King & Spalding

Client Alert

Trial and Global Disputes/Antitrust

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For more information, contact:

Norman Armstrong, Jr. (Norm)
+1 202 626 8979
narmstrong@kslaw.com

Robert M. Cooper (Bob)
+1 202 626 8991
rcooper@kslaw.com

Jeffrey S. Spigel (Jeff)
+1 202 626 2626
jspigel@kslaw.com

Hershel A. Wancjer
+1 202 626 5592
hwancjer@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania Avenue, NW
Washington, D.C. 20006-4707
Tel: +1 202 737 0500

Buyers Beware: An Increased Risk of Private Merger Challenges

On February 18, 2021, the Fourth Circuit affirmed the first court-ordered divestiture arising from a privately litigated merger challenge.[1] The Court also upheld a $36 million damages award (post-trebling) in favor of the private plaintiffs and did not disturb the district court's award of attorneys' fees. The decision reinforces the ability and incentives for private parties to challenge allegedly anticompetitive transactions, even if already consummated. It also underscores a role private parties can play in U.S. antitrust enforcement in the merger context even in the absence of governmental action. Although such cases may well be the exception, not the rule, companies contemplating M&A activity must take seriously the possibility of a private litigation challenge when assessing antitrust risk.

THE CHALLENGED MERGER AND LITIGATION

Both parties in the Fourth Circuit case sell molded doors, which generally consist of a wood frame and two "doorskins." Jeld-Wen, the defendant, is vertically integrated, meaning it manufactures and sells doors and doorskins, the latter of which it also sells to independent door manufacturers like the plaintiff, Steves. In 2012, Jeld-Wen acquired competitor CMI (including a manufacturing plant in Pennsylvania), thereby reducing the number of U.S. doorskin manufacturers, all of which were vertically integrated, from three to two. Shortly thereafter, the other manufacturer stopped selling doorskins and Jeld-Wen increased the prices that it charged Steves multiple times. Jeld-Wen also notified Steves that it would terminate the parties' long-term supply agreement, effective September 2021.

In 2016, Steves filed a lawsuit challenging the Jeld-Wen/CMI merger under the Clayton Act,[2] and in 2018 a Virginia jury found as unlawful the acquisition and subsequent overcharges to a rival for parts. Steves was awarded damages of $36.4 million for past lost profits and $139.4 million for future lost profits. The district court then granted Steves' request to

unwind the merger via divestiture of the Pennsylvania facility. The Fourth Circuit affirmed the district court's finding of antitrust injury, the corresponding award for past lost profits, and divestiture of the Pennsylvania facility.[3]

The case highlights several issues both for parties contemplating transactions in highly concentrated industries and those that may contemplate a private challenge to such transactions.

TIMING

This was not a case seeking to block a prospective merger. Rather, Steves filed suit in 2016, *nearly four years after* the underlying transaction was consummated. At trial, Jeld-Wen asserted a "laches" defense to the district court's divestiture order (*i.e.*, that Steves unreasonably delayed filing suit which prejudiced Jeld-Wen). The district court rejected the defense and the Fourth Circuit affirmed. While courts have relied on laches to dismiss post-consummation challenges to mergers,[4] the appeals court explained that the relevant inquiry is fact-specific and that delay is not measured from the date of the challenged merger, but the date when plaintiff "discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action … and is able to pursue a claim."[5]

APPROPRIATENESS OF DIVESTITURE AS AN EQUITABLE REMEDY

While the district court considered less drastic alternatives to divestiture of the Pennsylvania facility (*e.g.*, ordering Jeld-Wen to meet Steves' requirements at fair prices going forward), it ultimately concluded divestiture was necessary to restore competition in the market, and that alternative conduct remedies would provide only temporary relief before eventually expiring.[6] The Fourth Circuit agreed. As the Court summarized: "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, as CMI did before the 2012 merger."[7]

EVIDENCE OF GOVERNMENT AGENCY INACTION

Steves' success on appeal is also noteworthy because, on two previous occasions, DOJ's Antitrust Division had investigated the merger but declined to intervene. First, upon learning of the proposed transaction in 2012, at a time when Steves did not oppose it, and second, in 2015-2016, when DOJ reexamined the merger at Steves' request.[8] At trial the district court excluded evidence of DOJ's involvement and decisions not to challenge the merger, a ruling Jeld-Wen criticized on appeal.

Concluding that the district acted within its discretion, the Fourth Circuit explained that DOJ's decision not to pursue the matter was not "probative as to the merger's legality because many factors may motivate such a decision, including the [DOJ's] limited resources."[9] The Court added: "[E]vidence of [DOJ's] decision could have misled the jury into thinking that [DOJ] deemed the merger to be legal 'when no such determination ha[d] been made.'"[10]

CONSIDERATIONS FOR MERGING/ACQUIRING PARTIES

Private merger litigation is likely to remain infrequent, primarily due to the challenges plaintiffs face in establishing antitrust injury and the time and costs associated with litigating such cases. Nevertheless, the Fourth Circuit's decision reinforces that the government's decision not to challenge a particular transaction does not immunize it from private challenge. Consequently, parties contemplating a merger need to assess their vulnerability to such claims, and the potential for both a court-ordered unwinding of a business combination and the imposition of substantial monetary damages if they face a post-closing challenge. Post-merger, the merged entity should monitor its conduct vis-à-vis competitors, customers and suppliers to ensure that the company is not helping to develop evidence for would-be plaintiffs.

[1] *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, No. 19-1397, 2021 WL 630521 (4th Cir. Feb. 18, 2021).

[2] The Clayton Act, 15 U.S.C. § 18, forbids mergers whose effect "may be substantially to lessen competition," and authorizes treble damages for private plaintiffs who are injured by such mergers.

[3] The Court vacated on ripeness grounds the lower court's $139.4 million award of future lost profits, finding it was premature since Steves' current supply contract with Weld-Jen does not expire until September 2021 and "the Clayton Act requires a plaintiff seeking damages—as opposed to equitable relief—to 'show actual injury.'" 2021 WL 630521 at 4 (quoting *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 111 (1986)). Indeed, the award of future lost profits was "meant to be a backup remedy in case divestiture doesn't pan out." *Id.*

[4] *Id.* at 40 (collecting cases).

[5] *Id.* at 39-40 (citing *Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.*, 673 F.3d 294, 301 (4th Cir. 2012)).

[6] *Id.* at 46.

[7] *Id.* at 54.

[8] DOJ eventually intervened on Steves' behalf, both during the equitable proceedings in the district court and, later on appeal, as an *amicus curiae*.

[9] *Id.* at 33 (citing *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 664 (7th Cir. 2002)).

[10] *Id.* at 34 (quoting *United States v. Candelaria-Silva*, 166 F.3d 19, 35 (1st Cir. 1999)).