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Private Antitrust Lawsuit Results in Unprecedented Post-Merger Divestiture Order

By Jeff Perry and Megan Granger

Last month, a federal judge in the Eastern District of Virginia ordered JELD-WEN, Inc. ("JELD-WEN"), one of the world's largest manufacturers of windows and doors, to divest a major production facility as equitable relief in a private antitrust lawsuit brought by rival door manufacturer Steves and Sons, Inc. ("Steves").[1] Steves alleged that JELD-WEN, its supplier of interior molded doorskins, a critical input to Steves' doors, had engaged in anticompetitive conduct that was facilitated by JELD-WEN's 2012 merger with a competing doorskin manufacturer, Craftmaster International ("CMI"). The alleged conduct included post-merger price increases and changes to JELD-WEN's customary practice for reimbursements for defective doorskins. A jury agreed and awarded Steves almost $60 million (approximately $180 million after trebling) in damages for past antitrust injury and future lost profits. Moreover, Steves also opted to pursue an equitable remedy as an alternative to the future lost profits award, seeking divestiture of the CMI doorskin facility in Towanda, Pennsylvania six years after JELD-WEN's acquisition. Although the Court acknowledged that "[d]ivestiture is stiff medicine," it nevertheless ordered the facility sold under the supervision of a special master in order to "restore the competition that was substantially lessened by the merger."[2]

Why is this case novel?

The law is well-settled that private parties may seek injunctive relief in a merger challenge under Section 16 of the Clayton Act.[3] And, the Supreme Court confirmed almost thirty years ago that divestiture is a form of "injunctive relief" within the meaning of Section 16.[4] However, before *Steves*, no previous case brought by a private party seeking divestiture under the Clayton Act has gone to verdict. Moreover, the Court ordered divestiture even though the DOJ reviewed JELD-WEN's acquisition of CMI on two occasions and declined in each case to challenge the acquisition.

Key takeaways

- **Even if the verdict is upheld, *Steves* does not signal a major shift in law that will have a "chilling effect" on mergers.** The appeal remains pending,[5] but some commentators already have suggested that the *Steves* divestiture order threatens the integrity of the DOJ and FTC merger review process. Plaintiffs have a four year window for private damages suits under Section 4B of the Clayton Act, but there is no statute of limitations on suits for injunctive relief brought under Section 16.[6] If courts begin "undoing" mergers by ordering divestitures years after DOJ or FTC approval, some argue that this uncertainty would "chill" M&A activity or discourage investment in acquired businesses and facilities.[7]

While certainly a cautionary tale, we think it at least premature to argue that *Steves* represents a serious challenge to traditional merger review, or that it will spur a flurry of private post-merger lawsuits seeking divestiture. Rather, we continue to expect that the federal – and to a lesser degree, state – antitrust enforcers will continue to lead the charge when it comes to both pre-merger and post-merger antitrust enforcement, and that post-closing private merger challenges will remain very rare events.

Here, DOJ has not disclosed the reasons why it declined to take an enforcement action on the CMI deal in 2012, and again in 2015, when *Steves* lodged an informal complaint with DOJ. Evidence from the DOJ reviews was excluded at trial, and the DOJ "Statement of Interest" filed with the *Steves* court took "no position on the jury's liability determination" and merely asked the court to adopt the Antitrust Division's preference for divestiture, as opposed to behavioral relief, as the appropriate remedy in merger challenges.[8] It is noteworthy – if unusual – that the factual record in a private suit resulted in a different outcome than the DOJ review. Nevertheless, while we ultimately view *Steves* as an outlier in the universe of post-merger challenges, it serves as a compelling reminder of the risk that plaintiffs can find sympathetic judges and juries receptive to theories of post-merger harm, particularly in concentrated industries with few competitive options.

- **Keep your customers happy even after the deal closes – *especially* if you operate in a concentrated industry.** Just before its 2012 merger with CMI, JELD-WEN entered into long-term doorskin supply agreements with Steves and other non-vertically integrated, independent door manufacturers. It is well established that the views of the merging companies' customers are often given significant weight by the enforcement agencies during the merger review process. Offering a favorable long-term contract to a customer affected by a potential deal on the basis that the merging parties will be sharing the efficiencies of the transaction with customers is a common strategy recommended by antitrust counsel to avoid customer complaints and increase chances of regulatory approval. This tactic seems to have worked well for JELD-WEN, at least initially. When the DOJ conducted its typical interviews of affected doorskin customers, Steves told DOJ that "it did not oppose the merger because it believed that the Supply Agreement would prevent JELD-WEN from taking any anticompetitive actions."[9] The DOJ closed its investigation three months after JELD-WEN announced the CMI deal.

  However, JELD-WEN apparently changed its tune with customers following its acquisition of CMI. The *Steves* jury found that, starting in 2013, JELD-WEN increased the prices it charged Steves for doorskins. JELD-WEN also adopted a new policy that limited reimbursements for defective doorskins. Then, in 2014, Masonite, the only other supplier of doorskins in the U.S., publicly announced its intention to stop selling doorskins to independent door manufacturers, leaving JELD-WEN as the only option for customers like Steves. Two months later, JELD-WEN provided notice to Steves that it intended to terminate its long-term supply contract in 2021. Confronted with the future loss of a critical input and even fewer doorskin options than in 2012, Steves complained to DOJ in 2015 and filed the present action in 2016, alleging that JELD-WEN had obtained market power after the CMI acquisition that enabled it to behave anticompetitively. While the final outcome may be unusual, given JELD-WEN's post-merger pricing and reimbursement conduct and Masonite's exit from merchant sales, it is not altogether surprising that an unhappy customer filed a private antitrust lawsuit challenging the CMI deal. As the *Steves* case demonstrates, good customer relations should not be ignored after a transaction closes. In order to mitigate the risk of private litigation, companies should carefully weigh the risks and benefits of changing pricing and other supply policies post-merger – *especially* in a concentrated industry.

1. *Steves and Sons Inc. v. Jeld-Wen Inc.*, No. 3:16-cv-00545 (E.D. Va. Oct. 5, 2018).
2. *Id.* at 110.
3. 15 U.S.C. § 26.
4. *California v. Am. Stores*, 495 U.S. 271, 295 (1990).
5. Jeld-Wen has publicly announced that it will appeal the *Steves* decision to the Supreme Court if necessary. *See* Press Release, JELD-WEN Announces Rulings in Steves & Sons Litigation; No Final Judgment on Antitrust Claims (Oct. 6, 2018), *available at* http://investors.jeld-wen.com/investor-relations/news-releases/2018/10-06-2018-121352416.
6. 15 U.S.C. § 15b.
7. For example, one of JELD-WEN's central arguments against divestiture is that it has improved the Towanda factory and made production changes at other facilities that were predicated on having Towanda in its manufacturing network. *Steve*s at 52-57.
8. Statement of Interest of the United States of America Regarding Equitable Relief, *Steves and Sons Inc. v. Jeld-Wen Inc.*, No. 3:16-cv-00545 (June 6, 2018) at 2, 7-10, *available at* https://www.justice.gov/atr/case-document/file/1069011/download.
9. *Steves* at 18-19.

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