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It's not over until it's over: Fourth Circuit upholds divestiture order in private party's antitrust challenge to long-consummated merger

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The United States Court of Appeals for the Fourth Circuit has held in a private antitrust case that a defendant must divest assets it obtained in a merger that violated Section 7 of the Clayton Act—the first divestiture order, the court said, imposed in a merger case brought by a private plaintiff.[1]

Jeld-Wen, CMI, and another competitor, were the three makers of "doorskins," an outer layer for molded doors. The three firms sold the doorskins to independent door makers—such as Steves—and also to finish their own molded doors. In October 2012, following the closing of a U.S. Department of Justice investigation, Jeld-Wen and CMI merged. The Department of Justice investigated the merger again in early 2016, and again took no action. In July 2016, almost four years after the merger, Steves sued Jeld-Wen, contending the merger violated Section 7 of the Clayton Act, 15 U.S.C. § 18. A jury subsequently found for Steves, and the district court, among other things, ordered Jeld-Wen to divest the doorskins plant it had acquired from CMI.

On appeal, the Fourth Circuit addressed a number of issues, and most importantly here, upheld the order requiring Jeld-Wen to sell the former CMI plant at auction. Jeld-Wen argued that divestiture was improper because, among other things, Steves had waited too long to bring its case, any potential future harm to Steve's could be remedied by requiring Jeld-wen to sell doorskins to Steves, and that Steves might buy the plant at auction. The court disagreed and found the delay was reasonable: Steves would not have known about any damage to it until 2014, and it had then pursued alternate dispute mechanisms and sought and cooperated with a DOJ investigation before bringing suit. The court rejected the notion that requiring Jeld-Wen to sell doorskins to Steves was sufficient relief—it found that it was a short-term solution and would not remedy harm to the public and door makers other than Steves. Finally, although the court wrote that a divestiture to Steves, as opposed to a firm that was not a door maker was not ideal, it concluded that even three vertically integrated doorskin makers was better than two. The merger was thus, according to the court, a "poster child for divestiture."

[1] *Steves & Sons, Inc. v. Jeld-Wen, Inc.*, No. 19-1397, 2021 U.S. App. LEXIS 4733 (4th Cir. Feb. 18, 2021).

There have, of course, been other challenges against consummated mergers by private parties, as well as state attorneys general and the FTC and DOJ. But, Jeld-Wen is the first case to order divestiture at the behest of a private plaintiff—and it is notable that the court did so when the merger at issue closed almost nine years ago. It will be interesting to see how other courts will address private party divestiture requests. Jeld-Wen says it will appeal the court's decision. In the meantime, Jeld-Wen is a reminder that sometimes it really isn't over until it's over.

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