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Fourth Circuit Upholds Divestiture Remedy in Private Merger Challenge

On February 18, the United States Court of Appeals for the Fourth Circuit held, among other things, that a district court did not abuse its discretion in ordering a divestiture remedy in an antitrust case brought by a private party challenging a consummated acquisition. This is a significant ruling, as it appears to be the first case in which a court has ordered a divestiture in such circumstances.

Background

The case involves companies in the door manufacturing industry. The defendant, JELD-WEN, manufactures doorskins (used for the outer parts of doors) as well as complete doors. The plaintiff, Steves & Sons, manufactures complete doors but purchases doorskins as inputs from other manufacturers. Steves was a doorskin customer of JELD-WEN under a supply agreement. In October 2012, JELD-WEN acquired CMI, another doorskin supplier. (Steves had earlier "shown interest" in acquiring CMI.) According to the court, the "CMI merger reduced the number of American doorskin manufacturers from three to two," yet the U.S. Department of Justice (DOJ) closed its investigation and the merger was consummated without conditions. As part of its investigation, the DOJ "reached out to Steves, who responded that it didn't oppose the merger."

After the merger, according to the court, JELD-WEN's quality decreased and prices increased. JELD-WEN provided notice to Steves that it intended to terminate the supply agreement. Meanwhile, Steves unsuccessfully sought to enter into a supply agreement with another supplier and explored the possibility of manufacturing its own doorskins. Over a period of months in 2015, the parties sought to resolve their dispute. In late 2015, Steves approached the DOJ with a request that it investigate the consummated merger, which it did. But the DOJ "closed its investigation without acting." In the appeal, the DOJ filed an amicus brief arguing, among other things, that "no inference should be drawn from the Division's closure of its investigations into JELD-WEN's proposed and consummated acquisition of CMI" and that "there are many reasons why the Antitrust Division might close an investigation or choose not to take an enforcement action. The [Antitrust] Division's decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive."

Steves then brought antitrust claims under the Clayton Act against JELD-WEN in mid-2016, seeking damages and an order requiring JELD-WEN to divest the plant it acquired in the CMI merger. (Steves also brought breach of contract claims, and JELD-WEN countersued with trade-secret claims related to Steves

hiring of a former JELD-WEN employee as a consultant to explore manufacturing doorskins. These claims were severed for a separate trial.)

After the antitrust and breach of contract trial, in which the jury found for Steves, the district court granted Steves's divestiture request and indicated that it would undertake an auction to effect the divestiture. As the appeals court wrote, "private suits seeking divestiture are rare and, to our knowledge, no court had ever ordered divestiture in a private suit before this case."

The Opinion of the Court of Appeals

JELD-WEN asserted several issues on appeal, including "whether divestiture was the proper remedy." First, the appeals court held that the district court did not abuse its discretion when it rejected JELD-WEN's laches defense, because JELD-WEN failed to prove that Steves acted with unreasonable delay in seeking divestiture.

Then, the court rejected JELD-WEN's argument that the district court abused its discretion in evaluating the factors used to determine whether equitable relief is proper under the Clayton Act. According to the court:

> A plaintiff must demonstrate: (1) that it [faces a significant threat of] irreparable [antitrust] injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

As to the first two factors, the court held that "the permanent loss of a business, with its corresponding goodwill, is a well-recognized form of irreparable injury," in particular noting that Steves is a 150-year-old "multi-generational family business" whose principals "want to sell doors, not to live on the income from a damages award." The court also held that a conduct remedy – i.e., ordering JELD-WEN to supply doorskins to Steves – would eventually expire, but "the threat to Steves's survival would persist, as there would be only two American doorskin manufacturers, each of whom would be vertically integrated." And, against the backdrop of a policy of allowing private enforcement as well as public enforcement of antitrust laws, the court wrote that "a remedy that helped only Steves wouldn't promote competition in the doorskin market, conflicting with the principle that antitrust law protects competition, not competitors."

In evaluating the district court's balance of hardships analysis, the appeals court found that "evidence supports the [district] court's finding that Steves faces collapse without injunctive relief, but that JELD-WEN could "weather" its asserted financial hardships "because it was much larger and more diversified than Steves." Here, the court cited JELD-WEN's available but unused doorskin manufacturing capacity and

the option of the court ordering the eventual divestiture purchaser to supply JELD-WEN with doorskins for a period of time.

In sum, the court concluded that "as it stands, this case is a poster child for divestiture. A merger has resulted in a duopoly. Each doorskin supplier is vertically integrated. Evidence indicates that they've used their market power to threaten the Independents' survival. And it's reasonable to expect that a third supplier—even one that's vertically integrated—will promote competition." (On the last point, the court was addressing concerns that Steves itself " is the only entity to have expressed interest in" purchasing the plant to be divested.)

Notably, the court of appeals also dealt with the district court's exclusion of evidence that the DOJ investigated but did not challenge the merger, and held that "the district court acted within its discretion" in so ruling. According to the opinion, the DOJ's "decision not to pursue the matter isn't probative as to the merger's legality because many factors may motivate such a decision, including the Department's limited resources" and "evidence of the Department's decision could have misled the jury into *thinking* that the Department deemed the merger to be legal 'when no such determination ha[d] been made.'"

Significance

This case may be among the rarest of the rare: it involves a post-consummation divestiture remedy (which is relatively rare) in a private antitrust suit challenging a merger (also relatively rare) for a deal the DOJ itself did not challenge. Nevertheless, it is an important reminder and affirmation that private parties, under the appropriate circumstances, may challenge anticompetitive mergers and avail themselves of antitrust remedies, including divestiture.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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