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Private Merger Challenge in Fourth Circuit Unlikely to Affect Future Government Antitrust Action

by Steven Cernak

Steves and Sons, Inc. v. Jeld-Wen, Inc. is an unusual antitrust case. A private challenge to a merger, and a consummated one at that. An ordered divestiture. A chance for an appellate opinion on merger law. Department of Justice Antitrust Division review, not once but twice, but no action. Later, DOJ argued on limited issues before the 4th Circuit.

All those oddities make the case one that antitrust lawyers should understand and follow. But, contrary to some speculation, those same unusual elements make the case easily distinguishable from any contemplated government, or even private party, attempts to unwind long-consummated mergers in the tech industry. (For an explanation of the issues in agency attempts to unwind reviewed and consummated mergers, see my WLF *Legal Backgrounder* here.)

Understanding that assertion requires an understanding of the case's complicated facts and procedural history. This summary comes from the 4th Circuit briefing.

Steves makes finished doors for residential construction. A key component of such doors is a door skin. Jeld-Wen makes both finished doors and door skins. In 2012, at the time of the allegedly anticompetitive merger, only Jeld-Wen, CMI and Masonite sold door skins.

When CMI was put up for sale in 2012, Jeld-Wen considered an acquisition but quickly realized that it could raise antitrust concerns. Therefore, before making the necessary Hart-Scott-Rodino premerger filing, Jeld-Wen entered into a long-term supply agreement with Steves. As a result, Steves raised no objections when contacted by DOJ as part of the HSR review. DOJ allowed the Jeld-Wen/CMI acquisition to close.

The supply agreement kept the price of doors skins to Steves constant except for changes based on changes in Jeld-Wen's key input costs. The agreement would automatically renew and Jeld-Wen had to give seven years notice before any termination. Even under the agreement, Steves could purchase a certain percentage of its door skin needs from Masonite.

The arrangement did not play out as Steves envisioned. Almost immediately, the parties disagreed on the operation of the price-escalation procedure. When Steves refused to pay higher prices in September 2014, Jeld-Wen invoked its seven-year termination clause. Earlier in 2014, Masonite informed Steves and the rest of the market that it would no longer be selling door skins to Steves or other independent door manufacturers. So Steves had no alternative door skin supplier. Finally, Jeld-Wen's service quality declined. Later, discovery revealed Jeld-Wen had created documents at this time that made elimination of Steves look like the plan all along.

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In the meantime, Jeld-Wen continued to invest in the former CMI facility and integrate it into the rest of its operations. DOJ also got involved a second time. In December 2015, it met with Steves and then opened an investigation. After collecting documents from Steves and meeting with Jeld-Wen, it closed its investigation in June 2016.

Steves unsuccessfully explored making its own door skins. It invoked the supply agreement's dispute resolution process and the parties mediated throughout 2015 and early 2016. When Jeld-Wen refused to enter a standstill agreement, Steves sued in June 2016 under both antitrust and breach of contract theories. After a twelve-day trial, the jury found that Jeld-Wen's acquisition of CMI violated the Clayton Act and that this violation caused Steves's antitrust injury, past damages, and lost profits. After further hearings and testimony, the court ordered Jeld-Wen to divest the CMI door skin factory. After adjustments to ensure no double recovery, the court certified the judgment for appeal to the 4th Circuit.

Jeld-Wen focuses on two arguments in its appeal. First, the lower court incorrectly excluded certain evidence of CMI's weakened financial condition at the time of the merger. Such evidence would have been used to better make a so-called "flailing, not failing, company" defense, that is, that CMI was a weak, price-taking competitor and its elimination did not harm Steves. Second, the equitable doctrine of laches means that Steves waited too long to bring its suit and obtain the equitable relief of divestiture.

DOJ also got involved yet again, both filing a brief with the lower court shortly after Steves requested a divestiture and then filing an *amicus* brief and participating in oral argument at the 4th Circuit. In both instances, DOJ made two limited arguments. First, it urged the courts not to use laches to bar a private party from ever seeking divestiture at any time after consummation of a merger. Second, it argued that no inferences should be drawn from it twice declining to act against the merger.

The 4th Circuit heard oral argument on May 29, 2020. Because so few merger challenges generate even district court opinions, let alone appellate court opinions, antitrust practitioners anxiously await the outcome. That opinion, however, should play little role in any attempt to unwind tech industry mergers, such as Facebook's 2012 purchase of Instagram and 2014 purchase of WhatsApp, because the facts and posture of the cases are so different.

First, Steves is a private party and had no access to crucial information, especially private Jeld-Wen documents, before the merger's consummation. The antitrust agencies, on the other hand, have access to terabytes worth of information and months of time to assess it through the Hart-Scott-Rodino process. Without opining on how long Steves waited to file this suit, it seems much more easily defensible for a private party to wait until some time after consummation of the merger before starting any challenge.

Second, Steves' alleged antitrust injury was not apparent until Jeld-Wen breached the long-term supply agreement, either in 2014 by attempting to charge a higher price or in mid-2016 when negotiations broke down. Steves' filing suit shortly after the specific action that ultimately caused its antitrust injury is a strong argument in the defense against any laches argument.

In the acquisitions by Facebook and other tech firms, there is no similar definitive event that moved the acquisition from competitively neutral, at worst, to anticompetitive. Also, if those tech industry acquisitions did become anticompetitive over time, they did so through a series of decisions and actions not just by the parties but by customers and other marketplace actors. Finally, the time between consummation of at least the highest profile of these mergers and any filing seeking divestiture will be at least as long, if not many years longer, than the delay in the *Steves* case.

As outlined in my *Legal Backgrounder*, agency challenges to such long-consummated mergers would be inconsistent with long-standing merger review policy. Nothing in the *Steves* case should change that conclusion.

