2 Door Makers And The Gutting Of Pre-Merger Clearance

By **Derek Dahlgren and Spencer Johnson** (August 22, 2018)

The century-old Clayton Act makes unlawful mergers or acquisitions that may have of the effect of substantially lessening competition. Remedies for such claims include both damages and injunctive relief, the latter of which may include the divestiture of certain assets or business units in order for the merger to be allowed or to reverse harm caused by a consummated merger. In 1976, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act and made it easier for regulatory agencies to focus on pre-merger clearance, in part to avoid the “deleterious effects of post-consummation challenges” such as the inefficiencies of divestiture of now-entangled targets from their acquiring firms.

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Despite these inefficiencies and the goals of the HSR Act, divestiture of consummated mergers remains a tool of regulatory agencies, although it is generally (but not always) applied against transactions not large enough to report for pre-merger clearance. Regarding private enforcement of antitrust law, the U.S. Supreme Court held in California v. American Stores Co. (1990) that divestiture is authorized by the Clayton Act in such actions, but that equitable defenses such as laches or unclean hands may foreclose such a remedy in the case of belated attacks of a merger by private parties.

The U.S. District Court for the Eastern District of Virginia is poised to render a decision that may run into the Supreme Court’s concerns regarding belated challenges to mergers, as well as potentially create uncertainty in mergers and acquisitions and the value of pre-merger clearance under the HSR Act.

The Case So Far

Steves & Sons Inc. v. Jeld-Wen Inc.[1] is an action under the Clayton Act alleging that Jeld-Wen’s acquisition of CraftMaster Inc. (CMI) harmed Steves, a competitor and customer of Jeld-Wen’s in the door manufacturing industry. The antitrust case is essentially that after Jeld-Wen, a manufacturer of both doors and doorskins (the front and back faces of hollow doors), acquired CMI in 2012, the number of interior molded doorskin manufacturers decreased in the United States from three to two. Following the 2014 announcement that the other doorskin manufacturer would no longer supply doorskins to third parties, Steves alleges Jeld-Wen became a de facto monopoly in the interior molded doorskins market, and that Steves, which manufactures doors using doorskins provided by Jeld-Wen under a long-term agreement, was harmed as Jeld-Wen breached the agreement in multiple ways.

In February, 2018, a jury agreed with Steves, awarding over $12 million in damages and $46 million in future lost profits. Despite damages and liability issues being already resolved by jury, at the beginning of August, 2018, the court heard argument on equitable remedies, including whether a specific facility in Towanda, Pennsylvania, that Jeld-Wen had acquired in the CMI acquisition should be divested. A decision on this issue remains pending.

Issues Presented by Current Outcomes

While divestiture in this case presents many potential issues, decisions and outcomes that have occurred already cloud the world of mergers and acquisitions, as well as undermine the perceived worth of regulatory agency review of announced mergers.

For example, the acquisition of CMI by Jeld-Wen was twice reviewed by the U.S. Department of Justice, with one investigation ending in 2012, and the second ending in 2016, weeks before Steves brought suit. Neither review resulted in a DOJ challenge to the transaction. Despite the presumptive relevance of such outcomes to whether the merger was anti-competitive, the court granted a motion in limine to exclude evidence of the review decisions at trial, and precluded the parties from referencing the DOJ or even making use at trial of documents that they had submitted to the DOJ. The result that a DOJ investigation bears no relevance on the question of whether antitrust laws were violated begs the question of what value such clearance has at all.

Related information was also excluded, such as Steves stating to the DOJ in the context of the earlier review that it had no problems with the merger. Other related information asserted by Steves seemed to not be present in their case as argued. Despite initially alleging in their complaint that other independent door manufacturers had also suffered from a rise in doorskin prices as a result of the merger, no other customer testified at trial or has come forward in support of Steves' divestiture request. Steves was even unable to identify nonparties to the suit willing or able to purchase the CMI assets in the event of divestiture, as discussed further below. Further, evidence showing the significant profitability, growth and expansion of Steves' own business since the 2012 acquisition was also barred.

As a result, the jury made its decision on the antitrust claim without the benefit of important and relevant evidence as to the alleged anti-competitive results of the CMI acquisition. While DOJ review decisions are not dispositive, and certainly do not foreclose challenges to mergers in the judiciary, the revisiting of consummated mergers, here in a case filed four years after the merger was reviewed and closed, has already prompted commentary on how obtaining regulatory antitrust clearance now does not provide safety or certainty to businesses.

Issues Presented by Potential Outcomes

The court's upcoming ruling on whether, or how, to divest CMI acquisition assets, including the Towanda plant, presents several further potential complications should divestiture be ordered.

First, the court in the liability phase of the antitrust claim granted a motion in limine to foreclose any reference to Steves' delay in asserting its antitrust claim against Jeld-Wen. The court had previously ruled that, while other circuits recognized laches, an equitable defense based on delay, as a bar against antitrust claims,[2] it interpreted the Supreme Court's American Store Co. decision to be that laches was not a bar against liability, but might operate as a defense in the remedy phase to foreclose divestiture sought by a private party.[3]

In this case, Steves waited almost four years from the CMI acquisition to file its suit, and more than six years would elapse between the DOJ clearance and any decision ordering divestiture. Such an order would create a drastic circuit split where divestiture may occur after years given that the Eighth Circuit and a court in the Ninth Circuit have rejected divestitures of consummated mergers, including those in suits filed within days of the closing of the merger. Not only would such a decision create a schism in the law generally, specific to this case it would require a very strong finding that Jeld-Wen's interests were strongly outweighed in the balance of the equities, such as the difficulties in disentangling combined business interests, any investment in the Towanda plant, and investment toward expansion relying on the production output of the Towanda plant.

Outweighing the combined issues of delay and burden on Jeld-Wen would be difficult, especially given that Steves has indicated that it intends to bid for the divested assets. The DOJ itself weighed in on the issue of divestiture, noting that such a purchase would result only in vertically integrated companies manufacturing both doors and doorskins. Further requests from Steves as to how the divestiture would be shaped appear "particularly inconsistent with the goal of restoring lost competition," as discussed by the DOJ.

Although the finding of liability in the antitrust claim has already weakened the meaning and power of any DOJ clearance of potential mergers, a divestiture in this case will only further render such clearances meaningless. Here, an order to divest will presumably have cost Jeld-Wen millions of dollars beyond those already ordered as damages: the cost of the initial merger, the cost of litigation, the lost investment into the Towanda facility. Moreover, the cost of divestment will become integrated into the calculation of whether future mergers and acquisitions go forward, even when DOJ review and clearance occurs.

Conclusion

In a system where past acquisitions may not become truly final until after all arguments have passed the statute of limitations and all potential claims from your competitors have expired,[4] the focus shifts to litigation rather than strategic planning toward growth and even increased competition through acquisition.

While it is acceptable that regulatory agencies might later wish to challenge a consummated merger cleared by the DOJ, that option was rejected by the DOJ here. Instead, in this case, it would be a competitor with goals "particularly inconsistent" with restoring competition that could win a delayed suit for divestiture. A regime of expensive lawsuits and inefficient divestitures years after consummation of mergers does not particularly seem what the drafters of the HSR Act had in mind. Nor is such a regime likely to help businesses navigate the competing concerns when evaluating mergers and allocating investments.

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[1] No. 3:16-cv-545 (E.D. Va.).

[2] Steves & Sons, Inc. v. JELD-WEN, Inc., 292 F. Supp. 3d 656, 674 (E.D. Va. 2018).

[3] Steves & Sons, Inc. v. JELD-WEN, Inc., 252 F. Supp. 3d 537, 545 (E.D. Va. 2017).

[4] Note that even in this case, there was an argument that the competitive injury did not occur until a third-party manufacturer of doorskins not part of this suit made a decision in 2014 to withdraw from making sales to third parties.