Door Maker Merger Case May Transform Behavioral Remedies

By **Lauren Weinstein and Lauren Dayton** (August 2, 2019)

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An unprecedented antitrust case is currently pending before the U.S. Court of Appeals for the Fourth Circuit. Steves and Sons Inc. v. Jeld-Wen Inc. is the first case in which a district court ordered a company to divest — i.e., sell off — one of its subsidiaries after a jury verdict finding that the acquisition violated the Clayton Act.

The district court's divestiture order was extraordinary and has received significant attention. But the district court also imposed several other just as notable "behavioral" or "conduct" remedies. Those remedies have largely flown under the radar — they are not even up on appeal. Unless the Fourth Circuit overturns the divestiture order or grants a new trial, the behavioral remedies will remain in effect, with profound implications for the functioning of the relevant market.

Like so many exceptional cases, this one concerns a relatively banal commodity — doorskins. A doorskin is an exterior shell that, when affixed to a frame, makes a "molded" door. Steves and Sons, the plaintiff, and Jeld-Wen, the defendant, both manufacture and sell molded doors. Unlike Steves, Jeld-Wen also manufactures doorskins. From 2001 to 2012, when the merger at issue in this case happened, there were only three doorskin manufacturers in the United States, including Jeld-Wen.

In 2012, after obtaining merger approval from the U.S. Department of Justice's Antitrust Division, Jeld-Wen acquired one of the other two doorskin manufacturers. In the years that followed, Jeld-Wen began raising the doorskin prices it charged Steves. And, unfortunately for Steves, the remaining doorskin supplier, which also sells its own molded doors, announced that it would no longer sell doorskins to competitors like Steves. Shortly after that announcement, Jeld-Wen told Steves that it was terminating its supply agreement, effective 2021. Without a supply of doorskins, Steves would go under.

Faced with losing its doorskin supplier, and, in turn, its business, Steves filed a federal antitrust suit against Jeld-Wen in the U.S. District Court for the Eastern District of Virginia, alleging that Jeld-Wen's acquisition of the other doorskin manufacturer violated the Clayton Act. The case went to trial, and the jury returned a verdict in favor of Steves.

The question of remedy, however, was left for the district court. Steves asked the court to order Jeld-Wen to divest the recently acquired doorskin manufacturing facility and requested additional behavioral remedies that it argued would help the divested entity become an effective competitor in the doorskin manufacturing market.

Some of the requested remedies — transferring certain of the acquired plant's tangible and intangible assets; guaranteeing that the divested entity could retain its employees; prohibiting Jeld-Wen from rehiring those employees for two years — were merely ancillary to the divestiture. But others were more notable:

- Requiring the divested entity to offer Steves an eight-year supply agreement;

- Allowing other molded door manufacturers to terminate their supply agreements with Jeld-Wen without penalty; and

- Prohibiting Jeld-Wen from buying doorskins from the divested entity after two years following the divestiture.

Before the remedies hearing, the DOJ's Antitrust Division submitted a statement of interest expressing no view on whether divestiture itself was appropriate in this case but explaining that the division generally "strongly prefers structural relief" (i.e., divestiture), to behavioral remedies. The DOJ also specifically objected to two of Steves's requested behavioral remedies: (1) the eight-year supply agreement and (2) the prohibition on Jeld-Wen's purchase of doorskins from the divested entity after two years. In the DOJ's view, those provisions could threaten the divested entity's viability and distort competition on price and quality in the doorskin market.

Despite the DOJ's urging not to impose behavioral remedies, the district court did so anyway. The court denied the request for an eight-year supply agreement, but it authorized certain door manufacturers to break their contracts with Jeld-Wen without penalty. Although the district court did not grant the request that Jeld-Wen be forbidden from buying doorskins from the divested entity after a two-year transition period, it required that, after two years following divestiture, the divested entity fulfill doorskin orders from independent door manufacturers like Steves before fulfilling orders from Jeld-Wen.

That the district court imposed behavioral remedies is not remarkable. But that it did so in a private suit, over the DOJ's objection, is extraordinary. Behavioral remedies aren't novel. In fact, they have been part of the DOJ's and Federal Trade Commission's arsenal against unfair competition for decades. While not new, they have come in and out of vogue over the years. And the current administration has expressed that it disfavors behavioral remedies because they distort the functioning of the free market.

In January 2018, during remarks about the Antitrust Division's policies during the first year of the Trump Administration, Principal Deputy Assistant Attorney General Andrew C. Finch affirmed the current DOJ's preference for structural remedies and against behavioral remedies. "[B]ehavioral conditions," he explained, "impos[e] ongoing government oversight on what should preferably be a free market."

A little over a year ago — and one month before the district court issued its opinion on remedies in this case — Assistant Attorney General Makam Delrahim announced that the DOJ was withdrawing the 2011 Antitrust Division Policy Guide to Merger Remedies. The 2004 policy guide, AAG Delrahim said, would be in effect going forward. The 2011 policy guide had endorsed behavioral remedies as a solution for anti-competitive mergers, particularly vertical mergers, like the one at issue in Steves. But the reinstated 2004 policy guide strongly disfavors behavioral remedies.

The district court's order in Steves and Sons takes the opposite position on behavioral remedies than the one the current administration has embraced. The DOJ counsels against behavioral remedies in order to prevent interference with the free market and allow competition to proceed uninterrupted. But the district court imposed behavioral remedies precisely to restore competition in what it (and the jury) concluded was a broken market.

That the district court would approve some of the proposed behavioral remedies was to be expected. Four of the remedies were necessary to effectuate the divestiture. But the other behavioral remedies that the district court granted represent significantly more court involvement in the post-divestiture market than the DOJ's current policy supports. And, if it survives on appeal, the order may have severe consequences for Jeld-Wen.

Permitting competitors to break their long-term supply contracts with Jeld-Wen, for example, is a significant intervention in the market. In fact, it is a direct modification to agreements that predate this lawsuit and that Jeld-Wen made with parties not before the court. Similarly, the requirement that the divested entity, beginning two years after divestiture, fulfill orders from independent door manufacturers such as Steves before fulfilling Jeld-Wen's orders also represents a substantial intervention in the day-to-day operations of the divested entity. It is impossible to know how those remedies will affect Jeld-Wen's ability to compete, the prices the divested entity can negotiate with molded-door manufacturers going forward, and the molded door and doorskin markets generally.

Steves and Sons broke ground as the first Clayton Act case brought by a private party to go to verdict and obtain a divestiture order. But it is also remarkable because Steves convinced a court to impose consequential behavioral remedies that the DOJ — before now, the only successful plaintiff in a Clayton Act divestiture suit — would not have sought and urged the district court not to impose. That precedent is antithetical to current DOJ policy. If the outcome on appeal emboldens courts to impose behavioral remedies in other suits between private parties, then we could see a new era of behavioral remedies despite the current administration's attempts to curb their use.

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