BRACEWELL

INSIGHTS

Latest Developments to Affect Antitrust M&A

October 30, 2018

*By: **Daniel E. Hemli** and **Jacqueline R. Java***

The past month has seen interesting developments in the antitrust M&A arena, including the first ever successful private antitrust merger challenge resulting in a divestiture order, and the announcement by the Department of Justice's Antitrust Division of several reforms aimed at expediting the merger review process. These developments have a number of practical implications for companies doing deals.

Steves and Sons v. JELD-WEN, Inc.

On October 5, 2018, a federal district court in Virginia ***ordered*** defendant JELD-WEN, Inc. to divest a manufacturing plant acquired six years earlier, following a jury verdict that JELD-WEN's 2012 acquisition of competitor Craftmaster International substantially lessened competition in the door coverings market in violation of Section 7 of the Clayton Act.

JELD-WEN is a vertically integrated manufacturer of interior molded doors that also makes doorskins that provide a decorative covering for the doors. The plaintiff in the case, Steves and Sons, also manufactures interior molded doors, but does not make doorskins. Steves, like other independent (non-vertically integrated) door manufacturers, must purchase doorskins from doorskin manufacturers. Craftmaster International was one of only two other suppliers of doorskins. JELD-WEN's acquisition of Craftmaster International thus reduced the number of doorskin suppliers from three to two. The acquisition was investigated and cleared by DOJ prior to the transaction closing in October 2012. It appears that DOJ's decision to clear the transaction was based, at least in part, on JELD-WEN having entered into long-term supply contracts with the independent door manufacturers, presumably assuaging concerns of future price increases or other anticompetitive conduct.

However, following the merger of JELD-WEN and Craftmaster, Steves found that JELD-WEN did not abide by the terms of their existing supply contract. Steves sued JELD-WEN in 2016, alleging both antitrust and breach of contract claims. Despite the fact that DOJ had already cleared the acquisition, the Court allowed the private lawsuit to proceed to trial. A jury ultimately found that the merger lessened competition in the doorskin market, which allowed JELD-WEN to breach its supply contract with Steves and injure Steves' business. The jury awarded antitrust damages of approx. $58.6 million, which amount was trebled by statute to over $175 million. Despite this favorable verdict, Steves filed a motion for equitable relief, seeking (in lieu of damages for future lost profits) a court order that JELD-WEN be forced to divest its Towanda doorskin plant to a third party to restore competition in the doorskin market and to help ensure future supply of doorskins to Steves and other independent door manufacturers.

In considering the plaintiff's request for divestiture of the Towanda facility, the Court found, on the evidence, that Steves likely would go out of business when its long-term supply agreement with JELD-WEN ends in 2021, because Steves would no longer be able to source doorskins for its door manufacturing business (the third doorskin supplier, Masonite Corporation, no longer sold doorskins to independent door manufacturers). The Court also found that, while JELD-WEN would suffer various hardships if it had to sell Towanda, many of those hardships could be mitigated (for example, by imposing terms on the divestiture to assure JELD-WEN a reliable source of doorskin supply for a certain period of time). The Court determined that, if divested, Towanda would be able to operate as an effective and profitable competitor in the doorskin market. Ultimately, while the Court acknowledged that "[d]ivestiture is stiff medicine," it concluded that this was the most effective and perhaps the only way to restore the lost competition resulting from the merger at issue, and therefore would serve the public interest.

This case was the first successful merger challenge by a private party under the Clayton Act resulting in a divestiture order. This is noteworthy because, historically, most challenges to potentially anticompetitive mergers have been brought by government antitrust authorities, so the threat of a successful private challenge was mostly theoretical. Although this decision is likely to be appealed, it may embolden aggrieved customers or competitors to bring more private antitrust challenges to M&A transactions, and thus could reduce the degree of comfort that government clearance provides to merging parties. This case also serves as a reminder that transactions can be challenged on antitrust grounds even after closing, so merged firms should be mindful about their post-closing conduct and think carefully before taking actions that could unduly provoke customers or other third parties.

DOJ Merger Process Reforms

Meanwhile on the government side, in a September 25 ***speech***, Makan Delrahim, the head of DOJ's Antitrust Division, announced a series of changes to modernize the merger review process at DOJ. Acknowledging that significant merger reviews are taking too long to complete (in many cases close to a year) and that this creates uncertainty and wastes public and private resources, Delrahim stated that the overall goal of the proposed reforms is to resolve most merger investigations within six months from initial notification of the transaction.

To achieve this goal, Delrahim outlined the following reforms:

- The Antitrust Division Front Office will be open to an initial, introductory meeting with transaction parties. In the past, the Front Office would usually only meet with the parties near the end of the merger review after the investigating staff had made their recommendation.

- DOJ will publish online a model voluntary request letter describing certain types of key information it will typically request during the initial Hart-Scott-Rodino (HSR) waiting period. This is intended to give parties a head start so they can be proactive and submit relevant information as early as possible in the process.

- DOJ will also publish a model timing agreement to reduce the burden on parties of complying with a Second Request and to provide for quicker decision-making. Specifically, the model timing agreement will seek documents from fewer custodians than in the past (up to 20 per party), impose fewer depositions (no more than 12), and require DOJ to make a decision within 60 days from the time the parties certify compliance, although all of those provisions can be modified by senior DOJ officials (by contrast, the Federal Trade Commission's model timing agreement allows 60-90 days for the FTC to reach a final decision).

- DOJ has implemented a system to track what happens when parties pull-and-refile their HSR notifications to give the agency more time for its review. The new system is designed to ensure that DOJ has an investigative plan in place to maximize use of the additional time to try and avoid or narrow a Second Request.

Delrahim stressed in his speech that DOJ is not "unilaterally disarming," and that the quid pro quo for these changes is greater cooperation from merging parties, including an expectation that they will produce documents and data earlier in the review period, as well as more time for DOJ to conduct post-complaint discovery for transactions that result in contested litigation.

Delrahim also announced the withdrawal of DOJ's 2011 Policy Guide to Merger Remedies and stated that the previous 2004 guide will be in effect until DOJ releases an updated merger remedies policy. The 2011 merger remedies guide was more permissive than the 2004 version of so-called "behavioral" or "conduct" remedies to resolve merger concerns, so this is yet another clear signal from Delrahim of his dislike of behavioral conditions and his strong preference for structural remedies, such as asset divestitures.

It remains to be seen how effective these reforms will be at speeding up merger reviews. Similar efforts by past administrations have had modest success at best. Nevertheless, this is a welcome initiative, especially given the significant financial costs and other burdens that lengthy merger investigations impose on companies.