

## *Jeld-Wen*: Opening the Door to Private Merger Challenges?

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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." Nonetheless, *Jeld-Wen* provides precedent upon which future private plaintiffs can rely to seek divestiture in private litigation.

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