THE 4TH CIRCUIT AFFIRMS GROUNDBREAKING DIVESTITURE ORDER IN PRIVATE CLAYTON ACT SUIT CHALLENGING COMPLETED MERGER

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The 4th Circuit's decision in *Steves and Sons Inc. v. JELD-WEN Inc.*[1] affirmed a district court's order compelling an acquirer to divest the business of a competitor, which the court held had been acquired in violation of Section 7 of the Clayton Act.[2] The court described the case as the first instance in which a private party successfully compelled divestiture of a completed acquisition. Government antitrust enforcers commonly obtain divestiture orders in Section 7 cases. Private parties have previously succeeded in enjoining mergers before closing. Moreover, in *California v. American Stores Co.*,[3] the Supreme Court declared that private parties could obtain divestiture orders. However, private plaintiffs seeking divestitures have customarily been foreclosed by equitable defenses, such as (i) laches because of delays in initiating suit, (ii) the availability of damages or less-drastic equitable relief, or (iii) the greater damage divestiture would impose on the defendant.[4] By contrast, in Steves, a private party for the first time succeeded in obtaining a divestiture order.

Facts

Steves and Sons, Inc. (Steves) competed with JELD-WEN INC. (JELD-WEN), CMI, and Masonite in the manufacture and sale of molded doors. Molded doors consist of a wood frame with a solid or hollow core between two “doorskins,” which comprise the front and back surfaces of the door. While JELD-WEN, CMI, and Masonite were vertically integrated manufacturers of both doorskins and completed doors, Steves and five other independents purchased doorskins from JELD-WEN, CMI, and Masonite and then sold completed doors. JELD-WEN and CMI were found to have possessed 38 percent and 16 percent of the doorskin market, respectively.

Early in 2012, JELD-WEN agreed to purchase CMI, and the transaction was consummated in October 2012. Steves learned of the acquisition agreement in April 2012 and shortly thereafter signed a long-term contract with JELD-WEN for the purchase of doorskins. Steves did not sue to challenge the merger until almost four years after the transaction had closed. By then, JELD-WEN had given notice of its intention not to continue Steves's supply agreement. In addition, according to Steves, JELD-WEN had raised prices in violation of the supply agreement and had lowered the quality of the doorskins it delivered.

The District Court Decision

The district court held a jury trial on Steves's damages claim, finding that the merger violated Section 7. The court then held nonjury proceedings on Steves's requests for equitable relief, including divestiture.[5] The court rejected JELD-WEN's laches defense that Steves had prejudiced JELD-WEN by not suing until long after the deal had closed and JELD-WEN had spent time and resources integrating the acquired operation. Then, declining to

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identify and qualify a proposed buyer before ordering divestiture, the court required JELD-WEN to hold the CMI assets separate throughout the appeal process and then to divest it. Assuming the order survived appeal, the court intended to designate a special master, who would conduct an auction of the CMI business and vet the bidders.

The 4th Circuit's Decision

The 4th Circuit held that the district court had not erred either in finding that the acquisition violated Section 7 or in concluding that Steves had avoided all of the obstacles that typically obstruct private plaintiffs' access to a divestiture remedy. To establish liability, the 4th Circuit held that Steves had shown evidence that the merger's effect "may be to substantially lessen competition"[6] and that the merger inflicted on Steves a loss that "reflects the anticompetitive effect"[7] of the merger.

Nevertheless, to obtain divestiture relief, Steves also had to prove:

1. That there was a significant threat that it would suffer irreparable injuries;
2. That it could not be fully compensated through monetary damages;
3. That the hardships Steves would suffer from denial of divestiture would exceed those that JELD-WEN would suffer from divestiture; and
4. That the public interest would not be disserved by divestiture.[8]

The district court had not abused its discretion in concluding that these requirements had been satisfied. With respect to the presence of a significant threat of irreparable injury and the insufficiency of damages, the court pointed to a significant potential for the collapse of Steves's 150-year-old family business if the merged JELD-WEN implemented its announced decision to end sales to independents. Regarding the balance of harms, the court concluded that the trial court had acted within its discretion in concluding that the potential harm if Steves were driven out of business because of the merger outweighed both the financial costs to JELD-WEN of divestiture and its potential loss of supply of doorskins from the plant to be divested. The latter harm the trial court had mitigated by ordering the divestee to sell doorskins to JELD-WEN for two years.

Further, the appellate court held that the trial court had reasonably concluded that divestiture was in the public interest since it would restore competition to the doorskin market. It rejected arguments that no conclusion could be drawn regarding the public interest without first identifying the divestee as well as ascertaining its incentives to compete in the doorskin market (rather than using the assets in another market) and the divestee's financial and business capabilities to do so successfully. Notwithstanding the important role that the Federal Trade Commission and U.S. Department of Justice play in vetting potential acquirers where the government compels divestiture,[9] the 4th Circuit approved the trial court's decision to deal with those issues itself with the aid of a special master, as part of a post-appeal auction. The circuit court observed that delaying the auction until after appeal may increase the number of interested bidders by reducing the divestee's risk that the divestiture would be overturned on appeal.

The 4th Circuit acknowledged that injunctive relief should be no more burdensome to the defendant than is necessary to provide complete relief to the plaintiff. In this case, the court held, the trial court reasonably concluded that the alternative of an order compelling the merged company to sell doorskins to Steves at a fair price would not be adequate. Such an order would be temporary, and upon its expiration, the threat to Steves's

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existence would remain. Furthermore, the Clayton Act's purpose is protecting competition, and competition in the overall doorskin market would not be protected by an order securing a doorskin supply only for Steves.

In addition, the 4th Circuit recognized laches as a defense to divestiture but held that, on the facts of the case, laches had not been shown. The court measured Steves's delay not from 2012, when Steves learned of the acquisition, but from 2014, when it learned that it would lose access to doorskins in 2021 when its existing contract with JELD-WEN ended. The court reasoned that Steves's divestiture claim, unlike its damages claim, was premised upon its exclusion from the market because JELD-WEN and Masonite had individually announced their intention to terminate doorskin sales to independents. The 4th Circuit also allowed for delays caused by Steves's pursuit of alternative remedies, such as pursuing alternative suppliers, seeking to develop its own doorskin-manufacturing capability, and pursuing settlement negotiations with JELD-WEN.

Conclusion

Although American Stores declared that private parties may obtain divestiture remedies in merger cases, no federal court in the ensuing 30 years had allowed a private plaintiff to exercise that power and taken upon itself (without assistance from an enforcement agency) the responsibility to (i) assess the likelihood of finding a divestiture bidder, (ii) define the scope of the divestiture package, (iii) assess the respective bidders' incentives to employ the divested assets in the relevant market to restore competition, (iv) evaluate the bidders' respective financial and business capacities to enable the enterprise succeed, (v) weigh the divestiture's potential to harm competition, and (vi) evaluate whether the sale is structured to enable the purchaser to emerge as a viable competitor. In light of the current public and political pressures to enhance antitrust enforcement against mergers,[10] other federal courts may follow the path the Steves court has plowed to compel divestitures at the request of private parties, without relying on the judgment of government antitrust enforcers. To the extent that divestiture at the instance of private parties becomes commonplace, the risk profile for acquiring parties will be enhanced.

FOOTNOTES

[1] 2021 WL 630521 (Feb. 18, 2021).

[2] Section 7 of the Clayton Act, 15 U.S.C. § 18, provides in relevant part: “No persons engaged in commerce . . . shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person also engaged in interstate commerce . . .where in any line of commerce . . . in any section of the country the effect of such acquisition may be substantially to lessen competition. . . .”

[3] 495 U.S. 271, 295 (1990).

[4] *See, e.g.*, *id.* at 296; Ginsburg v. In Bev NV/SA, 623 F.3d 1229, 1232–35 (8th Cir. 2010); Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 883 F. Supp. 1247, 1263–64 (W. D. Wis. 1995).

[5] The district court also awarded Steves post-trial damages, to be paid only if the divestiture was not completed after appeals. The 4th Circuit dismissed those future damage claims without prejudice on the grounds they were not ripe for adjudication.

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[6] Clayton Act § 7.

[7] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[8] These are the usual conditions for obtaining equitable relief (eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006)) as modified to fit the Clayton Act's standard of "a significant threat" of irreparable antitrust injury. Steves, 2021 WL 630521 at 14.

[9] FED. TRADE COMM'N, NEGOTIATING MERGER REMEDIES 1–7 (Jan. 2012); U.S. DEP'T OF JUST. ANTITRUST DIV., MERGER REMEDIES MANUAL 6–12, 22–25 (Sept. 2020).

[10] *See, e.g.*, Press Release, Amy Klobuchar, Senator Klobuchar Introduces Sweeping Bill To Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement; Bill Baer, *How Senator Klobuchar's proposals will move the antitrust debate forward*, BROOKINGS (Feb. 8, 2021), https://www.brookings.edu/blog/techtank/2021/02/08/how-senator-klobuchars-proposals-will-move-the-antitrust-debate-forward/; SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMIN. L. OF THE COMM. IN THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 7, 11, 19–20, 149–60,391–95, 403–05 (Feb. 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519; Bill Baer et al., *Restoring Competition in the United States*, WASH. CTR. FOR EQUITABLE GROWTH (Nov. 19, 2020), https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/.

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