4th Circ. Seems Leery Of Divestiture Order In Doormaker Case

By **Lauren Weinstein and Lauren Dayton** (June 1, 2020)

Steves and Sons Inc. v. Jeld-Wen Inc. is "a breach-of-contract case dressed up in antitrust garb in an effort to procure treble damages." That was what Paul Clement, counsel to doorskin manufacturer and doormaker Jeld-Wen, Inc., told a panel of the U.S. Court of Appeals for the Fourth Circuit on Friday.

Lauren Weinstein

Lauren Dayton

Jeld-Wen appealed from a jury verdict in favor of its customer, doormaker Steves and Sons Inc., on Steves' claim that Jeld-Wen engaged in anticompetitive conduct under the Clayton Act and the district court's order requiring Jeld-Wen to divest part of its business as an equitable remedy.

The panel's questions during the nearly-75-minute oral argument suggested that the judges might not agree with Jeld-Wen's characterization of the case. But the panel was more receptive to Jeld-Wen's arguments that the district court's divestiture order — the first ever imposed by a court at the request of private plaintiff — was erroneous.

The appeal represents one piece of a long-running dispute between Steves and Jeld-Wen. The dispute arose from Jeld-Wen's October 2012 acquisition of CraftMaster Manufacturing Inc., one of two U.S. companies (besides Jeld-Wen) that manufactured doorskins, the exterior shells necessary to make the molded doors that both Steves and Jeld-Wen sell.

The District Court Proceedings

Steves sued in federal court in Virginia, alleging that Jeld-Wen's acquisition of Craftmaster and subsequent anti-competitive doorskin pricing violated the Clayton Act. After a 12-day trial, a jury returned a verdict for Steves and awarded it damages for past injury and future lost profits.

After the jury verdict, Steves asked the district court to order Jeld-Wen to divest — i.e., sell off — the manufacturing facility in Towanda, Pennsylvania, that Jeld-Wen acquired through the merger with CraftMaster as an equitable remedy for Jeld-Wen's anti-competitive conduct. Jeld-Wen opposed divestiture as unwarranted, pointing out, among other things, that Steves would be compensated by the jury's award for future lost profits.

Jeld-Wen also argued that Steves was unreasonable in waiting until nearly four years after the acquisition closed to file suit and that divestiture was therefore barred by the equitable doctrine of laches. After a three-day evidentiary hearing and two days of argument, the district court granted Steves' request and ordered divestiture (on the condition that an appropriate buyer could be found), as well as various behavioral remedies designed to effectuate the divestiture.

The district court entered judgment for Steves in the amount of $36 million for past damages plus the equitable relief of divesture, and, in the alternative, future lost profits in the amount of $139 million.

The Fourth Circuit Briefing

Jeld-Wen appealed the district court's divestiture order, arguing that divestiture was unwarranted and barred by the doctrine of laches. Jeld-Wen also appealed several other issues, arguing, among other things, that the jury verdict should be thrown out because Steves failed to prove an antitrust injury.

On divestiture, Steves responded that the district court properly exercised its discretion in imposing divestiture and that two independent, fact-intensive grounds — that Steves' delay was reasonable and that it didn't prejudice Jeld-Wen — both supported the district court's decision on laches.

The U.S. intervened as amicus curiae. It urged the court of appeals to reject Jeld-Wen's laches argument to the extent that it would functionally prevent private parties from seeking divestiture after a merger was complete.

The Parties' Arguments on Divestiture

The lack of precedent for the divestiture order featured prominently in the panel's questions about whether divestiture was appropriate here. U.S. Circuit Judge Allison Rushing pressed both Taylor Owings, who argued on behalf of the U.S. Department of Justice, and Benjamin Horwich, who argued on behalf of Steves, to explain how the court could evaluate whether a divestiture order would restore competition in this case without knowing who would be the prospective buyer.

The DOJ declined to express a view of the merits in its brief, and Owings demurred again at oral argument. But Owings pointed out that, at the DOJ's urging, the district court had applied the factors the DOJ uses to evaluate mergers to decide whether divestiture would be likely to restore competition.

U.S. Circuit Judge Albert Diaz's questions also suggested that he might agree with Jeld-Wen's argument that divestiture was not available because the jury's future-lost-profits award provided an adequate remedy. He asked Horwich, "why shouldn't the case end there?" Horwich responded that future lost profits couldn't compensate for what he characterized as the ultimate loss of good will, the "total annihilation" of a family-owned business. But Judge Diaz pressed him again, seemingly skeptical that "none of that was actually factored into this lost profits calculation."

On laches, Owings urged the court to reject Jeld-Wen's argument that a Clayton Act suit brought after a merger would almost always be barred by laches, arguing that such a rule would ignore the reality that market participants may be unable to anticipate whether conduct will be anticompetitive before a merger and may be unable to investigate the merger fully.

Judge Diaz seemed sympathetic to this view. He questioned whether Jeld-Wen's argument about the appropriate timing, rooted in cases brought by the government, should apply to cases brought by private parties. A private party, Judge Diaz pointed out, "by definition is focused on its own injury, not necessarily focusing on a broader market," implying that the incentive and information differences may justify a different rule.

Clement agreed that a short period of delay after a merger is consummated may be reasonable if the party is only seeking damages, but that if a court waits "four years after a merger to order divestiture, the divestiture starts to look like a very punitive remedy, as opposed to an equitable remedy."

However, on balance, the panel, and Judge Rushing in particular, seemed generally receptive to Jeld-Wen's argument that laches should apply here. Several of Judge Rushing's questions suggested that she thought Steves should have known at the time of the acquisition that it was threatened with the type of harm the jury found that it eventually suffered.

The panel was clearly wrestling with some of Jeld-Wen's core arguments, but the district court's unprecedented divestiture order seemed like the most likely basis for reversal. At least two members of the panel seemed to doubt whether divestiture was appropriate, particularly because the district court did not identify a buyer for the divested Towanda plant first. Horwich conceded that his client Steves could be among the potential buyers, another fact that seemed to trouble the panel. As Judge Diaz remarked, almost ruefully, "one of the ultimate ironies here would be if this divestiture resulted in further antitrust litigation."

Lauren Weinstein is a partner and Lauren Dayton is an associate at MoloLamken LLP.