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Steves v. JELD-WEN: 4th Circuit Affirms Divestiture in Private Antitrust Lawsuit

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The recent decision of the U.S. Court of Appeals for the Fourth Circuit in Steves & Sons, Inc. v. JELD-WEN, Inc., 2021 WL 630521 (4th Cir. Feb. 18, 2021), is noteworthy for its affirmance of the trial court's unusual grant of the equitable remedy of divestiture in a private antitrust suit brought by a customer challenging a merger of competing suppliers. That challenge was brought under Section 16 of the Clayton Act, 15 U.S.C. § 26, and followed a merger consummated four years before the plaintiff's complaint.

While divestiture is a commonly sought remedy in government enforcement actions brought by the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ), the Fourth Circuit observed that "private suits seeking divestiture are rare and, to our knowledge, no court had ever ordered divestiture in a private suit before this case." Steves & Sons, Inc., 2021 WL 630521, at *5; see also id. at *29 (noting that, while the Fourth Circuit had "not previously had occasion to speak on the issue of divestiture sought by a private plaintiff under Section 16 of the Clayton Act, . . . other courts have considered such requests, and none has yet encountered a case in which divestiture was an appropriate award," and noting that "courts have been reluctant to order divestiture at the behest of a private plaintiff after consummation of the allegedly anticompetitive merger") (Rushing, C.J., concurring).

If Section 16 divestiture becomes a more common feature of private antitrust litigation, the reasoning of the Steves & Sons opinion could have important implications for antitrust defendants and plaintiffs alike. We consider some of the ramifications of greater judicial acceptance of such private divestiture challenges below.

Summary of Relevant Facts

The suit involved the market for "doorskins" – i.e., the molded paneled and textured covers placed on wooden doors and their frames. That market was dominated by three primary competitors at the time of the merger in 2012: Masonite, JELD-WEN, Inc. (JELD), and CMI. These three dominant firms supplied doorskins to customers including Steves & Sons, Inc. (Steves). The dominant suppliers had market shares of approximately 46% (Masonite), 38% (JELD), and 16% (CMI). In 2012, JELD and

CMI proposed to combine to form a single entity. At the time, Steves did not object to the proposed merger, apparently because earlier in the year Steves and JELD had entered into a long-term supply agreement that contained certain limits on price increases JELD could charge Steve, as well as quality assurances. DOJ, after consulting Steves as part of its investigation of the proposed merger, closed its investigation in September 2012. The merger was consummated in October 2012.

In short order, notwithstanding JELD's earlier promises to Steves, JELD began to raise the prices on its product and the quality of its product deteriorated. Steves unsuccessfully sought to negotiate a contract with the only remaining supplier in the market, Masonite, but Masonite sought to raise prices, leaving Steves no option but to continue to obtain product from JELD. In December 2015, Steves asked DOJ to reexamine the merger, which DOJ did, but once again closed its investigation without further action, in April 2016. Steves initiated a lawsuit against JELD in June 2016, seeking to unwind the merger and to obtain damages.

The Fourth Circuit's Affirmance of the Divestiture Grant

Following a jury trial, the trial court awarded Steves treble damages on its Clayton Act Section 7 antitrust claim. In addition, the trial court took the unusual step of ordering divestiture of certain of the assets of the combined entity. However, the Court held its order in abeyance pending the appeal before the Fourth Circuit, with a view to assigning a special master the task of managing an auction for the divestiture. The District Court, relying upon an approach approved in the classic Brown Shoe Co. v. United States, 370 U.S. 294, 309-10 (1962), declined to order immediate divestiture, noting that potential suitors might be reluctant to engage in a purchase pending the outcome of the appeal.

On appeal, the Fourth Circuit observed that "[d]ivestiture is the customary form of relief in Clayton Act § 7 cases because (among other reasons) it's 'simple, relatively easy to administer, and sure.'" Id. at *5 (quoting California v. Am. Stores Co., 495 U.S. 271, 281 (1990)). Notwithstanding the trial court's unusual award of divestiture to a private litigant, Steves, the Fourth Circuit affirmed the trial court's grant of this relief. Specifically, the Fourth Circuit agreed that Steves had satisfied the requisite equitable factors to obtain divestiture. The Court considered but ultimately declined to order a "conduct remedy" that, for example, could have ordered JELD to continue to supply Steves at fixed rates. Although this might have offered a temporary remedy for Steves, the Court found it would not eliminate the future threat to Steves. In addition, the Court reasoned that a conduct remedy would not address the broader anticompetitive market effects of the merger. As the Court stated, "courts may fashion equitable remedies with that broader purpose in mind. 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." Id. at *21.

After concluding that other equitable factors favored divestiture, the Court summed up concisely: "this case is a poster child for divestiture." Id. at *24. After all, the merger "resulted in a duopoly"; "[e]ach doorskin supplier is vertically integrated"; and "they've used their market power to threaten the . . . survival" of smaller independent door manufacturers, like Steves. Id.

The Fourth Circuit's Rejection of the Defendant's Laches Defense

Another notable aspect of the Fourth Circuit's decision was its ruling on a laches defense JELD raised. Given the passage of time between the merger's consummation and the initiation of Steve's suit (four years), JELD's laches defense asserted Steves had waited too long to initiate its challenge to the merger. The DOJ filed an amicus brief (a practice that increased in frequency during the Trump administration), arguing that a laches defense does not categorically foreclose divestiture, particularly in situations where (as in this case) Steves had cooperated with DOJ's investigation. DOJ also argued there was no evidentiary significance to the two occasions on which DOJ had reviewed the merger and yet declined to take any action. Any number of reasons, DOJ noted, could have accounted for this decision, including simply limited resources.

The Fourth Circuit affirmed the trial court's conclusion that JELD failed to satisfy the required elements of a laches defense: (1) unreasonable delay by the plaintiff in initiating the lawsuit, and (2) prejudice to the defendant. First, as to delay, Steves was on notice of the injury giving rise to its divestiture claim only as of 2014. Only then, the Court observed, did Steves become aware that its access to doorskins – and hence the very survival of its business – was threatened. Steves' delay was also explainable by virtue of its good faith efforts to seek alternative remedies, including its cooperation with DOJ. Second, having found no delay, the Court concluded there was no need to inquire further regarding the possible prejudice to JELD from Steves' alleged delay.

Conclusion

Time will tell whether the Fourth Circuit's affirmance of the trial court's unusual divestiture ruling in a private suit will become a more common feature of private antitrust litigation. What is certain, however, is that even in the context of government enforcement actions, laches defenses in post-consummation merger challenges will continue to have relevance. Thus, for example, we can anticipate Facebook's inevitable laches defense to the challenge the FTC and state Attorneys General have brought against Facebook's acquisition of Instagram and WhatsApp. After all, the FTC's Facebook complaint filed in December 2020 challenges Facebook's acquisition of Instagram in 2012 and WhatsApp in 2014, and seeks divestiture as an equitable remedy. How courts should address private divestiture claims, however, is not straightforward. On the one hand, the failure of the DOJ or FTC to halt a merger does not bar later attempts to unwind it. On the other hand, where a merger investigation has been terminated on the condition that the parties make certain divestitures, later challenges to the merger or requesting additional divestitures might strike the merging parties as unfair. The DOJ's recently updated Merger Guidelines may offer helpful guidance to the courts in sorting out such challenges.

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1 The authors are partners at Saul Ewing Arnstein & Lehr, LLP. The views expressed in this article are their own, not the firm's or the firm's clients.

2 "DOJ weighs in on more antitrust cases, with mixed success," Oct. 1, 2019, last visited Feb. 24, 2021

3 See Merger Remedies Manual, U.S. Dep't of Justice, Antitrust Division (Sept. 2020), last visited Feb. 24, 2021.

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