergency motion for injunctive relief. Nothing more. Kroger and Albertsons separately filed answers opposed to the State's emergency motion.

This court has the authority to issue orders before or after acceptance of review "to insure effective and equitable review, including injunctive or other relief". RAP 8.3. The applicant must demonstrate the existence of debatable issues on review and that injunctive or other relief is necessary to preserve the fruits of appellate review in light of equitable considerations. *Confederated Tribes of Chehalis Rsrv. v. Johnson*, 135 Wn.2d 734, 759, 958 P.2d 260 (1998).

Whether the proposed special dividend is the product of improper concerted action between Albertsons and Kroger turns on disputed questions of fact and competing interpretations of the Consumer Protection Act. The superior court did not find evidentiary support for the State's request for a preliminary injunction. Determining whether that was a correct decision will require careful review of the records thus far provided. The State does not make a compelling case at this juncture that it will prevail in the end, but the issue is at least debatable for purposes of

² Since the State seeks discretionary review directly in this court, it must also file a statement of grounds for direct review. RAP 4.2.

determining whether discretionary review is merited under RAP 2.3(b) and whether the case should stay in this court or be transferred to the Court of Appeals under RAP 4.2. Those are questions to be determined later.

The easier question is whether continuation of the TRO is necessary to preserve the fruits of a successful discretionary review proceeding. The superior court determined it was necessary to extend the TRO to December 19 for that reason. The same reasoning supports extending the TRO further at least until the discretionary review and direct review questions are resolved. As for equitable considerations, the harm of further delay to Albertsons and Kroger is seemingly less than immediate erasure of the State's interest in obtaining success on discretionary review.

The emergency motion for injunctive relief is granted. The TRO imposed in King County Superior Court No. 22-2-18046-3 SEA shall remain in place until further order of the court.

So ordered.


COMMISSIONER

December 16, 2022