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Insights

A NEW WRINKLE IN ANTITRUST LITIGATION—PRIVATE PLAINTIFF FORCES DIVESTITURE

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On February 18, 2021, the Fourth Circuit Court of Appeals upheld a district court's ground-breaking order requiring divestiture several years after a completed merger. With hindsight, the merger was found to be anti-competitive and to have caused antitrust injury to a private plaintiff.[1] Divestitures are a remedy sometimes applied in merger enforcement actions brought by the government, but almost always prior to the merger's closing. Previously, no court has compelled a divestiture in a private suit, and this holding is even more unusual because the divesture order comes several years after closing.

Steves and Sons, a family-owned door maker, alleged antitrust violations based on Jeld-Wen Inc.'s ("Jeld-Wen") 2012 acquisition of CraftMaster Manufacturing, Inc. ("CMI"), one of only three domestic manufacturers of "doorskins." Doorskins are the designed exterior layers, applied to a wood frame, that make up the finished front and back of a door. According to Steves and Sons, Jeld-Wen's acquisition gave the company unprecedented power in the doorskins market.

After a jury verdict found in favor of Steves and Sons, and after trebling the damages on the antitrust claims, the Eastern District of Virginia awarded Steves and Sons $36.4 million in past damages and $139.4 million for future lost profits.[2] Steves and Sons also asked the court to compel the divestiture of the Towanda, Pennsylvania doorskins manufacturing plant, which Jeld-Wen had acquired from CMI. The district court held that divestiture was an appropriate equitable remedy to protect others in the industry from "threatened loss or damage by a violation of the antitrust laws" and granted Steves and Sons' request for a divesture (although it also ruled that Steves and Sons could not have both the divestiture and damages for future lost profits). [3]

On appeal, the Fourth Circuit explained that to obtain a divestiture, Steves and Sons had to show:

- a significant threat of irreparable antitrust injury;
- inadequate remedies at law to compensate for that injury;
- that a divestiture is warranted after balancing the hardships of both parties; and

- that a divestiture is in the public interest.[4]

The Fourth Circuit found the first two factors met because Steves and Sons would likely go out of business in 2021 if the court did not step in. This likely collapse was a "significant threat." Further, damages were inadequate to compensate for the permanent loss of a 150-year-old business. While other equitable options were available, the Fourth Circuit held that the district court was within its discretion to decide that a divestiture would best promote competition in the industry. For the third prong, when balancing the hardships of divestiture on both parties, the Fourth Circuit found that the survival of Steves and Sons significantly outweighed Jeld-Wen's hardship in selling the acquired plant.[5] Finally, the Fourth Circuit held the divestiture to be in the public interest because it would—once again—place three competitors, instead of two, in the doorskins market.

Thus, the Fourth Circuit affirmed the novel divestiture order although it rejected the alternative remedy of lost future profits on the ground that it was too speculative. There is no word yet on whether Jeld-Wen intends to ask the Supreme Court to review the Fourth Circuit's decision.

Bryan Cave Leighton Paisner's experienced antitrust attorneys can help clients navigate complex antitrust issues like those found here. For more information, please contact a member of the Antitrust and Competition team.

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[1] *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 2021 WL 630521(4th Cir. Feb. 18, 2021).

[2] *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 345 F. Supp. 3d 614 (E.D. Va. 2018).

[3] *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 2021 WL 630521, at *5.

[4] *See id.* at *7 (citing *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 130 (1969); *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006)).

[5] *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 2021 WL 630521, at *8, *20-25.

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