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Novel Diverstiture Ruling Likely Leaves Merger Landscape Intact
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A federal appeals court broke new ground by unwinding a merger after a challenge by a rival, rather than a regulator, but the novel decision likely reflected the perfect plaintiff with the perfect claim, rather than a sea change in the way business deals are policed, according to experts.

The first-of-its-kind decision, while "certainly an interesting post that's been set in concrete," is unlikely to upend the current enforcement model, according to Rich Snyder, a Freshfields Bruckhaus Deringer LLP antitrust attorney in Washington.

But it's still an important ruling showing that divestiture is achievable with a "compelling plaintiff" who falls in "the sweet spot," Snyder told Bloomberg Law.

"Is this a huge move in the law? The answer is no," he said. "Is this a new data point in terms of asking what kind of claims and what kind of claimants will be necessary? I think we have the answer to that now."

The Feb. 18 opinion by the U.S. Court of Appeals for the Fourth Circuit affirmed an order that required doormaker Jeld-Wen Inc. to divest a manufacturing plant it acquired in a merger with a competitor.

'Poster Child for Divestiture'

Despite the ruling's potentially limited impact, it "absolutely affects the way courts view this sort of relief," according to Carol O'Keefe, a Korein Tillery LLC partner who focuses on complex litigation.

Before, "you might throw in a claim for injunctive relief," O'Keefe, based in St. Louis, told Bloomberg Law. "But this makes that claim much more powerful. The availability of this as a private remedy was open to debate, and having a circuit court rule on it is really significant."

The Fourth Circuit's decision involved a challenge by Steves and Sons Inc., a 150-year-old family-run doormaking business, to a tie-up between Jeld-Wen and another industry leader, CMI.

The lawsuit accused Jeld-Wen of exploiting its market power, after the deal was consummated, to flagrantly breach its long-term supply contracts with Steves, which it eventually threatened to cut off entirely from access to the "skins" used as door exteriors.

After a jury verdict in favor of Steves, a federal judge in Virginia ordered the sale of a "doorskin" plant Jeld-Wen acquired in the merger.

Affirming, the appeals court called the dispute "the poster child for divestiture."

Courts previously ordered transactions to be unwound only in cases brought by the Federal Trade Commission, the Justice Department, or state attorneys general, but the logic "applies with equal force" in private civil suits, according to the opinion.

Never Used, Always There

Although never before invoked, the power to unwind mergers at the request of a rival has been there all along, hiding in plain sight in the plain text of the Clayton Act, the statute authorizing federal antitrust suits, according to attorneys in the field.

"There's supposed to be private enforcement of the antitrust laws," and the Fourth Circuit "walked the walk," John Briody, a McKool Smith PC principal in New York, told Bloomberg Law. "In the antitrust bar, people knew this tool was in the toolkit. But will this embolden some people that wouldn't otherwise seek this sort of remedy? That's probably true."

While it's not "groundbreaking to acknowledge its viability, to see it practically effected is noteworthy," Briody added.

The decision is unlikely to open the floodgates, according to O'Keefe, who noted that the high burden in merger cases "remains where the bar has always been."

'Can't Unscramble the Eggs'

The Jeld-Wen case presented "a perfect scenario" for "showing how a monopolistic acquisition really destroys competition in a market," she said. "It's a nice, simple market. It's established market power. It's a plaintiff that tried to work its way around and survive through contractual arrangements."

Eleanor Tyler, a Bloomberg Law antitrust analyst, agreed that the case signaled "all the stars aligning," rather than a major risk more mergers would be undone by industry rivals. The main factor keeping private divestiture suits from "overrunning the system" is the ineffectiveness of divestitures themselves, she said.

"The remedy just doesn't do what you need it to do," according to Tyler. "It fundamentally doesn't work. It doesn't repair the market that's already been destroyed. You can't unscramble the eggs."

Divestiture, whether sought by the government or a competitor, is a poor substitute for intervention in advance to block an anti-competitive merger, Snyder said.

"Your first port of call probably should be antitrust agencies," he said. "If the independent sellers had actually forced the issue or been more forceful with the DOJ, might this whole thing have been headed off at the pass?"

Jeld-Wen Eyes Supreme Court

The main reason that didn't happen during the run-up to Jeld-Wen's merger with CMI appears to have been its supply contracts with independent doormakers, which made them "more muted in their commentary to the DOJ," according to Snyder. Antitrust enforcers are reluctant "to bring cases where customers aren't complaining," he said.

Those contracts also surfaced as part of Jeld-Wen's legal strategy, when it argued to the DOJ—successfully—that independent doormakers were insulated from anti-competitive harm for at least five years.

The Fourth Circuit, however, rejected that reasoning, holding that Jeld-Wen began breaching its contracts almost immediately after the CMI deal gave it the leverage to do so with impunity.

Steves praised the ruling in a statement Feb. 19, saying it would "restore competition and fairness in the door manufacturing marketplace."

Jeld-Wen, meanwhile, blasted the decision as "unprecedented and fundamentally incorrect." The company "will use all available avenues of appeal," it said in a statement.

Jeld-Wen's lead attorney is former U.S. Solicitor General Paul D. Clement, a U.S. Supreme Court specialist at Kirkland & Ellis LLP.