An ALM Publication

THE AMERICAN LAWYER

THE AM LAW LITIGATION DAILY

Litigators of the Week: Opening a New Door in Private Antitrust Enforcement

No private merger challenge has gone before a jury—until now. And no judge in such a private action has ordered a divestiture as a remedy to restore competition—until now.

By Jenna Greene
October 12, 2018

Lit Daily: Who is your client – and what the heck are doorskins?

Lewis F. Powell III: Our client was founded by Edward Steves, who opened a lumberyard in San Antonio in 1866. Today, Edward Steves IV and his brother Sam run Steves & Sons. Steves makes doors–the kind of doors that most of us have in our homes.

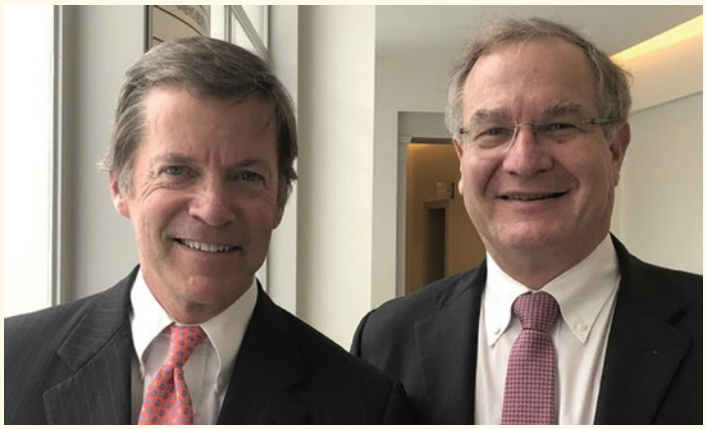
The front and back panels of these doors are called doorskins. Americans mainly buy 20 different styles of interior residential doors. All of these doors are the same, except for the parts that you can see–the doorskins. You cannot make these doors without doorskins.

What were the events that gave rise to the dispute?

Glenn D. Pomerantz: There are two dominant players in the U.S. interior residential doors market – JELD-WEN ("JW") and Masonite. Each has approximately 40 percent of the market. Steves and other small door manufacturers comprise the remaining share of the market.

Steves and the other smaller door manufacturers don't make doorskins. In the U.S., only JW and Masonite make doorskins—and only JW supplies significant volumes of doorskins to Steves and the other smaller manufacturers.

This wasn't always the case. Before 2012, three companies–JW, Masonite and CraftMaster ("CMI")–all competed vigorously to sell doorskins to Steves and the other small door manufacturers. During this period, Steves had choices, and it bought doorskins from all three suppliers and negotiated with all three. In 2011, for example, Steves decided it wanted a long-term supply agreement with a single supplier, so it commenced negotiations with all three suppliers. In the spring of 2012, it signed an eight-year contract with JW.



Powell (left) and Pomerantz (right)

In October 2012, JW acquired CMI, which left Steves and other door manufacturers with only two remaining suppliers, JW and Masonite. And just 18 months later, Masonite made it clear that it would no longer sell to Steves and the other small door manufacturers.

JW then followed Masonite's lead. It sent a notice to Steves in September 2014 stating that it was going to terminate its doorskin supply agreement with Steves on the earliest date permitted by the agreement, which was September 2021. Without doorskins from Masonite or JW, Edward and Sam Steves faced a stark reality: They could not make doors without doorskins, which meant their family's 150-year-old business would have to shut down in 2021 or earlier unless they did something about it.

Powell: We were retained in July 2015. At first, I focused on the contract dispute. But Steves' very able San Antonio counsel, Marvin Pipkin, thought there was something more than a contract breach going on—there was a fundamental problem with competition when a big company like JW could put the squeeze on Steves, with which JW was competing in the doors market.

Marvin was correct. My colleague, Jack Martin, an antitrust expert, quickly appreciated that there may be a violation of Section 7 of the Clayton Act, because JW's merger with CMI appeared to have caused a substantial lessening of competition.

Did the Department of Justice or Federal Trade Commission review JW's acquisition of CMI? If so, was there a second request or any conditions placed on the deal?

Pomerantz: Yes. Although the proposed acquisition was below the HSR threshold, in the summer of 2012, JW advised the DOJ of its intention to acquire CMI. The DOJ looked at the proposed transaction, but did not seek to block it.

Of course, the DOJ's decision not to take an enforcement action does not mean the DOJ "approved" the deal. In fact, the DOJ wrote a letter to both parties shortly before trial expressly stating that no inference should be drawn from the fact that the DOJ did not bring an action challenging the merger.

The feds on occasion have sued to undo consummated transactions that weren't subject to premerger notification. Did your client try to get them to take action here?

Powell: Yes. We approached the DOJ in the fall of 2015 and asked it to have another look. The DOJ opened a file, but in May 2016 closed the investigation without pursuing an enforcement action. We filed suit the next month. The centerpiece of our complaint was the allegation that JW's merger with CMI in 2012 violated Section 7 of the Clayton Act. We also sued for breach of the doorskin supply agreement.

Soon after we filed the lawsuit, I contacted Glenn Pomerantz. I had never tried an antitrust case. In fact, I didn't even take antitrust in law school.

Pomerantz: When Lewis called me and summarized the suit that he had just filed, I realized that Edward and Sam Steves faced a real challenge: They could only keep their company in business if they convinced a jury that the merger was illegal and then convinced the judge to order JW to divest the doorskin plant it had acquired four years earlier. I was not aware of any private party that had ever achieved this kind of result.

Powell: I well remember that first conversation with Glenn. And I remember responding to Glenn that this challenge was precisely why I wanted him to join the fight and take the lead in prosecuting our Section 7 claim. I'm thankful he said yes.

Merger fights are normally the provenance of federal antitrust authorities. What were some of the biggest challenges in litigating the case as a private plaintiff?

Pomerantz: There were two primary challenges–time and Latham & Watkins. Steves needed resolution as quickly as possible. Steves filed in the Eastern District of Virginia because it has a reputation for moving cases along. That meant that we often had to do things within weeks or months that often take years. And then there was Latham. JW defended the case aggressively, and they picked a first-class team to do just that.

How closely did you two work together, and what were your respective roles? Who were the other members of your team?

Powell: We worked together seamlessly. We essentially formed a single team, with the two of us (along with Marvin Pipkin) setting the overall strategy. Glenn and his colleagues at Munger, Tolles & Olson worked up the antitrust side of the case, and the Hunton group focused on the contract issues. But we cross-pollinated as necessary to respond to what quickly became a very dynamic and fast-paced discovery and pretrial process.

The key Munger lawyers were Ted Dane, Kyle Mach, Emily Curran-Huberty, Kuruvilla Olasa, and Josh Patashnik. The key Hunton lawyers were Maya Eckstein, Jack Martin, Meghan Podolny, Josh Hanbury, and Allie Taylor.

What was the over-arching narrative or theme in your case?

Pomerantz: Our theme was captured by a single word:

choice. Consumers benefit when they have choices. That helped the jurors see why this merger hurt Steves: Steves (and, not unimportantly, the other smaller door makers) were deprived of the choice to buy doorskins from any firm other than JW, and then lost that choice as well. The jurors could identify with the loss of choice: What if they only had one (or no) grocery stores to choose from, or restaurants, or gas stations?

Tell us about the jury trial and the result. What do you think were some of the keys to your success?

Powell: The trial lasted nearly three weeks. The jury deliberated less than three hours before returning a unanimous verdict in our favor, on every issue, awarding Steves $12 million in past antitrust damages and $46.6 million in future lost profits, which was every penny of the damages we were seeking, and all of which will be trebled automatically. Steves also is entitled to recover its attorneys' fees.

It helped that we had a compelling story—a very old, family-owned and operated company, threatened with extinction by a publicly traded behemoth bent on dominating the doorskins and doors market, and deploying its illicitly gained market power to do so.

But to win over the jury, we knew that we needed to go beyond a compelling story and present compelling evidence. We presented the jury with clear evidence from JW's own documents and witnesses that not only showed how its acquisition of CMI gave it market power, but also showed how JW devised a plan to use that market power to drive Steves and other small door manufacturers out of the market.

We also offered the jury compelling economic testimony from Professor Carl Shapiro, a well-regarded expert in the world of antitrust economics. And we let the jury get to know Edward and Sam Steves—two gentlemen who care deeply about their family and who want nothing more than an opportunity to compete fairly.

Beyond the monetary award, there was still the question of restoring competition. Why did you argue a divestiture was necessary?

Powell: For the simple reason that only divestiture can restore competition in the doorskins market to its pre-merger condition. From the beginning, divestiture has been our lodestar. If divestiture can be accomplished, Steves will forego its future lost profits award (nearly $140 million after trebling). Edward and Sam Steves never saw this case as just about money; they wanted their family's business to survive and succeed for generations to come.

On Oct. 5, Senior U.S. District Judge Robert Payne in Richmond, Virginia, issued a 149-page decision compelling JW to sell its plant. To what extent is the remedy unprecedented? What, to you, are some of the highlights or most important passages?

Pomerantz: Divestiture has long been available to remedy an anti-competitive merger, regardless of whether the challenge is brought by the government or a private party. To be sure, this appears to be the first time it has been ordered in a private party challenge, but as Judge Payne noted, our case had the right facts and the jury found the merger to have been illegal.

There isn't a single passage in Judge Payne's opinion that is most important. What is most important is Judge Payne's remarkably detailed discussion showing that when a private party has the facts and law on its side, it can successfully challenge an anticompetitive merger and obtain divestiture as a remedy.

What impact do you think this case might have on antitrust law? Do you think we're likely to see a fight like this again anytime soon?

Pomerantz: Time will tell. We certainly expect that the government will remain a guardian of competition. But this case fulfills the basic promise of the Clayton Act—private plaintiffs as well as the government have the right to challenge unlawful mergers, and under the right circumstances, both private parties and the government have the right to obtain divestiture as a remedy.