JELD-WEN: OPENING THE DOOR TO PRIVATE MERGER CHALLENGES?

By Neely B. Agin, Susannah P. Torpey, and Dana Cook-Milligan[1]

I. INTRODUCTION

Private merger challenges can be messy, time consuming, and expensive, particularly when a private plaintiff is seeking to unwind a previously consummated transaction. Plaintiffs seeking divestiture from private merger challenges rarely have been successful, and such cases tend not to move the needle too much because they are often fact specific and thus limited in their application. In February 2021, however, the Fourth Circuit Court of Appeals granted divestiture in a private merger challenge years after the merger had been consummated. The court's decision raises several key questions. Will the decision be far reaching? What guidance does it provide for future merger challenges? How will merger challenges be presented in the future under Section 7 of the Clayton Act or Section 2 of the Sherman Act? And how will current Congressional proposals to dramatically change federal antitrust law contribute to the conversation?

In *Jeld-Wen*, the Fourth Circuit affirmed the lower court's order requiring divestiture to remedy the anticompetitive harm stemming from Jeld-Wen's acquisition of Craftmaster Manufacturing. The acquisition resulted in the combination of two of the three doorskin suppliers in the market and was consummated in 2012, about four years prior to the lawsuit being initiated by a purchaser of doorskins, Steves and Son Inc. The Department of Justice ("DOJ") had twice investigated the transaction but closed both investigations without enforcement action. Alleging direct harm from the merger, Steves was left to proceed in a costly and lengthy private litigation to seek redress. The Eastern District of Virginia ordered divestiture, and the Fourth Circuit affirmed.

Unquestionably, the court's decision in *Jeld-Wen* is an outlier. As the Fourth Circuit noted, "private suits seeking divestiture are rare and, to our knowledge, no court has ever ordered divestiture in a private suit before this case."[2] Nonetheless, *Jeld-Wen* provides precedent upon which future private plaintiffs can rely to seek divestiture in private litigation. Although this should not be minimized and could be followed in existential or "bet the business" disputes, on its own it is unlikely to become a significant new tool for addressing the very real market challenges of the day, such as serial acquisitions in niche markets fueled by venture capital firms or strategic acquisitions of nascent competitors to forestall competitive innovation and economies of scale. For this decision to have a greater impact, it would need to be accompanied by further guidance and regulatory advancement

1 Neely B. Agin is an Antitrust Partner in Winston & Strawn LLP's Washington, D.C. office who advises clients on the antitrust aspects of mergers and acquisitions, and regularly represents clients before the FTC and DOJ; Susannah P. Torpey is Co-Chair of Winston's Technology Antitrust Group and a Litigation Partner in Winston's New York office who litigates merger-related monopolization cases as well as other antitrust, IP, and tech issues; and Dana Cook-Milligan is an associate in Winston's San Francisco office who focuses on antitrust litigation and white collar criminal defense. The authors would like to thank Global Competition Review for permitting the authors to expand upon an earlier version of this article that was published by GCR USA on March 24, 2021, *available at* https://globalcompetitionreview.com/gcr-usa/standalone-claims/the-jeld-wen-legacy.

2 *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, 988 F.3d 690, 703 (4th Cir. 2021).

out of Congress, the DOJ, and/or the Federal Trade Commission ("FTC"). Otherwise, we cannot expect private litigation to cure what ails these markets and competition in general.

Traditionally, private litigants have been reluctant to seek divestiture, which is a remedy in merger cases brought under Section 7 of the Clayton Act and in monopolization cases brought under Section 2 of the Sherman Act, and courts have been reticent to order it. Breaking up a merged entity is an extreme remedy,[3] and *Jeld-Wen* is unlikely to change this calculation by a significant degree without other movement in the legal landscape. Focusing on the divestiture itself could result in distractions as the parties argue over the severity of the requested relief, as opposed to the exclusionary conduct that the plaintiff would prefer to be the focus.

Post-*Jeld-Wen*, particularly if it is accompanied by federal antitrust reform, the threat of divestiture demands could serve as an important tool for competitors that suddenly have their supply chain disrupted by venture capital-backed and other aggressive acquisition sprees. Numerous industries have faced rapid consolidation over the last two decades as a result of the rise of venture capital funding and strategic directives to this end. The prospect of private divestiture litigation could serve as leverage for ensuring the continuity of fair terms in supply agreements but is unlikely to lead to a surge in private litigation seeking to unwind consummated mergers or divestiture of portions of vertically integrated entities.

Some might speculate that private divestiture may provide an opportunity to lessen large tech companies' grip over various markets, but the component manufacturing plant divested in *Jeld-Wen* is a far cry from the technologically integrated products in tech markets. Anticipating growing political threats of government divestitures, vertically integrated tech firms have in recent years made calculated efforts to quickly integrate their products with those of acquired competitors, in part to ensure their transactions will be harder to unravel. This is largely by design, and an issue that the DOJ and FTC will need to overcome when assessing remedies in connection with their ongoing tech investigations.

Increasingly, Congress has heightened its focus on regulating concentration in various industries because of its potential to lessen competition.[4] This newfound congressional exuberance has even been recognized in colorful terms.[5] Further, Congress has given particular focus to the tech industry and digital markets.[6] But generalized antitrust reform

---

3 *See United States v. United Shoe Mach. Co. of N.J.*, 247 U.S. 32, 46 (1918) (dissolution is "extreme, even in the mildest demands").

4 U.S. Dep't of Justice, *New Legislation Supports More Effective Antitrust Enforcement: Division Update Spring 2021*, Mar. 24, 2021, https://www.justice.gov/atr/division-operations/division-update-spring-2021/new-legislation-supports-more-effective-antitrust-enforcement.

5 *See, e.g.*, Kevin Yeh, The American Bar Association, *Hipster Antitrust: A Brief Primer*, 2018, https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/antitrust/hipster-antitrust-brief-primer/.

6 Jerrold Nadler & David N. Cicilline, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations*, 2020, at 38, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 ("Consistent with winner-take-all dynamics, the digital economy is highly concentrated. A number of key markets online—such as social media, general online search, and online advertising— are dominated by just one or two firms. In some instances, this concentration is the result of a high volume of acquisitions by the dominant digital platforms. Together, the largest technology firms have acquired hundreds of companies in the last ten years.").

legislation that applies broadly across industries has bipartisan support across aisles.[7] Cases like *Jeld-Wen* ostensibly indicate that at least some courts share Congress's apparent desire to increase the reach of the antitrust laws.

The inherent tradeoff between choosing to support the merger or to oppose it proves that neither option is perfect. Often merging parties will put their customers in a difficult position by seeking the companies' support of the proposed transaction through a statement or declaration provided to the DOJ or FTC. If a customer agrees to do so, it may get a preferable supply contract in return. That supply contract will likely be limited in substantive or temporal scope, however, and does not guarantee the customer's position years later, when the merging firm has a dominant market position and the ability to charge anticompetitive prices. On the other hand, if customers choose not to sign the declaration, to sign an alternative declaration in support of the FTC or DOJ's position, or simply to remain quiet, they may put themselves at a competitive disadvantage by failing to secure the favorable supply contract. Supporting the government's position, however, may better position the customer in the long run because it ultimately may help the agency to block consummation of an anticompetitive merger.

The implications of the *Jeld-Wen* decision, particularly if coupled with legislative reform and increased focus on concentration occurring in many industries today, is discussed in detail in this article, the goal of which is to ensure that companies (both merging entities and customers) are in the best position to consider all the benefits and risks of mergers.

Section II of this Article provides a background on merger enforcement under Section 7 of the Clayton Act and Section 2 of the Sherman Act, as well as a discussion of the impact on such enforcement from the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act").

Section III of this Article provides a history of private merger challenges in the United States, including cases that have provided precedent on which future plaintiffs could rely and those that have limited the potential for private challenges, as well as insight into how private challenges differ from government challenges.

Section IV of this Article provides a summary of the *Jeld-Wen* case history, including a discussion of the market and the acquisition, the prior relationship with Steves, the Department of Justice's investigation, and the subsequent breakdown of the relationship between Steves and Jeld-Wen, which led to the filing of the private merger challenge.

Section V of this Article discusses what may come next in private merger challenges, both in the courts and in the legislature. It also provides guidance on implications of ongoing consolidation of various industries and what private plaintiffs should consider when deciding whether to support or challenge a proposed merger, and what to do if an anticompetitive effect arises post-consummation.

---

7 Alvaro Mateo Alonso, et al., *117th Congress Takes Early Steps Towards Antitrust Reform*, JD Supra (Feb. 9, 2021), https://www.jdsupra.com/legalnews/117th-congress-takes-early-steps-6904745/.

II. BACKGROUND ON ANTITRUST MERGER ENFORCEMENT

Before discussing the *Jeld-Wen* case, it is helpful to understand antitrust law relevant to merger challenges, in addition to guidelines published by the government. The most significant substantive antitrust laws are Section 7 of the Clayton Act[8] and Section 2 of the Sherman Act.[9, 10]

A. Section 7 of the Clayton Act

Mergers typically are analyzed under Section 7 of the Clayton Act. Section 7 prohibits mergers and acquisitions where the effect "may be substantially to lessen competition, or to tend to create a monopoly."[11] Particularly if seeking to unwind a consummated acquisition, Section 7 is the most common vehicle, because it only requires *threat* of (not *actual*) lessened competition or creation of a monopoly. A merger that may be subject to Section 7 scrutiny generally involves two post-consummation features – (1) one fewer competitor in a particular market, and (2) a larger market share for the newly merged firm. The newly merged firm would then be subject to scrutiny for two primary risks. First, courts look for increased incidence of express or tacit collusion,[12] and second, courts look for increased prices resulting from the newly merged firm.[13] Section 7 challenges often turn on the definition of the relevant geographic and product markets, as Section 7 forms the basis for the court to determine the market participants and their market shares.[14]

As joint enforcers of Section 7, the DOJ and FTC have jointly published horizontal merger guidelines that, while not binding, provide guidance on the standards by which proposed or consummated mergers will be challenged.[15] According to the most recently published version of the guidelines, from 2010, the DOJ and FTC's unified goal is to prevent mergers that may "create, enhance, or entrench market power or to facilitate its exercise."[16] The DOJ and FTC largely focus on issues of decreased output or increased prices that may result from a merger and will look to actual effects, direct comparisons

---

8 Section 7 of the Clayton Act (15 U.S.C. § 18).

9 Section 2 of the Sherman Act (15 U.S.C. § 2).

10 In addition, there are two remedies for private merger challenges – Section 4 of the Clayton Act (15 U.S.C. § 15) for monetary damages, and Section 16 of the Clayton Act (15 U.S.C. § 26) for injunctive relief. Divestiture falls under Section 16, which allows relief in equity "when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26.

11 Section 7 of the Clayton Act (15 U.S.C. § 18).

12 Herbert Hovenkamp, Federal Antitrust Policy § 3.1d (6th ed. 2020).

13 *See, e.g.*, *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-92, 76 S. Ct. 994, 1005 (1956).

14 Hovenkamp, *supra* note 12 ("In antitrust cases that require proof of market power the court traditionally determines whether some 'relevant market' exists in which the legally necessary market power requirement can be inferred. In order to do this, the court usually 1) determines a relevant product market, 2) determines a relevant geographic market, and 3) computes the defendant's percentage of the output in the relevant market thus defined.").

15 U.S. Dep't of Justice and Fed. Trade Comm'n, *Horizontal Merger Guidelines*, Aug. 19, 2010, https://www.justice.gov/atr/horizontal-merger-guidelines-08192010.

16 *Id.* at § 1.

based on experience, market shares and concentration, head-to-head competition, and the potentially disrupting role of a merging entity.[17]

B. Section 2 of the Sherman Act

Section 2 of the Sherman Act is another but less common method of merger challenge. Section 2 makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."[18] Section 2 establishes three offenses, commonly termed "monopolization," "attempted monopolization," and "conspiracy to monopolize."[19]

Section 2 is not explicitly limited to challenging mergers but can be used to challenge both the merger directly and any anticompetitive conduct alleged to result from the merger. Put another way, monopolization or attempted monopolization that results from increased market share and market power stemming from a merger (and would not otherwise have existed) may more properly be challenged under Section 2. This provides a broader scope of conduct that can be alleged (the effects of the merger as a transaction and as a vehicle for post-acquisition conduct). As with Section 7, the relevant market definition is critical to a Section 2 challenge.

C. When to Use Section 7 and When to Use Section 2

As already mentioned, the operative difference between Section 7 and Section 2 is whether the alleged anticompetitive behavior is the merger itself or monopolistic behavior stemming from the firm's post-merger market power. The bar for alleged anticompetitive conduct under Section 7 may be lower than that of Section 2, requiring only a substantial lessening of competition, rather than a dangerous probability of monopolization.[20] A claim of attempted monopolization under Section 2 of the Sherman Act, however, does not require a showing that the defendant was *actually* successful in attaining a monopoly to face liability.[21] Further, the Section 7 standard of a substantial lessening of competition must be paired with a merger, whereas the broader language of Section 2 (i.e., that it is not solely tied to a merger) allows for more post-consummation anticompetitive conduct to properly be included. More recent merger challenges, particularly in the tech industry, have been brought under Section 2 to allow for allegations of post-consummation anticompetitive conduct, which shows a marked shift in the government's strategy of trying to block mergers they believe are likely to harm or lessen competition.

The balance between Section 7 and Section 2 is an interesting and important one. Section 7 is an important tool, where Section 2 might not reach the conduct at issue because the defendant is not a monopolist. Even with "attempt-to-monopolize" cases under Section 2, litigants must prove specific intent to monopolize, which can be challenging without the right evidence. The Clayton Act has a lower standard of proof

---

17 *Id.* at § 2.1.

18 Section 2 of the Sherman Act (15 U.S.C. § 2).

19 *Id.*

20 *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 113 S. Ct. 884 (1993).

21 *Lorain Journal Co. v. United States*, 342 U.S. 143, 153, 72 S. Ct. 181, 186 (1951).

of anticompetitive effects than the Sherman Act, because it applies where the effect may be substantially to lessen competition in addition to tending to create a monopoly. It was intended to catch violations from their incipiency – or to catch the "weed in the seed," as the legislative history puts it.[22] How these two sections will be used in future cases, particularly as we continue to see a hyper-concentration of many industries, will be interesting to watch.

D. HSR Act

In addition to the question of which law is a more appropriate vehicle for a merger challenge, there is also a question of whether the merger requires pre-closing review by the government. The Clayton Act was amended in 1976 to include the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act"), which established a pre-merger notification program under which the entities proposing a merger that meets the statutory thresholds must notify the FTC and DOJ and observe a thirty-day waiting period, during which the agencies evaluate the proposed merger and its likely effects on competition.[23]

The HSR Act included an initial threshold in 1976 of $15 million – meaning that any proposed merger valued at more than $15 million had to be reported to the FTC and DOJ. In 2000, the HSR Act was revised to require the FTC to adjust the thresholds annually based on the percentage change in the gross national product from the previous year. Since that time, the monetary threshold has been updated on a periodic basis to account for inflation, with the current threshold at $92 million. This presents an interesting additional factor when considering a private merger challenge. If, for example, a proposed merger does not exceed the threshold, then the merger can be consummated without DOJ or FTC evaluation. This could affect future analyses in a private challenge because each party may be able to argue whether the government was on notice about the merger.

III. HISTORY OF PRIVATE MERGER CHALLENGES

Private merger challenges are rare and divestiture as a remedy is even more unusual. This section discusses the history of merger challenges, including DOJ and FTC merger challenges and how they differ from merger challenges brought by private plaintiffs.

A. Government Versus Private Merger Challenges

Section 4 and Section 16 of the Clayton Act expressly permit merger challenges seeking monetary damages and equitable relief, respectively.

22 Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125, 136 (2000).

23 Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. § 18a).

Divestiture, as an equitable remedy, is commonly sought by the FTC and DOJ to remedy anticompetitive mergers.[24] The government strongly prefers structural remedies, i.e., divestiture, over conduct-based remedies in merger cases. According to the DOJ's Merger Remedies Manual, most recently updated in 2020, structural remedies are more effective because they are "clean and certain, effective, and avoid ongoing government entanglement in the market. A carefully crafted divestiture decree is 'simple, relatively easy to administer, and sure' to preserve competition."[25] There is general acceptance of the government's right to seek divestiture. One reason for this difference is that a merger challenge by one of the agencies more likely "reflect[s] a thorough assessment of the situation and dispassionate conclusions regarding the public interest."[26] Conversely, private plaintiff challenges are more often rooted in personal, private loss.[27] The limitations of antitrust liability and the standard required for divestiture also prove to be a natural barrier that may dissuade the government from bringing a case but may not otherwise dissuade a private plaintiff. Further, if the government brings a merger challenge, it need only prove the antitrust violation, whereas a private plaintiff must also show standing and actual or threatened harm, which makes such a case more complicated for the private plaintiff.[28]

Private merger challenges also serve an important function of the overall system, because they fill the gap left by prosecutorial discretion and constrained government resources. Private plaintiffs are also uniquely situated – they can make independent determinations for whether a particular merger challenge is worth their resources, and in some situations, the challenge is an existential one under which the alternative is the destruction of the plaintiff entity. They are likewise able to point to specific harm the merger has caused in their own business – and while they still need to show harm to *competition* not just competitors, as the Supreme Court made clear in *Brown Shoe*,[29] harm to their own business can be nonetheless compelling.

B. Examples of Prior Merger Challenges

The common acceptance of divestiture as an available equitable remedy for the agencies historically was in direct contrast to the availability of such a remedy for private plaintiffs, for whom the circuits were split for decades on whether divestiture was even an option.

---

24 *See, e.g.*, *Polypore Int'l, Inc. v Fed. Trade Comm'n*, 686 F.3d 1208 (11th Cir. 2012); *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014); *In the Matter of Polypore Int'l, Inc.*, 2010-2 Trade Cas. (CCH) ¶ 77267, 2010 WL 5132519, *35 (F.T.C. Dec. 13, 2010) ("The purpose of relief in a Section 7 case is to restore competition lost through the unlawful acquisition. We recognize that complete divestiture is generally the most appropriate way to restore competition lost through an unlawful acquisition.").

25 U.S. Dep't of Justice, Antitrust Division, *Merger Remedies Manual*, Sept. 2020, https://www.justice.gov/atr/page/file/1312416/download, at 13 (quoting *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 (1961)). Conversely, the Manual indicates that conduct remedies are also a valuable tool and "[w]here cognizable efficiencies are significant but the merger is on balance anticompetitive, requiring a structural divestiture might remedy the competitive concerns only at the cost of unnecessarily sacrificing significant efficiencies." *Id.* at 16.

26 Phillip E Areeda & Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application, ¶ 303e (4th ed. 2019).

27 *Id.*

28 *Id.* at ¶ 303e3.

29 *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

The First and Third Circuit, for example, endorsed divestiture as an option in private suits.[30] Conversely, the Sixth and Ninth Circuits disapproved of divestiture as a private equitable remedy.[31] And the Second Circuit allowed for divestiture in limited circumstances.[32]

This situation changed in 1990, when the Supreme Court issued the landmark case *California v. American Stores*, in which the Court held that the equitable remedies available through Section 16 are equally available to private plaintiffs as they are to government plaintiffs.[33] While the State of California is a government actor, the suit was filed by the California Attorney General as a private plaintiff, as Attorneys General are often treated, and sought to enjoin the merger of two major grocery store chains. The district court granted the State's motion for a temporary restraining order and preliminary injunction, after which American Stores appealed, arguing that the decision was "tantamount to divestiture since the merger of the two companies had already been completed."[34]

The Ninth Circuit overturned the injunction, ruling that it was contrary to the Ninth Circuit's precedent in *International Telephone and Telegraph*, in which the appellate court denied divestiture as a remedy based on its reading of Section 16 legislative history.[35] The Supreme Court then disagreed and instead adopted the First Circuit's reasoning in *Cia. Petrolera Caribe, Inc.*, concluding that Section 16 "states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order."[36] The Court held that the legislative history of Section 16 indicated that divestiture should be available to private plaintiffs but offered a caveat: "Our conclusion that a district court has the power to order divestiture in appropriate cases brought under [Section] 16 of the Clayton Act does not, of course, mean that such power should be exercised in every

30 *See, e.g.*, *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 413-30 (1st Cir. 1985) (divestiture remedy permissible, based on extensive discussion of legislative history, policy, and principles of equity); *NBO Indus. Treadway Cos., Inc. v. Brunswick Corp.*, 523 F.2d 262, 278-79 (3d Cir. 1975) (rejecting Ninth Circuit's reasoning in *International Telephone and Telegraph*, 518 F.2d 913 (9th Cir. 1975), but refraining from ruling on availability of divestiture since less drastic remedy sufficient in this case), *vacated on other grounds by* 429 U.S. 477 (1977).

31 *See, e.g.*, *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp.*, 518 F.2d 913, 920-25 (9th Cir. 1975) (denying divestiture remedy relying primarily upon legislative history); *Cont'l Sec. Co. v. Mich. Cent. R.R.*, 16 F.2d 378, 379 (6th Cir. 1926) (divestiture remedy denied with little explanation: 'Section 16 never has been held to reach such a case. The result sought is practically the same as would be asked for in a suit by the Attorney General."), *cert. denied*, 274 U.S. 741 (1927); *Am. Commercial Barge Line Co. v. E. Gas & Fuel Assocs.*, 204 F. Supp. 451, 453 (S.D. Ohio 1962) (divestiture denied without discussion).

32 *See Julius Nasso Concrete Corp. v. DIC Concrete Corp.*, 467 F. Supp. 1016, 1024-25 (S.D.N.Y. 1979) (allowing divestiture, relying primarily on policy and principles of equity); *Graves v. Cambria Steel Co.*, 298 F. 761, 762 (S.D.N.Y. 1924) (stating without further explanation "I cannot suppose that any one [sic] would argue that a private suit for dissolution would lie under section 16 of the Clayton Act"); *Venner v. Pa. Steel Co. of N.J.*, 250 F. 292, 296 (D.N.J. 1918) ("The suits covered by [Section 16] are limited to those seeking preventative relief…. [A]nd, as the relief sought in the present supplemental bill is not of a preventative character but to annul a consummated transaction, none of the venue provisions of the Sherman or Clayton Acts is available….").

33 495 U.S. 271, 295-296 (1990).

34 *Id.* at 277 (quotation marks omitted).

35 *Id.* (citing *Int'l Tel. & Tel. Corp.*, 518 F.2d 913 (1975)).

36 *Id.* at 281-82 (quoting *Cia. Petrolera Caribe, Inc.*, 754 F.2d at 416).

situation in which the Government would be entitled to such relief."[37] Private plaintiffs must still show standing and threatened loss or injury.

Since American Stores, private plaintiff actions resulting in a divestiture appear nonexistent. Conversely, government agencies are often successful in (either partially or completely) unwinding mergers they challenge. During the fiscal year 2019, for example, the DOJ challenged 17 proposed mergers and filed complaints in 11 of those challenges, eight of which included simultaneously filed settlement papers with partial divestitures as a component of the resolution.[38] Of the six challenges in which the DOJ did not file suit, five proposed transactions were abandoned and one was restructured to resolve the DOJ's concerns.[39] That same year, the FTC challenged 21 mergers, nine of which were abandoned, 10 of which resulted in consent orders with partial divestitures, and two of which the FTC challenged in court (resulting in one being abandoned and one challenge being voluntarily dismissed).[40] And during its fiscal year 2018, the DOJ challenged 17 proposed mergers, filing complaints in nine of those challenges, eight of which included simultaneously filed settlement papers with partial divestitures as part of the resolution.[41] Of the remaining eight challenges in which the DOJ did not file suit, four proposed transactions were abandoned and the remaining four were restructured to resolve the DOJ's concerns.[42] That same year, the FTC challenged 22 mergers, 12 of which resulted in consent orders with partial divestitures, and five of which the FTC challenged in court (resulting in abandoned transactions or divestitures in all five challenges).[43]

IV. THE *JELD-WEN* DIVESTITURE

A. Long-Term Supply Contract and CMI Acquisition

The dispute in this case arose from Jeld-Wen's 2012 acquisition of one of its competitors, Craftmaster ("CMI").[44] Jeld-Wen and CMI were doorskin manufacturers. Doorskins are molded fibrous panels placed on the front and back of a frame to make a "molded door"—the most common door in American homes. Prior to the acquisition, there were three main doorskin manufacturers in the United States: Jeld-Wen, Masonite, and CMI.[45] Masonite had a 46% market share, Jeld-Wen had 38%, and CMI had 16%.[46]

---

37 *Id.* at 295.

38 Fed. Trade Comm'n and Dep't of Justice, *Hart-Scott-Rodino Annual Report, Fiscal Year 2019*, July 9, 2020, at 9-13, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf.

39 *Id.*

40 *Id.* at 13-17.

41 Fed. Trade Comm'n and Dep't of Justice, *Hart-Scott-Rodino Annual Report, Fiscal Year 2018*, Sept. 16, 2019, at 9-12, https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/fy18hsrreport.pdf.

42 *Id.*

43 *Id.* at 12-18.

44 *Jeld-Wen*, 988 F.3d at 698-99.

45 *Id.* at 699.

46 *Id.*

Each competitor was vertically integrated and also sold its own molded doors, in addition to selling doorskins to independent door manufacturers (called "independents"), including the plaintiff, Steves and Sons, Inc. ("Steves").

In May 2012, Steves signed a long-term supply contract with Jeld-Wen, which required Steves to purchase a minimum of 80 percent of its doorskins from Jeld-Wen. The contract allowed Steves to terminate the contract if a Jeld-Wen competitor beat Jeld-Wen's prices, and it also included quality assurances and dispute resolution procedures. The contract included a termination provision under which Steves could terminate on two years' notice and Jeld-Wen could terminate on seven-years' notice.[47] At the time, Jeld-Wen's CEO told Steves that Jeld-Wen considered it to be a "life time [sic] deal."[48]

However, at the same time, Jeld-Wen was also in the process of acquiring CMI. CMI's business had been struggling since the housing bubble burst in 2007, and it began looking to sell in 2011. Steves was aware of the acquisition, having bid on the CMI business itself. Jeld-Wen did not notify the government of the merger until after it signed the long-term agreement contract with Steves and other independents. Jeld-Wen hoped that the long-term supply contracts it had signed, which appeared to protect Steves and other independents from price increases or refusal to sell, would quell any government concerns about the competitive impact of the merger. When it learned of the merger, the DOJ opened an investigation and reached out to Steves, which responded that it did not oppose the merger, seemingly based on the long-term supply contract it had secured with Jeld-Wen. The DOJ subsequently closed its investigation, and Jeld-Wen and CMI completed the merger in October 2012.[49]

The merger reduced the number of doorskin manufacturers from three to two (Jeld-Wen and Masonite), with Jeld-Wen consequently achieving a 54 percent market share.[50]

B. Post-Consummation Conduct

Steves and Jeld-Wen started having issues almost immediately after the merger closed. Steves began experiencing quality issues with Jeld-Wen's doorskins, and Steves started complaining about Jeld-Wen increasing its prices almost 8% more than the supply agreement allowed, despite indications that Jeld-Wen's costs were declining, and the quality was decreasing.[51] Internal documents showed that Jeld-Wen was aware that the merger gave it leverage in contract negotiations with independents because Jeld-Wen and Masonite were the only remaining doorskin manufacturers in the market.[52]

In 2014, Masonite announced that it would stop selling doorskins to independents, which left Jeld-Wen as the only manufacturer available to supply independents. Masonite intended for itself and Jeld-Wen to maintain a duopoly in doorskin manufacturing because

---

47 *Id.* at 700.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.* at 700-01.

52 *Id.* at 701.

barriers to entry were high and independents were not likely to survive in the industry long term.[53] Then in September 2014, Jeld-Wen invoked the seven-year termination provision in its long-term supply contract with Steves, causing the contract to terminate in 2021. Steves reached out to Masonite, but it refused to negotiate a new supply contract.[54] Steves then turned to foreign suppliers, but ran into cost and quality issues. In 2015, Steves triggered the dispute resolution provision, but its attempts to resolve the matter were unsuccessful.[55]

In the interim, Steves continued to buy from Jeld-Wen at increased rates and lower quality, which appeared to be its only option. As Jeld-Wen's prices increased and quality issues arose, Steves asked the DOJ to reexamine Jeld-Wen's merger with CMI. The DOJ did so, but it closed its investigation in April 2016 without any further action.[56]

C. Private Litigation in Eastern District of Virginia

Unable to secure any government enforcement action, in June 2016 Steves filed a private merger challenge in the Eastern District of Virginia, claiming that the Jeld-Wen/CMI merger violated Section 7 of the Clayton Act.[57] Steves alleged that the merger "gave Jeld-Wen too much power in the doorskin market, which emboldened it to charge higher prices, offer inferior products and customer service, and eventually try to 'kill off' Steves by refusing to sell it doorskins."[58] Steves requested past monetary damages for breach of contract, future damages for loss of access, and equitable relief to unwind the CMI acquisition.

At both the motions to dismiss and summary judgment stages, the district court upheld Steves' claim for equitable relief, including Jeld-Wen's potential divestiture of the doorskin manufacturing plant acquired from CMI.[59] The court then held a jury trial to address Steves' damages claims first, with the expectation that separate proceedings would be held on equitable claims if the jury found that the merger was anticompetitive.[60] At the conclusion of a 2018 trial, the jury ruled for Steves on all damages claims, finding that Jeld-Wen had breached the Supply Agreement and that the merger violated Section 7. On the antitrust claim, the jury awarded damages of approximately $58.5 million in past damages and future lost profits, which the court trebled to $175.8 million.[61]

As planned, the court then held additional hearings on the request for equitable relief, for which the DOJ filed a statement of interest regarding the proposed divestiture remedy.

53 *Id.*

54 *Id.* at 701-02.

55 *Id.* at 702.

56 *Id.*

57 *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-cv-545, Complaint for Injunctive and Declaratory Relief, Damages, and Specific Performance, Doc. No. 1 (E.D. Va. June 29, 2016). The complaint also brought breach of contract claims, alleging that Jeld-Wen breached the long-term supply contract by improperly increasing prices and failing to ensure doorskin quality. *Id.*

58 *Jeld-Wen*, 988 F.3d at 702-03.

59 *Id.* at 703.

60 *Id.*

61 *Id.* at 704-05.

The DOJ argued that "divestiture of assets, particularly an ongoing business, normally is the best way to preserve and restore competition in the relevant market threatened by, or already harmed by, an anticompetitive merger."[62] The DOJ concluded that before ordering divestiture, the court should determine who would purchase the divested assets and whether that buyer would run the business "independently as a vigorous competitor," particularly because Steves had been interested in purchasing CMI, which may not protect competition.[63] Based on the DOJ's statement of interest, Jeld-Wen argued that the court should not order divestiture without first identifying a buyer.

After considering all arguments presented, the court ordered the CMI doorskin manufacturing plant to be divested through a public auction, to be conducted after the conclusion of any Jeld-Wen appeal, because it was the "most effective way of restoring the substantially lessened competition brought about by the merger" and in the public interest to create a third doorskin supplier.[64] The court held that absent divestiture, Steves would likely collapse once its agreement with Jeld-Wen expired in 2021.[65] The court also rejected the DOJ's and Jeld-Wen's argument that the court should identify and appropriately scrutinize a proposed buyer before ordering divestiture.[66] Rather, the court chose a two-step process: (1) rule for divestiture and thereafter (2) arrange an auction with a special master.[67] The court held that this process would reduce uncertainty that prospective buyers would face pending appeal.[68]

Importantly, the court also denied Jeld-Wen's argument that laches precluded the divestiture remedy. The court held that the four-year delay for bringing the claim did not bar equitable relief because Steves was not aware it had suffered an antitrust injury until Jeld-Wen terminated their agreement in 2014, and Steves had diligently pursued other alternative remedies thereafter, like dispute resolution.[69]

D. Fourth Circuit Appeal

Jeld-Wen then appealed to the Fourth Circuit, arguing that the district court's decision on divestiture was an abuse of discretion and that various other findings, including that the merger caused antitrust injury and impact, were improper. The Fourth Circuit vacated much of the antitrust damages award on the basis that the question of future lost profits was not a ripe issue that the trial court should have adjudicated but otherwise rejected Jeld-Wen's arguments.[70] Instead, the Fourth Circuit upheld the district court's decision on divestiture, noting that divestiture is a well-suited form of relief in Clayton Act Section

---

62 *Steves and Sons, Inc. v. Jeld-Wen, Inc.*, No. 3:16-cv-545, Statement of Interest of the United States of America Regarding Equitable Relief, Doc. No. 1640, 1 (E.D. Va. June 6, 2018).

63 *Id.* at 1-2, 11.

64 *Jeld-Wen*, 988 F.3d at 706.

65 *Id.* at 706, 719, 721. The appellate court also noted that the future lost profits award would only have been awarded in the absence of divestiture. *Id.* at 725.

66 *Id.* at 706-07.

67 *Id.* at 707.

68 *Id.*

69 *Id.*

70 *Id.* at 724, 729.

7 cases because of its simplicity.[71] The Fourth Circuit agreed that Steves had satisfied the conditions for equitable relief.[72] The appellate court also considered whether a less burdensome equitable remedy could have been pursued but ultimately held that a conduct remedy, such as asking Jeld-Wen to supply doorskins to Steves at fair prices, would be a temporary fix that would not restore competition to the market.[73] The appellate court also upheld the district court's ruling that a delay in bringing the claim did not bar divestiture as an equitable remedy.[74]

In doing so, the Fourth Circuit acknowledged that private lawsuits under the Clayton Act "seeking divestiture are rare and, to our knowledge, no court had ever ordered divestiture in a private suit before this case," but that divestitures in private Clayton Act actions are based on well-established Supreme Court precedent.[75] Ultimately, the court concluded that the case was "a poster child for divestiture" given that the 2012 CMI merger had created a duopoly and the remaining suppliers "used their market power to threaten [the] survival" of independent door manufacturers like Steves.[76] The court further noted that the loss of a 150-year-old family business like Steves could not be fully compensated by monetary damages or less drastic conduct remedies, and concluded that divestiture would promote competition, as Congress had made a policy judgment that divestiture was "the remedy best suited to redress the ills of an anticompetitive merger."[77] The court found no error in the district court's view that Jeld-Wen would be able to "weather" the significant cost of divestiture and resulting reduction in its doorskin output, and that the potential harm to Steves of extinction outweighed any harm to Jeld-Wen.[78]

V. WHAT MAY COME NEXT

A. Antitrust Legislation Reform and the (Potential) *Jeld-Wen* Impact

The *Jeld-Wen* decision comes at an interesting time during which various industries are undergoing significant consolidation both vertically and horizontally, and simultaneously the executive branch, Congress, and the federal antitrust enforcement agencies are hyper-focused on how antitrust reform may inform and improve protections to competition that may be harmed by further consolidation.

71 *Id.* at 703, 724.

72 *Id.* at 719-24.

73 *Id.* at 720.

74 *Id.* at 718.

75 *Id.* at 703.

76 *Id.* at 724.

77 *Id.* at 720.

78 *Id.* at 721. On March 22, 2021, the Fourth Circuit denied Jeld-Wen's petition for rehearing en banc, and shortly thereafter, mandate was issued. *See Steves and Sons v. Jeld-Wen, Inc.*, No. 19-1397, 2021 U.S. App. LEXIS 8387, at *2 (4th Cir. Mar. 22, 2021). Whether Jeld-Wen will petition the Supreme Court for certiorari is yet undetermined, the deadline for which is August 19, 2021, according to the Supreme Court's March 19, 2020 Order extending filing deadlines 150 days due to COVID delays and closures.

As a practical matter, the *Jeld-Wen* decision does not on its own change the legal landscape of merger challenges. The facts in *Jeld-Wen* were extreme – a private plaintiff that was persuaded to provide support for a merger in exchange for a long-term supply contract, while the remaining two competitors explicitly spoke of their intent to form a duopoly and squeeze independents like Steves out of the market and then made good on that plan. Such facts are not likely to be common, and such evidence of actual or threatened harm unlikely to be so readily available in every case. Under such extreme facts, the equally extreme remedy of divestiture was deemed appropriate and practically the only way to cure the egregious harm to competition that Jeld-Wen had caused.

The influence of the *Jeld-Wen* decision may, however, increase if it is accompanied by federal antitrust reform., and such reform seems imminent. On July 9, 2021, President Biden signed a comprehensive Executive Order on Promoting Competition in the American Economy, which aims to do exactly what the title suggests: to promote economic competition through enhanced antitrust enforcement.[79] According to the fact sheet published by the White House, the Executive Order calls for a "whole-of-government" approach to address corporate consolidation, rising consumer prices, and low wage growth resulting in growing income, wealth, and racial inequalities.[80] In remarks regarding the Executive Order, President Biden admonished corporations for acquiring competitors rather than engaging in competition,[81] particularly "killer acquisitions" in the tech industry that are meant to forestall potential competitive threats.[82] The Executive Order also calls on the enforcement agencies to review and revise their horizontal and vertical merger guidelines and to aggressively enforce existing antitrust laws, specifically with respect to unwinding anticompetitive mergers that were unchallenged by prior administrations, particularly in the tech and internet sectors.[83] While the Executive Order holds no binding power over Congress or the enforcement agencies, it signals a focus from the executive branch on protection of competition, particularly in ever-developing

---

79 White House Briefing Room, *Executive Order on Promoting Competition in the American Economy* (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

80 White House Briefing Room, *Fact Sheet: Executive Order on Promoting Competition in the American Economy* (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

81 White House Briefing Room, *Remarks by President Biden at Signing of an Executive Order Promoting Competition in the American Economy* (July 9. 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

82 White House Briefing Room, *supra* note 80.

83 White House Briefing Room, *supra* note 80.

and concentrating industries like Big Tech.[84] More significantly, on the same day the Executive Order was issued, FTC Chair Lina Khan and Acting Assistant Attorney General of the DOJ Antitrust Division, Richard A. Powers, issued the following joint statement:

> We must ensure that the merger guidelines reflect current economic realities and empirical learning and that they guide enforcers to review mergers with the skepticism the law demands. The current guidelines deserve a hard look to determine whether they are overly permissive. We plan soon to jointly launch a review of our merger guidelines with the goal of updating them to reflect a rigorous analytical approach consistent with applicable law.[85]

Congress has also exhibited a particular focus on antitrust reform in recent years, including a more robust merger approval standard and process. According to a report issued by the American Antitrust Institute in April 2020, nearly 60 antitrust-related bills have been introduced in Congress during the last few years, sending "a clear signal that voters are concerned about declining competition."[86]

Two reform proposals are getting the most attention, and they are being introduced from opposite ends of the political spectrum. The proposed Competition and Antitrust Law Enforcement Reform Act of 2021, which was introduced by Senators Klobuchar, Blumenthal, Booker, Markey, and Schatz in February 2021, seeks to change the very framework of antitrust regulation in America, and lowers thresholds of scrutiny placed on merger challenges.[87] In particular, the bill:

- prohibits mergers that "create an appreciable risk of materially lessening competition," with "materially" defined as "more than a de minimus amount." This replaces the current legal standard, which prohibits mergers that "substantially lessen competition;" and

---

84 For further discussion of President Biden's Executive Order Promoting Competition in the American Economy, see Jeffrey J. Amato & David A. Bujarski, *Biden Signs Sweeping Executive Order Aimed at Promoting Competition*, Winston & Strawn LLP Competition Corner, July 9, 2021, https://www.winston.com/en/competition-corner/biden-signs-sweeping-executive-order-aimed-at-promoting-competition.html; Susannah P. Torpey & Aldo A. Badini, *Time for Tech Companies to Prepare for Increased Antitrust Enforcement and Private Litigation*, Winston & Strawn LLP Competition Corner, July 15, 2021, https://www.winston.com/en/competition-corner/time-for-tech-companies-to-prepare-for-increased-antitrust-enforcement-and-private-litigation.html. *See also generally Competition EO Series*, Winston & Strawn LLP Competition Corner, https://www.winston.com/en/competition-corner/index.html#!/tids=1041923.

85 Fed. Trade Comm'n, *Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines* (July 9, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant.

86 *The State of Antitrust Enforcement and Competition Policy in the U.S.*, Am. Antitrust Inst., Apr. 14, 2020, at 35, https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL2.pdf.

87 Senator Klobuchar Press Release, *Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement* (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement.

- shifts the burden to the merging parties to show that the transaction does not "create an appreciable risk of materially lessening competition" in (i) transactions that significantly increase market concentration, (ii) transactions involving firms with 50% or greater market share or a significant amount of market power, (iii) acquisitions of a disruptive competitor, (iv) transactions that would allow the buyer to exercise market power, and (v) transactions above a certain value or market-capitalization threshold.[88]

On the other end of the political spectrum, Senator Hawley introduced two antitrust reform bills in April 2021: the Trust-Busting for the Twenty-First Century Act, designed to "crack down on mergers and acquisitions by mega-corporations" and make it easier to break up dominant firms through antitrust enforcement;[89] and the Bust Up Big Tech Act, which is meant to "break up Big Tech companies seeking to dominate multiple industries simultaneously."[90] Senator Hawley's proposed bills pack in a number of major changes in a short text. In particular, the bills:

- Empower the FTC to label companies as "dominant digital firms," and any acquisition exceeding $1 million by a dominant digital firm would be presumed "an unfair or deceptive act or practice," which the bill would make unlawful;
- Prohibit mergers and acquisitions by companies with a market capitalization exceeding $100 billion where "the effect of such acquisition . . . may be to lessen competition in any way;"
- Eliminate the need for market definition and market share analysis whenever a plaintiff can demonstrate "the existence of substantial market power or the anticompetitive or otherwise detrimental effects of particular practices" by a preponderance of the evidence, effectively eliminating the need to involve experts in such analyses;
- Replace the longstanding consumer welfare standard with one centered on the "protection of economic competition within the United States;"
- Mandate disgorgement of profits earned as a result of the anticompetitive conduct; and

---

88 For further discussion of the Competition and Antitrust Law Enforcement Reform Act of 2021, see Susannah P. Torpey, Ian L. Papendick, & Nasir Hussain, *Democratic-Led Congress and Biden Administration Gearing Up to Revamp Antitrust Law, Enforcement, and Merger Reviews/Challenges*, Winston & Strawn LLP Competition Corner, Feb. 8, 2021, https://www.winston.com/en/competition-corner/democratic-led-congress-and-biden-administration-gearing-up-to-revamp-antitrust-law-enforcement-and-merger-reviews-challenges.html.

89 Senator Hawley Press Release, *Senator Hawley Introduces the 'Trust-Busting for the Twenty-First Century Act': A Plan to Bust Up Anti-Competitive Big Businesses* (Apr. 12, 2021), https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big.

90 Senator Hawley Press Release, *Senator Hawley Introduces the Bust Up Big Tech Act* (Apr. 19, 2021), https://www.hawley.senate.gov/senator-hawley-introduces-bust-big-tech-act.

- Prohibit big tech companies from selling, advertising, or otherwise promoting their own goods and services on their own platforms.[91]

While Senator Hawley's proposal is accompanied by a political rhetoric of "woke mega-corporations" [92] that are comfortable being "coddled by Washington politicians,"[93] interestingly the result is very similar to what Senator Klobuchar proposes. Both proposed approaches to antitrust reform take aim at large tech companies that are making significant acquisitions both vertically and horizontally and are heavily contributing to the increasing consolidation in tech and other industries at the potential expense of American consumers and workers. The coalescing around similar results from opposite ends of the political spectrum suggests that there is bipartisan support for significant antitrust reform of at least big tech companies.

B. The Upside and Downside to Mergers and Divestiture

It is also important to consider that mergers can both help and hurt an industry, depending on the circumstances. Mergers can promote innovation and growth, improve efficiencies, and reduce costs to consumers. There are many real procompetitive effects of mergers. But in other circumstances, they can limit competition and drive competitors out of the market, which can lead to price increases that are not tied to costs but cannot be so easily controlled with less competitive players. In some circumstances, mergers deter innovation because there are fewer players in the market looking for ways to top each other – competition between evenly matched competitors is good, and when mergers take away that competitive atmosphere, the industry and consumers can suffer.

Debates over mergers are likely to continue playing out before Congress, in guidance provided by the enforcement agencies, and in the courts. As these debates continue, and without explicit guidance, there exist meaningful legal defenses and complications that make challenging these mergers all the more difficult. Recent tech merger challenges are a good example because they have shown the difficulties in even defining the relevant market. Vertical integration, or acquiring potential competitors in a similar or adjacent business before they develop a directly competitive product, makes defining a plausible relevant market complicated – what exactly is the market if the acquired companies were only *potential* competitors, and do the entities provide similar enough products and services to satisfy a reasonable interchangeability test? Added to that, particularly in the tech industry, products and services are ever-changing, and some exist in markets that did not exist just a few short years ago. What does seem clear is that the constant development and reinvention of what is considered a "market," what/who it serves, and how it generates revenue in a digital world will make challenging alleged anticompetitive mergers or conduct incredibly difficult.

---

91 For further discussion of Senator Hawley's proposed antitrust legislation, see Ian L. Papendick & Mulan Cui, *Senator Hawley's Antitrust Bills Take Aim at Mega-Corporations*, Winston & Strawn LLP Competition Corner, Apr. 23, 2021, https://www.winston.com/en/competition-corner/senator-hawleys-antitrust-bills-take-aim-at-mega-corporations.html.

92 Senator Hawley Press Release, *supra* note 90.

93 Senator Hawley Press Release, *supra* note 90.

It can also be said that divestitures can be both good and bad, again depending on the circumstances. Some will promote competition and eliminate the harm from a merger, or at least return competition to its pre-merger status quo. But divestitures are not always perfect. The oft-debated breakup of Ma Bell in 1984 is a prime example. Initially, the breakup of the local telephone services into seven different "Baby Bells" gave customers of what is now commonly known as AT&T access to more choices and kept prices low and competitive for long distance service.[94] It forced AT&T to get rid of long-held rules that its telephone service could not be accessed by phones manufactured by other companies, so consumers had to rent phones from AT&T. But there is a strong debate in the industry regarding whether the breakup set back innovation and delayed availability of high-speed internet service for a lot of consumers. The Baby Bells were natural monopolies in their geographic areas and slow to upgrade their phone lines, so high-speed internet was delayed. And by 2018, most of the Baby Bells had been reunited under the AT&T umbrella,[95] leading to the second major criticism – that it was ultimately an unnecessary divestiture that was somehow allowed to "rewind" the unwinding through a series of acquisitions over the next few decades.

Interestingly, there have been at least two recent examples of companies choosing voluntarily to divest portions of their telecom business, suggesting that mergers can have unforeseen consequences that the merging parties themselves want to eliminate. Take for example Verizon's announcement in Spring 2021 that it had agreed to sell Yahoo and AOL to a private equity firm, just a few short years after their acquisition (Yahoo in 2017, AOL in 2015).[96] Only two weeks after Verizon's announcement, AT&T announced that it would spin off WarnerMedia, which includes HBO and Warner Bros., to a new company, which would be combined with Discovery, Inc., less than three years after AT&T's acquisition of Time Warner Inc.[97] Both of these examples indicate that the merging of media companies with telecom giants is not a seamless or simple process, and sometimes companies do not have as many synergies or efficiencies as initially anticipated.

Taking all of this together – both mergers and divestitures can have both positive and negative effects for the relevant market and for consumers generally. There can be unforeseen consequences for the market, parties, competitors, and consumers, and a decision to merge or to unwind should be carefully considered.

---

94 *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (case filed by the DOJ that led to the consent decree that broke up AT&T into "Baby Bells").

95 Matthew Stuart, *How AT&T Conquered All Forms of Communication After the Government Forced it to Break Up*, Business Insider, Mar. 5, 2018, https://www.businessinsider.com/att-breakup-1982-directv-bell-system-2018-02. *See also* Jose Pagliery, *How AT&T Got Busted Up and Pieced Back Together*, CNN Business (May 20, 2014), https://money.cnn.com/2014/05/20/technology/att-merger-history/index.html ("When you look at the history of AT&T, you wonder why federal regulators ever bothered to break up the telecom giant.").

96 Verizon Wireless News Center, *Verizon Media to Be Acquired by Apollo Funds* (May 3, 2021), https://www.verizon.com/about/news/verizon-media-be-acquired-apollo-funds?AID=11365093&SID=100098X1555750X1e4caa54a09e47be30bdcf06028a031a&vendorid=CJM&PUBID=100017430&cjevent=844b340ace6111eb81c48b400a1c0e0d&CMP=afc_m_p_cj_na_ot_21_99_affiliate-100017430_11365093&cjdata=MXxOfDB8WXww.

97 AT&T Press Release, *AT&T's WarnerMedia and Discovery, Inc. Creating Standalone Company by Combining Operations to Form New Global Leader in Entertainment* (May 17, 2021), https://about.att.com/story/2021/warnermedia_discovery.html.

C. Advice for Competitors in a Changing Landscape

Consolidation has increased across many industries in the past two decades.[98] When combined with Congress's new desire for increased antitrust scrutiny and at least the *Jeld-Wen* court's approval of divestiture as an appropriate remedy in private merger challenges, it is likely that more legal challenges are forthcoming. While *Jeld-Wen* may not have moved the needle much, there may be a perception that it did, particularly if antitrust reform continues to be a focus in Congress. If Congress or the enforcement agencies are going to be more aggressive about antitrust reform and divestiture in the future, companies will need to take that into account when considering the potential risks related to acquisitions and post-transaction conduct, and private entities considering whether to support or challenge a merger will need to carefully consider the changing landscape and the impact it may have on the success of a potential merger challenge.

The facts of *Jeld-Wen* are a good vehicle for this discussion.

We start with the long-term supply contract. Jeld-Wen offered Steves the long-term supply contract to address Steves' concerns about the security of its supply post-transaction. Given the supply contract, when the DOJ reviewed the Jeld-Wen/CMI transaction, Steves chose not to complain to the DOJ about the combination. Companies in a similar situation – when their supplier is combining with a competitor and is offered a long-term supply contract by its supplier – should weigh the benefits of such a contract with the risks of what might happen at the end of that contract. At the same time, the customer should consider whether sharing its concerns with the government ultimately may lead to the transaction being challenged, and thus be better for the customer in the long run. Even without the quality and pricing issues, signing a "long-term" supply contract only guarantees access to the market for a finite amount of time, which would be considered "short term" in the span of the customer's business. And as we saw in *Jeld-Wen*, there is no guarantee that the supplier will not terminate at its first opportunity. Such a contract is a temporary fix, even if it seems long term. Steves then faced price and quality issues during the years the contract was still active, which further affected its business.

A company has options – on one end, it can offer explicit written support in the form of an affidavit or declaration, and on the other end it can publicly and explicitly object to a proposed merger. But there are a multitude of options in between, including a more obscure support or non-objection and a confidential complaint to the DOJ and FTC to voice potential harms to competition that the proposed merger presents. Due to the confidential nature of the enforcement agencies' evaluation of a proposed merger, it is not always clear how much weight support declarations are provided, but it should be understood that they are often provided with an expectation of future procompetitive behavior from the merged entity. Regardless, a company should weigh its options carefully and think about the short-term effects, long-term effects, and even longer-term effects. Short term, public objection may hurt a company's relationship with the merging parties, and it may not stop the merger from happening. But long term, support (or failure to object) could make a private merger challenge more difficult, absent facts

---

98 Kathryn C. McDonald & Nicholas Giorgi, *The Great Consolidation: Industry and Equity Market Concentration After the Crisis*, Merril Investments, July 2020, https://mlaem.fs.ml.com/content/dam/ML/Articles/pdf/ML_The_Great_Consolidation_3160566_v4.pdf.

like those presented in *Jeld-Wen*. And realistically, a company that counts on a long-term supply contract following a merger that threatened its business may have limited future prospects. The negative impact on competition in general (not just on a competitor) cannot necessarily be avoided without a broader approach. And a broader approach is more appropriate coming from the government agencies, which could more aggressively enforce the antitrust laws to ensure that competition is not harmed.

We then consider what a company should do if post-consummation, it suffers harm due to the merger or the merging parties' post-merger anticompetitive conduct. Like Steves, a company can approach the DOJ or FTC and ask that the agency reopen its investigation into the merger based on post-merger anticompetitive effects. But as with Steves, this will not always be successful. A company can likewise file a private merger challenge, which also comes with pros and cons. In litigation, the private plaintiff has full control over the litigation strategy and scope, whereas if it is a government challenge, a harmed competitor may have little to no control (or even information) of the government's strategy, which could be frustrating to a company suffering anticompetitive harm. But conversely, as we all know, litigation is expensive, and many merger challenges could be viewed as "bet the business" litigation, so there is a significant financial risk for the private plaintiff. Further, as exhibited by *Jeld-Wen*, the potential of future lost profits may not present an issue ripe for adjudication, and allegations of threatened injury or *actual* harm may be required. The appellate court in *Jeld-Wen* noted that the anticipated refusal to sell after a contract has terminated does not create a specific injury that is "fit for judicial decision," because the conduct that would cause future lost profits had not yet occurred.[99] So even if a private plaintiff succeeds on the merits, the actual harm it may be able to establish may not be sufficient to make the litigation risks worthwhile.

It is also important to consider whether the merger has been consummated, and if so, how long ago. This is, again, a way the *Jeld-Wen* decision appears to be an outlier. It is not at all typical for a merger to be challenged years after closing. Unwinding a transaction is much easier if it has not been consummated or if the consummation is recent, so the need to establish that truly no alternative remedy exists at law is harder and harder to prove the longer it has been. Nonetheless, *Jeld-Wen* suggests that private plaintiffs may keep the threat of divestiture on the table long after the merger is cemented and vast resources, time, and efforts have already been spent on making the deal go though.[100] This type of business risk is likely to have a deterrent effect on mergers that are even beneficial to markets and consumers. But the existence of one case should not be taken as a significant change in jurisprudence without legislative changes or follow-on cases out of different circuits that

99 *Jeld-Wen*, 988 F.3d at 725.

100 Note that while private merger challenges may be successful post-consummation, there are also examples of cases in which courts have denied divestiture under the laches doctrine because it would lead to stockholder harm. *See, e.g.*, *Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1171-72 (C.D. Cal. 2000) (holding that divestiture was barred by the doctrine of laches because plaintiffs had delayed in bringing suit and divestiture "can have far-reaching effects on persons who are not parties to the litigation"); *Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 277 (8th Cir. 2004) (holding that divestiture was barred by the doctrine of laches because "shareholders would be unduly prejudiced were this claim for equitable relief allowed to proceed"); *Ginsburg v. InBev NV/SA*, 623 F.3d 1229, 1235 (8th Cir. 2010) (holding that divestiture was barred by the doctrine of laches because it would result in "dramatic and certain" hardship and competitive disadvantage).

signal a shift in approach. Instead, private plaintiffs should continue to proceed cautiously and consider all possibilities of the decisions they make when presented with a proposed merger of competitors in their industry.

VI. CONCLUSION

The Fourth Circuit's *Jeld-Wen* decision is groundbreaking, because as the appellate court noted, divestiture had previously never been granted in a private plaintiff merger challenge. The facts presented were so specific and egregious, and the private challenge was a very stereotypical existential "bet the business" litigation, which makes the chances of *Jeld-Wen* moving the needle on its own somewhat unlikely. It sets a precedent upon which plaintiffs may now rely to seek divestiture in private litigation, to be sure, but the likelihood of success in future cases that rely on *Jeld-Wen* will turn on how severe the facts are; and if the facts are less egregious, it is likely that courts will conclude that less extreme remedies may be appropriate. So while the decision should not be minimized and could lead to future high-stakes and existential disputes that may warrant divestiture, it is unlikely to have a substantial impact on its own.

However, the decision coincides with a shifting focus on increasing industry concentration and an increasing tide of federal antitrust reform initiatives. If *Jeld-Wen* is coupled with real, meaningful change to the legislative groundwork for private merger challenges, it could signal the start of change.

One thing is clear – we appear to be in the nascent stages of antitrust reform, and there are many directions such reform may go. The protection of competition remains as important as ever; what is likely to change is the methods by which it is protected. Entities considering mergers and entities considering challenging mergers should think about the potential anticompetitive effects such mergers may have and weigh their options carefully. And as always, the advice of experienced antitrust counsel is a good place to start.