4th Circ. Opens Door To New Private Merger Enforcement Era

By **Lauren Weinstein and Lauren Dayton** (March 9, 2021)

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On Feb. 18, the U.S. Court of Appeals for the Fourth Circuit affirmed the U.S. District Court for the Eastern District of Virginia's landmark order in Steves and Sons Inc. v. Jeld-Wen Inc., requiring Jeld-Wen to divest a factory as a penalty for an anti-competitive merger.

The case is historic — the district court's decision was the first time a court has ever ordered divestiture as a remedy in a private lawsuit.

The Fourth Circuit's opinion, which unequivocally affirmed the divestiture order, suggests that it may not remain the only instance in which that extraordinary remedy has been ordered in a private suit for long. Now that the remedy has been blessed by a court of appeals, private plaintiffs may be more inclined to seek divestiture. And district courts across the country may be more emboldened to order it.

The case also has broader implications beyond the court's blessing of the divestiture remedy. Jeld-Wen's primary argument on appeal was that Steves was essentially dressing up a contract claim in antitrust garb. The Fourth Circuit resoundingly rejected that argument.

Given the recent resurgence in interest in antitrust remedies for problems typically relegated to privacy, consumer protection or other spheres, that ruling, too, is likely to have implications beyond this case.

The Dispute

This case arose from Jeld-Wen's acquisition of one of the only two other doorskin manufacturers in the U.S. in a 2012 merger. Following the merger, Jeld-Wen began raising prices. It also terminated a long-term supply agreement with Steves and Sons, a door maker that had purchased doorskins from Jeld-Wen.

After the only other doorskin manufacturer refused to sell to Steves, and therefore left Steves faced with no option but to buy overpriced doorskins from Jeld-Wen, Steves sued Jeld-Wen for breach of contract and violation of the federal antitrust laws, claiming that the merger was anti-competitive.

The jury awarded Steves damages for past injury and future lost profits. But Steves wasn't done yet. After all, it still had the problem that it had no choice but to buy doorskins from Jeld-Wen. Steves thus sought order requiring Jeld-Wen to divest the recently acquired doorskin factory. In a landmark ruling, the district court granted that relief.

Jeld-Wen appealed, arguing, among other things, that the district court had erred as a matter of law in upholding the jury's finding of antitrust injury, arguing that the termination of the supply agreement was a breach of contract, not a violation of the antitrust laws. It also argued that the district court had abused its discretion in ordering divestiture, rather than a less drastic remedy.

The Fourth Circuit affirmed the decision below almost in its entirety. Critically, it concluded

that Steves had proven antitrust injury and that ordering divestiture was an appropriate use of the court's discretion.

Implications

It is hard to overstate the importance of the Fourth Circuit's opinion to the future of private post-merger enforcement. Although the Clayton Act provides for a divestiture remedy, which the U.S. Supreme Court has endorsed as "the remedy best suited to redress the ills of an anticompetitive merger" in the 1990 California v. American Stores Co. decision, a district court had never before ordered it in a case brought by a private party. Because it had never been done, the remedy was rarely sought. This decision changes that.

Jeld-Wen urged the Fourth Circuit to find that divestiture was unnecessary to promote competition. But the court didn't buy it. Even if Steves eventually purchased the divested plant itself, the court ruled, the divestiture would still promote competition because three vertically integrated doorskin manufacturers would be better than two.

Jeld-Wen also attempted to scuttle the divestiture order on the ground that no buyer had been identified yet. The Fourth Circuit wasn't troubled by that either. After all, the process the district court ordered is the same one used in cases in which the government obtains a divestiture order: Order divestiture first; find a buyer later.

In affirming the two-step process and upholding the district court's factual findings supporting divestiture, the Fourth Circuit set out a road map for future district courts and private litigants seeking divestiture.

In concluding that a less drastic remedy was not required, the decision spent significant time on how divestiture can promote competition. The Fourth Circuit agreed with the district court that divestiture would require less intervention in the market than behavioral remedies, such as an order requiring Jeld-Wen to meet Steves' long-term doorskin requirements.

That position — that divestiture is a less drastic remedy than others — may seem counterintuitive. But it is the current position of the U.S. Department of Justice's Antitrust Division. The panel's conclusion that divestiture would promote competition even if Steves acquired the divested plant, because "three is better than two," reflects the panel's enthusiastic endorsement of the divestiture remedy.

The Fourth Circuit's opinion didn't just affirm the district court's order; it did so in a full-throated but simultaneously nonchalant way, treating divestiture as a completely appropriate remedy to the harm presented. By doing so, the decision seems very likely to encourage private plaintiffs to seek, and district courts to impose, divestiture in the future.

Divestiture remains rare, though not unheard of, even in suits brought by the DOJ Antitrust Division. If the Fourth Circuit's decision spurs even a handful of district courts to impose the remedy, it will represent a huge shift in the law of antitrust remedies.

That divestiture orders would increase seems like more than a mere possibility, given that many of the reasons the Fourth Circuit affirmed divestiture — that it would require less government intervention than behavioral remedies, that it would restore competition to the marketplace, that money damages could not fully compensate the plaintiff — are likely to be present in many Section 7 cases. By declaring this case a "poster child for divestiture," the Fourth Circuit has all but ensured that it won't be the last.

Although the divestiture remedy is what makes this case groundbreaking, the rejection of Jeld-Wen's argument that Steves was dressing up breach of contract claims as an antitrust violation may have significant repercussions as well. Before the Fourth Circuit, Jeld-Wen's arguments focused on the theme that this was simply a breach of contract case for which treble damages and equitable remedies like divestiture simply were not available.

But those arguments were unpersuasive to the Fourth Circuit. In its view, Steves had clearly suffered an antitrust injury — without the merger, Steves would have been able to buy doorskins in a competitive marketplace. The Fourth Circuit also concluded that the consequences of the merger reflected its anti-competitive effect; specifically, Jeld-Wen's product quality declined, it became stingier with reimbursements, and it raised its prices.

When and how contractual breaches can reflect illegal, anti-competitive conduct is an issue of increasing importance as many industries have become more consolidated. As the U.S. Congress and state legislatures consider changes to the antitrust laws, Steves' success here, and the divestiture remedy it received, may also influence even more directly the future of antitrust law.

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