

Fourth Circuit Affirms District Court's First-of-Its-Kind Divestiture Order in Private Merger Challenge

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On February 18, 2021, the United States Court of Appeals for the Fourth Circuit upheld the divestiture order issued by the U.S. District Court for the Eastern District of Virginia in a private merger challenge brought by Steves and Sons Inc. ("Steves") against Jeld-Wen Inc. ("Jeld-Wen") relating to Jeld-Wen's acquisition of CraftMaster Manufacturing Inc. ("CMI") in 2012. While divestitures are the government's preferred remedy when it challenges a merger, this case represents the first instance when this remedy was ordered in a private litigation.

Steves filed its lawsuit under Section 7 of the Clayton Act in June 2016, challenging Jeld-Wen's acquisition of CMI. After a twelve-day trial in February 2018, the jury found that the consummated merger resulted in antitrust injury to Steves and awarded Steves past damages and lost profits. Separately, in December 2018, the court ordered Jeld-Wen to divest the doorskin manufacturing plant in Towanda, Pennsylvania that it acquired from the merger.

On appeal, the Fourth Circuit affirmed the district court's divestiture order while vacating the lost profits award. The [decision](#) represents the first-of-its-kind divestiture order in a merger challenge brought by a private plaintiff challenging a consummated merger. While the facts are fairly unique, and the Supreme Court does not take many merger cases (and has not issued a substantive merger ruling since 1974), the future course of this case bears watching.

Merger Background

Steves and Jeld-Wen both manufacture and sell interior molded doors, the most common type of interior residential door in the United States. Molded doors are made of a wood frame, a solid or hollow core, and two "doorskins" that make up the front and back of the finished door.

Steves is also a customer of Jeld-Wen. Jeld-Wen makes the doorskins components of the interior molded doors, which it uses on its own doors and sells to independent door manufacturers, including Steves. Steves historically had the option to purchase doorskins from one of three doorskin manufacturers: Jeld-Wen, CMI, and Masonite. In May 2012, Steves and Jeld-Wen entered into a long-term supply agreement (the "Supply Agreement"), which prohibited Jeld-Wen from raising doorskins prices unless Jeld-Wen documented increased costs for raw materials.

In July 2012, Jeld-Wen announced that it had signed a letter of intent to acquire CMI and notified the Department of Justice Antitrust Division ("DOJ"), which opened an investigation into the competitive effect of the transaction. Prior to announcing the deal, Jeld-Wen had executed long-term supply agreements with independent door manufacturers—including the Supply Agreement with Steves—as a strategy to "assuage the concerns of the DOJ." As trial testimony established, when interviewed by the DOJ, Steves did not raise any objections based on the price protections in the Supply Agreement. The DOJ ended its investigation in September 2012 and the merger closed in October 2012.

Following the merger, Jeld-Wen began increasing doorskin prices for Steves each year beginning in 2013 through 2015. In 2014, Jeld-Wen notified Steves that they were terminating the Supply Agreement. Shortly after, Steves received notice that Masonite—the only other U.S. doorskin manufacturer on the market—would stop selling doorskins to Steves and other independent door makers.

In 2015, Steves requested the DOJ to re-open its investigation into the merger, citing lack of competition in the doorskins market resulting in Jeld-Wen's ability to break the pricing schedule in the Supply Agreement and charge supracompetitive prices for doorskins. The DOJ opened an investigation, but

closed it in April 2016 without acting.

District Court Proceedings

In June 2016, Steves sued Jeld-Wen in the U.S. District Court for the Eastern District of Virginia seeking damages and injunctive relief under breach of contract and antitrust theories, alleging that the Jeld-Wen/CMI merger substantially lessened competition in the market for doorskins. Steves alleged that after the CMI acquisition, Jeld-Wen was able to overcharge for doorskins beyond the prices in the Supply Agreement because of the lack of another alternative doorskin manufacturer.

The district court held a jury trial as to liability and whether damages resulted from any anticompetitive effects of the merger. Following testimony by executives for both parties and expert witnesses, the jury found that the merger violated Section 7 of the Clayton Act and caused Steves to suffer an antitrust injury in the form of past damages and future lost profits. The court awarded Steves \$36.4 million in past damages and \$139.4 million for future lost profits.

Steves also sought injunctive relief in the form of Jeld-Wen's divestiture of the Towanda plant acquired in the merger. Following three days of testimony and two days of argument on this issue, the court granted the request for divestiture, finding that Steves had satisfied the four-factor test outlined in the Supreme Court's *eBay* decision, which involved the patent laws:¹

1. irreparable injury;
2. remedies available at law were inadequate to compensate for that injury;
3. remedy in equity was warranted considering the balance of hardships between plaintiff and defendant; and
4. the public interest would not be disserved by a permanent injunction.

The court held that the first two factors were satisfied following testimony that Steves would likely go out of business by September 2021 without equitable relief. As to the third factor, the court held that the threat to Steves's survival outweighed Jeld-Wen's hardships, which could be mitigated by ordering the divested entity to sell Jeld-Wen as many doorskins as needed for two years. Finally, the court concluded that the divestiture would be in the public interest because it would restore competition to the doorskin market. The court ordered the divestiture of the Towanda plant, to be auctioned if the order was affirmed on appeal.

Fourth Circuit Decision

On appeal, the Fourth Circuit rejected Jeld-Wen's argument that the jury mistakenly found antitrust injury in a contractual dispute, that Steves's 2016 lawsuit challenging the 2012 merger was late under the doctrine of laches, and that the district court improperly applied the divestiture factors.

As to the antitrust injury, the panel held that Jeld-Wen only had to power to demand the price increases by reducing competition in the market for doorskins, as "the ability to buy from either CMI or Masonite would have mitigated Steves's damages from Jeld-Wen's breaches . . . but the merger foreclosed that option."

The panel also rejected Jeld-Wen's argument that Steves improperly delayed bringing its lawsuit. In rejecting the Jeld-Wen's laches defense, the court noted that delay is measured "not from the date of the challenged action" but from when the plaintiffs discovers or reasonably could have discovered the facts giving rise to the cause of action. Applying that law, the panel held that Steves lacked notice of the *threatened injury on which the divestiture claim was based* until 2014, when Jeld-Wen indicated it was terminating the Supply Agreement and Masonite announced it would stop selling to independent door makers. Because Steves's claim of action for its divestiture request did not arise until 2014, the panel found that its 2016 lawsuit was within the four-year statute of limitations for antitrust claims and therefore timely.

Finally, the Fourth Circuit panel rejected Jeld-Wen's argument that the district court misapplied the four factors for divestiture. To start, the panel looked at the standard set by the Supreme Court in *American Stores*,² the seminal case involving private merger challenges noting that the Clayton Act authorizes divestiture when "appropriate in light of equitable principles" to protect plaintiffs from "threatened loss or damage by a violation of the antitrust laws."³ In reviewing the district court's decision for abuse of discretion, the panel concluded that the decision properly applied the *eBay* divestiture factors.

- As to the first two factors, Jeld-Wen argued that Steves's injury could be remedied by either monetary damages or less drastic divestiture. The panel rejected this argument, noting that monetary damages wouldn't repair the threatened harm of the permanent loss of a business, which was well-recognized as an irreparable injury. Additionally, any conduct remedy short of divestiture would only protect Steves temporarily and therefore foreclose Steves from "complete relief" against the threatened loss for which it sought divestiture.
- As to the third factor regarding balance of hardships, the panel found that the district court acted within its discretion, as Jeld-Wen could weather the hardships due to its resources—specifically, doorskin

plants other than the Towanda plant. The panel also found that some of the hardships cited by Jeld-Wen were speculative and therefore properly discounted by the district court.

- As to the final public interest factor, Jeld-Wen argued that the two-step divestiture procedure was inappropriate in private suits and against the public interest. The panel disagreed, finding that the two-step divestiture process was commonly taken in suits filed by the Federal Trade Commission, and that courts may properly order divestitures in both government and private suits to protect the public interest by restoring competition. Jeld-Wen also disputed the district court's finding that a divested Towanda would be able to compete effectively. On review for clear error, the panel concluded no error in the district court's finding given the substantial evidence of market realities suggesting Towanda would be able to compete.

While the panel affirmed the district court's divestiture order, it did vacate the \$139.4 million damages award relating to lost profits. The panel held that this damages claim was not ripe for adjudication, as the divestiture order would affect the claim for which its future lost profits rests. The panel remanded further proceedings back to the district court.

Takeaways

The Fourth's Circuit decision underscores that challenges to consummated mergers do occur, and can be brought by the government—or by private parties affected by the merger. While this action was the first private merger challenge to successfully require a divestiture, the Fourth Circuit's opinion makes it clear that similar challenges—particularly those involving evidence of anticompetitive effects—may succeed in the future.

Another aspect to note here is the DOJ's participation and evolving position as this case unfolded. Prior to the Steves' litigation, the DOJ opened and closed two investigations into the merger in 2012 and 2015, declining to bring an enforcement action either time. However, the government's closure of its investigations carried no weight in court and the facts regarding the DOJ's review were excluded from evidence at the jury trial under Federal Rule of Evidence 403. During the district court proceedings, the DOJ would not support Steves's request for the Towanda divestiture without first identifying a buyer, noting it would be difficult to assess whether the divestiture would be proper without knowing who would buy Towanda. The district court was unpersuaded and noted that the divestiture would still adequately competition concerns regardless of who purchased the Towanda entity. At the Fourth Circuit level, in filing an amicus brief, the DOJ came to fully support and urged the court to uphold the divestiture order at oral argument.

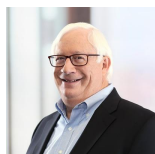
Should you have any questions about this decision, or any other antitrust or competition law question, please feel free to contact any of the attorneys listed above.

[1] *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

[2] *California v. Am. Stores Co.*, 495 U.S. 271 (1990).

[3] *Id.* at 280.

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Bruce D. Sokler is a Mintz antitrust attorney. His antitrust experience includes litigation, class actions, government merger reviews and investigations, and cartel-related issues. Bruce focuses on the health care, communications, and retail industries, from start-ups to Fortune 100 companies.



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