Crowell

Client Alert

Consummated-Merger Challenge by Private Party Results in First Ever Divestiture

October 15, 2018

Four years after a consummated merger, a private plaintiff, both a customer and competitor of the merged firm, successfully sued for damages and—for the first time ever—obtained a district court order of divestiture. Steves and Sons, Inc. sued JELD-WEN, Inc., claiming that JELD-WEN's consummated acquisition of Craftmaster International (CMI) harmed competition in the market for interior molded doorskins.[1] Steves's successful suit serves as a reminder that private plaintiffs have standing if they are harmed by a merger, and also that federal antitrust review does not provide immunity from a post-merger antitrust challenge or substantial remedies.

Background

Steves is both a customer and competitor of JELD-WEN. Steves and JELD-WEN each sell interior molded doors. JELD-WEN also makes interior molded doorskins, which are components of, and provide a decorative covering for, interior molded doors. JELD-WEN uses these interior molded doorskins on its own doors and sells them to independent door manufacturers, including Steves. Prior to the acquisition, Steves purchased interior molded doorskins from three main suppliers: JELD-WEN, CMI, and Masonite. In 2012, JELD-WEN acquired CMI after the Antitrust Division of the Department of Justice (DOJ) reviewed the merger and declined to bring an enforcement action. For the last several years and continuing today, JELD-WEN has supplied doorskins to Steves under a long-term agreement set to expire in 2019, with an option to renew.

In 2015, Steves asked the DOJ to re-open its investigation and consider bringing an action to unwind the transaction. After the DOJ declined this request, Steves sued JELD-WEN in 2016, alleging (among other claims) that JELD-WEN's acquisition of CMI violated Section 7 of the Clayton Act, which prohibits transactions that may substantially lessen competition. Steves alleged that the consummated merger substantially lessened competition in the molded interior doorskin market. The company alleged that, after the acquisition, JELD-WEN began overcharging for doorskins and reducing doorskin quality. Steves sought damages and injunctive relief.

A jury heard the case—believed to be the first Section 7 case heard by a jury in 40 years—and returned a verdict in favor of Steves, finding that merger substantially lessened competition in the interior molded doorskins market. On the antitrust claim, the jury awarded Steves nearly $59 million in antitrust damages, which were trebled to nearly $176 million. (Steves also received an award of approximately $10 million on a breach of contract claim, plus attorneys' fees and litigation costs).

The litigants argued strenuously over Steves's demand for equitable relief in the form of a divestiture. JELD-WEN opposed divestiture on several grounds, including that the proposed divestiture of a doorskin facility in Towanda, Pennsylvania would not be viable as a standalone facility or adequate to restore competition, and that no buyer had yet been identified for the plant. JELD-WEN also argued that a divestiture would hurt customers and JELD-WEN itself. In the interim six years since acquiring the facility, JELD-WEN had made significant investments to integrate and upgrade the Towanda operation. Under JELD-WEN, the Towanda facility improved in services, quality, and breadth of products offered, and generated external revenues of approximately $120 million.

The DOJ submitted a Statement of Interest in the case to weigh in on equitable relief. The DOJ expressed a strong policy preference for structural relief—i.e., a divestiture—as the preferred remedy in an anticompetitive merger and supported the court's authority to order such a remedy when the plaintiff is a private party. The DOJ also advocated against purely behavioral remedies, stating that such remedies "are not favored in merger cases because they entangle the [Antitrust] Division and courts in the operation of a market…and impose direct, frequently substantial, costs upon the government and public." This argument is consistent with the increased skepticism that the Antitrust Division has expressed during the past two years with respect to behavioral remedies in merger investigations, including vertical merger investigations.

Next, the DOJ articulated the analytical framework employed to ensure a divestiture would restore competition to the relevant market. Following this exposition, the DOJ expressed reservations about the court ordering a divestiture in a case where an independent buyer with the ability and incentive to operate as a vigorous competitor in the doorskin market had not been identified.

On October 5, 2018, Judge Robert E. Payne of the District Court for the Eastern District of Virginia granted Steves's motion for equitable relief, requiring JELD-WEN to divest the Towanda plant. JELD-WEN has indicated that it will appeal.

Analysis

Post-consummation merger challenges by the DOJ or Federal Trade Commission (FTC), while once rare, are now part of the merger enforcement landscape. Indeed, the agencies have challenged multiple consummated mergers in the past two years, including the mergers of Otto Bock and Freedom Innovations (currently in administrative litigation with the FTC); Parker-Hannifin and CLARCOR (challenged after the Hart-Scott-Rodino Act waiting period expired, then settled); and TransDigm Group and SCHROTH Safety Products (settlement requiring divestiture). And over the last decade, the antitrust agencies have frequently cited post-merger challenges as an important enforcement tool.

But the *Steves* case is unique for several reasons:

- The *Steves* case is unprecedented for approving a divestiture remedy in a private suit, as the district court acknowledged.
- Private parties—particularly competitors to the merging parties—seldom challenge mergers in court. While competitors often participate in the DOJ or FTC merger-review process and may testify at trial against a merger, they rarely file their own complaint. In part, this may be due to standing issues. In *Cargill v. Monfort of Colorado*, a competitor sued to challenge a merger *pre*-consummation, but the Supreme Court rejected standing absent an allegation of probable post-merger exclusionary conduct.

The *Steves* case may be distinct, however, in that Steves was not only a competitor to the merged firm, but also a customer. Still, customer challenges to mergers, particularly consummated mergers, are not widespread.

- While post-consummation merger challenges are not uncommon, it is rare for the challenge to occur years after the transaction's consummation. For example, the three recent post-merger challenges noted above all occurred within one year of closing. In 2004, however, the FTC challenged the consummated merger of Evanston Northwestern Healthcare and Highland Park Hospital, which closed in 2000. An Administrative Law Judge issues an initial decision in 2005, finding the merger unlawful and ordering a divestiture. In 2007, on appeal, the full Commission upheld the finding that the merger was unlawful. Notably, though, the Commission ordered a behavioral remedy instead of divestiture, largely due to the long time that had passed since the merger had closed, the amount of integration that had occurred, and the potential harm from unwinding the merger.
- The DOJ conducted two separate reviews of JELD-WEN's acquisition of CMI—one at the time of the 2012 acquisition and another at Steves's request in 2015. On both occasions, the DOJ took no enforcement action against the acquisition.

Takeaways

As a case whose result could change on appeal, it is premature to say whether this marks the beginning of a trend or an anomaly. Given the time and cost involved to bring merger litigation, it is likely to remain a rare occurrence. Nonetheless, the *Steves* case is a stark warning to counsel and merging parties that consummated mergers are subject to competitor and customer challenge in court, even if previously cleared by the federal antitrust agencies, and courts may order severe remedies if they deem the merger unlawful, even if significant investment and integration has occurred. In short, *Steves* warns that merging parties can take less comfort that their consummated merger, cleared of federal antitrust review, is free from further scrutiny and perhaps challenge.

---

[1] *Steves and Sons, Inc. v. JELD-WEN, Inc.*, No. 3:16cv545 (E.D. Va. Oct. 5, 2018).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Alexis J. Gilman
Partner – Washington, D.C.
Phone: +1.202.624.2570
Email: agilman@crowell.com

Olivier N. Antoine
Partner – New York
Phone: +1.212.803.4022

Email: oantoine@crowell.com

Juan A. Arteaga
Partner – New York, Washington, D.C.
Phone: +1.212.803.4053
Email: jarteaga@crowell.com

Shawn R. Johnson
Partner – Washington, D.C.
Phone: +1.202.624.2624
Email: srjohnson@crowell.com

Wm. Randolph Smith
Senior Counsel – Washington, D.C.
Phone: +1.202.624.2700
Email: wrsmith@crowell.com

Jeane A. Thomas, CIPP/E
Partner – Brussels, Washington, D.C.
Phone: +32.2.282.4082, +1.202.624.2877
Email: jthomas@crowell.com

Ryan C. Tisch
Partner – Washington, D.C.
Phone: +1.202.624.2674
Email: rtisch@crowell.com