Court of Appeals Affirms Divestiture from a Consummated Merger in First-of-Its-Kind Private Antitrust Challenge

Written by Lisa C. Wood, Austin A.B. Ownbey

February 26, 2021

On February 18, 2021, the Fourth Circuit upheld a District Court's first-of-its-kind divestiture order against Jeld-Wen Inc., which was seeking to overturn the lower court's 2018 order requiring Jeld-Wen to spin off a factory it acquired as part of the acquisition of Craftmaster Manufacturing Inc. (CMI) as part of a private challenge to the acquisition. This is an important reminder that merger challenges can come not just from federal and state antitrust enforcers, but also from customers who are disadvantaged by the transaction. It is also a reminder that antitrust challenges can arise even after a transaction has been consummated.

Background

The dispute originated from Jeld-Wen's 2012 purchase of CMI. Jeld-Wen, which among other things manufactures doorskins, seemingly followed the correct steps before acquiring CMI, who also manufactures doorskins. Jeld-Wen hired antitrust counsel, entered into long-term supply agreements with most, if not all, of its customers "to alleviate customer concerns" about the impact on competition, and filed an HSR premerger notification with the FTC and the DOJ. As a result, none of Jeld-Wen's customers publicly expressed any concerns about the merger and after an investigation, the DOJ allowed the merger to close.

Following the merger, however, Jeld-Wen slowly began to change its policies to the detriment of its customers. In particular, Jeld-Wen threatened not to renew the long-term supply contract of one of its customer's, Steves and Sons Inc. (Steves), unless Steves agreed to a substantial price increase for Jeld-Wen's doorskins. Doorskins are essential to Steves' business and without a steady supply from Jeld-Wen, Steves would likely go out of business. Jeld-Wen's acquisition of CMI eliminated an alternative source of doorskins for Steves, and for various reasons, after the transaction Jeld-Wen was Steves' only viable option for a long-term supply contract. After several attempts to mediate Jeld-Wen's threat not to renew the contract with Steves without a significant price increase, in 2016, Steves filed a lawsuit against Jeld-Wen challenging the acquisition of CMI as anti-competitive.

The protracted litigation saw rulings go in both directions, but Steves ultimately walked away largely the victor, securing a $185 million jury verdict against Jeld-Wen as well as a slew of post-trial wins. In the wake of the jury's findings, the District Court ordered Jeld-Wen to spin off a factory to resolve antitrust concerns. The District Court determined that a divestiture was the only effective way to adequately restore competition in the doorskins market and that the merger having been completed was not a barrier to divestiture being the appropriate remedy. It was the first ever court-ordered divestiture arising from a privately litigated merger challenge.

Appeals Court Affirms Divestiture

In its decision last week, the Fourth Circuit agreed with the District Court that monetary damages would not suffice in lieu of the divestiture and noted that if Jeld-Wen ceased to supply Steves with doorskins it would likely drive Steves out of business. In addition, other "equitable remedies," like a mandate to keep supplying Steves, would not be sufficient to restore competition. The panel remanded the case back to the district court, and the long-running dispute is almost certainly not over.

Antitrust Implications

Speaking for the panel, U.S. Circuit Judge Albert Diaz said that this case was "a poster child for divestiture" and that Jeld-Wen's acquisition of CMI has "resulted in a duopoly." While not every merger will present such significant antitrust concerns, this transaction is a reminder that even with the best preparations all it takes is one upset customer to disrupt a transaction. The antitrust laws are purposely

designed to encourage enforcement to come from many different sources and they incentivize private enforcement. Jeld-Wen may have been able to close its transaction, but this Fourth Circuit decision is a warning to all that there may be a long distance to go from closing a transaction to closing the book on a transaction.

RELATED INDUSTRIES

- Technology
- Life Sciences

RELATED PRACTICES

- Antitrust & Trade Regulation
- Business Counseling
- Litigation
- Mergers & Acquisitions
