COMMENT

PRIVATE MERGER CHALLENGES UNDER SECTION 16 OF THE CLAYTON ACT: CAUTION POST-*JELD-WEN*

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INTRODUCTION

Private merger enforcement is a thorny corner of antitrust law. Private merger challenges pose considerable potential financial downside for industry because in many cases, the motivations of private plaintiffs in initiating a challenge do not align with the purposes of antitrust law. These actions are risky for plaintiffs as well because they are difficult to win. Plaintiff successes have been so uncommon that in a Fourth Circuit case decided in February of 2021, the court stated, "private suits seeking divestiture are rare and, to our knowledge, no court had ever ordered divestiture in a private suit before this case."[1] While claims brought under section 16 of the Clayton Antitrust Act of 1914 (Clayton Act)[2] have been historically underdiscussed, the Fourth Circuit's grant of divestiture to a private plaintiff in early 2021 affords us an opportunity to evaluate this oft overlooked corner of antitrust law. Should private plaintiffs be able to mold the shape of industries to such a degree?

The remedies for private merger challenges lie in section 4 of the Clayton Act for monetary damages[3] and section 16 of the Clayton Act for injunctive relief.[4] These remedies are clearly authorized by statute.[5] Under section 16, a private plaintiff may seek relief in equity for a violation of the antitrust laws "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 . . . ."[6] There are two section 16 cases of note: one idiosyncratic Supreme Court case from 1990, in which the Court established that private plaintiffs may seek any kind of equitable relief granted by courts in equity without limitations,[7] and a recent Fourth Circuit case, quoted above, which granted divestiture to a private plaintiff.[8]

The Fourth Circuit case, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, decided in February of 2021, is the only known successful private post-merger enforcement case under section 16 of the Clayton Act. Because of this, one can understand the court's characterization that the "case [was] a poster child

1 Steves & Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690, 703 (4th Cir. 2021).

2 Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27 (1914).

3 Clayton Act § 4, 15 U.S.C. § 15.

4 Clayton Act § 16, 15 U.S.C. § 26 ("Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . .").

5 California v. Am. Stores Co., 495 U.S. 271, 281 (1990) ("[T]he statutory language indicates Congress' intention that traditional principles of equity govern the grant of injunctive relief.").

6 Clayton Act § 16, 15 U.S.C. § 26.

7 *Am. Stores*, 495 U.S. at 295 ("In a Government case the proof of the violation of law may establish sufficient public injury to warrant relief.").

8 Steves & Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690, 724 (4th Cir. 2021) ("[T]he district court acted within its discretion by ordering divestiture.").

for divestiture."[9] But there is reason to doubt the propriety of this remedy under other factual circumstances. While it is clearly authorized by the statute, it is worth our time to question in what situations courts ought to grant equitable relief to private litigants. This Comment focuses on plaintiffs seeking relief under section 16 of the Clayton Act, as damages actions under section 4 of the Clayton Act have their own distinct set of concerns and considerations too numerous to explore under this one roof.

In Part I, I provide a brief overview of the relevant antitrust laws—in particular, the Clayton Act and the Celler-Kefauver Amendments.

In Part II, I explore the standing requirements for private litigants under section 16 of the Clayton Act in merger challenges. I then provide a summary of the Supreme Court's opinion in *California v. American Stores Co.*,[10] in which the Court confirmed that states and other private plaintiffs can seek divestiture and the full range of equitable remedies under section 16 of the Clayton Act. Lastly, I undergo a substantive analysis of the 2021 Fourth Circuit *JELD-WEN* case.

In Part III, I explore the implications of granting equitable remedies under section 16 to private litigants in merger challenges. I acknowledge that private merger enforcement is part of the overall antitrust enforcement schema designed by Congress, and that the importance of private plaintiffs in the overall system has been echoed by the Supreme Court. I then detail counterbalancing concerns unique to private merger enforcement under section 16 of the Clayton Act. Ultimately, I argue that despite the *JELD-WEN* ruling, courts should continue to review these suits with a critical eye. When evaluating private merger challenges, courts ought to consistently apply the antitrust injury doctrine, give preference to consumer plaintiffs over competitor plaintiffs, and be wary of unrecoverable waste resulting from divestiture in post-merger consummation challenges.

I. BACKGROUND ON MERGER LAW AND PRIVATE CHALLENGES

"The dominant view of antitrust policy in the United States is that it should promote some version of economic welfare."[11] This generally means that antitrust policy seeks to make markets as competitive as they can reasonably be while ensuring that "firms do not face unreasonable roadblocks

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9 *Id.* at 724.

10 495 U.S. 271 (1990).

11 Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2471 (2013); *see also id.* ("Antitrust would also not prefer a world of dominant firms unless dominance was essential to maintaining technological progress or cost reduction, but the prevailing literature suggests that this is not the case: greater structural competitiveness is typically conducive to greater innovation as well.").

to attaining productive efficiency."[12] Antitrust in the United States is simultaneously imbued with the idea that the market can generally attain these results, and thus intervention is appropriate only where there is a strong reason to believe that antitrust enforcement will make the market more competitive and efficient.[13] In Section I.A, I discuss the relevant antitrust law, case law, and the DOJ-FTC Merger guidelines concurrently. This context is necessary for my later critique of some aspects of private merger enforcement.

A. *The Clayton Act and the DOJ-FTC Merger Guidelines*

Merger activity increased dramatically at the turn of the twentieth century in the United States.[14] This wave of mergers, in conjunction with the development of the rule of reason in 1911,[15] led many to fear that the weakened Sherman Act was no match for strengthening and consolidating American firms. In response to these concerns, Congress passed the Clayton Act in 1914, which "explicitly condemned anticompetitive price discrimination, tying and exclusive dealing, expanded private enforcement . . . and condemned mergers on a far more aggressive standard than the Sherman Act had done."[16]

Congress amended the Clayton Act in 1950 through the Celler-Kefauver Amendments,[17] which extended the reach of the Clayton Act to condemn anticompetitive vertical as well as horizontal mergers, and asset acquisitions. The amendments reflected a general anxiety at the time about massive firms squeezing out small family businesses and poor Congressional regard for the efficiencies associated with many mergers.[18]

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12 *Id.*

13 *Id.*

14 HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 2.1a (6th ed. 2020) [hereinafter HOVENKAMP, FEDERAL ANTITRUST POLICY] (noting that the "largest wave of mergers" in U.S. history occurred between 1895-1905). Many believe this was due in large part to the relaxed prohibitions laid out in the Sherman Act: acting in concert was condemned, but all sorts of acquisitions seemed to be beyond the reach of the Act. *Id.*

15 Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 61-62 (1911) ("[T]he criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason . . . ."); United States v. Am. Tobacco Co., 221 U.S. 106, 181 (1911) (mentioning the importance of using the rule of reason to "give effect to the remedial purposes" contemplated by a law).

16 HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 2.1.

17 Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. § 18).

18 HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, §2.1 ("The legislative history of the Federal Trade Commission Act and Clayton Act of 1914 is somewhat more concerned with the protection of small businesses from the unfair or 'exclusionary' practices of bigger firms.").

Today, mergers are almost[19] always analyzed under section 7 of the Clayton Act.[20] Section 7 condemns any merger if its effect "may be substantially to lessen competition, or to tend to create a monopoly."[21] This type of merger produces two notable results: first, after the merger there will be one less competitor in the relevant market and a corresponding increase in market concentration; second, the post-merger firm will have a larger market share than either firm held before the merger.[22] Courts have focused on two primary dangers as a result of mergers:[23] increased incidence of express or tacit collusion,[24] and "unilateral effects," or the combination of two firms who hold a similar space in the relevant market, allowing for price increases by the post-merger firm due to enhanced control over their corner of the market.[25]

The DOJ and FTC jointly administer merger guidelines to alert industries to the standards by which potential mergers will be judged. The guidelines are not legally binding—and the Supreme Court has never decided a case in reference to them—but the courts have generally deferred to the agencies.[26] The newest iteration of the horizontal merger guidelines came out in 2010, and "[t]he unifying theme of the[] Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate

19 There is one notable and recent exception to this norm. In the FTC's complaint filed against Facebook early in 2021, Facebook's acquisition of WhatsApp and Instagram is being challenged as "monopoly maintenance through anticompetitive acquisitions" and other acts in violation of section 2 of the Sherman Act. First Amended Complaint for Injunctive Relief and Other Equitable Relief at 76-78, FTC v. Facebook, Inc., No. 1:20-cv-03590-JEB (D.D.C. Aug. 19, 2021), https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf [https://perma.cc/R7QA-8396].

20 HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, at § 12.1 (noting § 7's applicability to the acquisition of both stock and assets by "all persons," regardless of the status of incorporation.)

21 Clayton Act §7, 15 U.S.C. § 18.

22 The relevant market is central to the § 7 analysis.

> 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.

HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 3.1d.

23 I use the term "merger" to encompass stock acquisitions, asset acquisitions and consolidation.

24 HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 12.4 ("[O]ne principal concern of merger policy is that horizontal mergers may facilitate market wide express or tacit collusion.").

25 *See* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 392 (1956) ("Price and competition are so intimately entwined that any discussion of theory must treat them as one. It is inconceivable that price could be controlled without power over competition or vice versa.").

26 *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 12.1 ("[O]ver the years the courts have paid close attention to the Guidelines, generally giving the government the benefit of the doubt.").

its exercise."[27] The Agencies focus on decreased output and increased prices as a result of a merger, and do not focus on other anticompetitive behaviors like refusals to deal or exclusionary practices.[28] The Agencies look to several types of evidence of adverse competitive effects: "actual effects observed in consummated mergers," direct comparisons based on past mergers, market share and market concentration in the relevant market, "substantial head-to-head competition," and the disruptiveness of the merging party.[29]

In coordinated effects cases, the Agencies almost always look to the concentration of the market as an indicium of likely anticompetitive effects,[30] and they usually calculate the Herfindahl-Hirschman Index ("HHI") of market concentration. "The HHI is calculated by summing the squares of the individual firms' market shares, and thus gives proportionately greater weight to the larger market shares."[31] Generally, the Agencies consider HHI below 1500 to be an unconcentrated market, HHI between 1500 and 2500 to be a moderately concentrated market, and HHI above 2500 to be highly concentrated.[32] The Agencies then look to the hypothetical state of the market post-merger and the increase in the HHI as evidence of the anticompetitive impacts of the merger.[33]

The courts have largely agreed with this framework[34] and the underlying rationale.[35] Scholars generally believe that there is a likely positive correlation

27 U.S. DEP'T OF JUST. & FTC, *supra* note 27, § 1 (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/EK86-BGVV]. The DOJ-FTC also issue joint vertical merger guidelines and remedies guidelines.

28 There might be change on the horizon in this area. By President Biden's Executive Order on Competition, the Agencies have been instructed to reconsider the merger guidelines and update them. The Order states that, in aiming "[t]o address the consolidation of industry in many markets across the economy, as described in section 1 of this order, the Attorney General and the Chair of the FTC are encouraged to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines." Executive Order on Promoting Competition in the American Economy, Exec. Order No. 14,036 Section 5(c), 86 Fed. Reg. 36,987 (July 9, 2021), https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy [https://perma.cc/SUQ6-B3RF]. Right now, the merger guidelines only focus on unilateral effects cases and coordinated effects cases. These merger guidelines ought to be updated to increase focus on exclusionary practices, as even the *JELD-WEN* case discussed *infra* in Parts II & III demonstrates that one of the most salient harms that can come from an anticompetitive merger is exclusion from the market.

29 U.S. DEP'T OF JUST. & FTC, *supra* note 27, §2.1 (2010).

30 *Id.* § 5 ("The Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects."). In unilateral effects cases, market share is relevant to the merger analysis, but not quite so central.

31 *Id.* § 5.3 (footnotes omitted).

32 *Id.*

33 *Id.* §§ 6–13.

34 *See, e.g.*, *supra* note 25 and accompanying text.

35 This rationale is well illustrated by the language of section 10 of the 2010 Horizontal Merger Guidelines. U.S. DEP'T OF JUST. & FTC, *supra* note 27, § 10 ("[M]erger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets.").

between the concentration of a market and the likelihood of collusive activity or unilateral effects.[36] But there are certainly situations in which markets function effectively despite being concentrated, and having another larger player among a dominant few may even *increase* competition.[37] Nevertheless, in *United States v. Philadelphia National Bank*, the Supreme Court endorsed the use of concentration indexes and other data about firm size to find a merger illegal.[38] The Court held a merger which results in one firm controlling a significant share of the relevant market "and results in a significant increase in the concentration of firms in that market . . . is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[39]

Mergers, however, have benefits for the market. Mergers produce efficiencies. For example, larger plants or multi-plant enterprises can be run more efficiently, and mergers can create economies of distribution.[40] Post-merger efficiencies have been viewed differently at different times throughout history.[41] Today, mergers are no longer condemned merely because they make it more difficult for less efficient, smaller firms to compete. Rather, the efficiencies of mergers are seen as a benefit to the relevant industry.[42] Efficiencies are considered in merger challenges only after a merger has been deemed presumptively anticompetitive, and ideally "defendants must show that efficiencies created by the merger are sufficiently large to keep post-

36 *See, e.g.*, HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 12.1a ("Most strategies for earning monopoly profits require either a dominant firm or relatively high concentration as a prerequisite. Many of the strategies work much better as concentration levels go up.").

37 For example, in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, a merger introduced competition in a market by reviving failing businesses in an area that otherwise would have had just a few dominant competitors. 429 U.S. 477 (1977).

38 374 U.S. 321, 364-65 (1963) (finding that a commercial bank's 30% market share presented a threat to competition).

39 *Id.* at 363.

40 HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 12.1b ("Most mergers . . . can increase the efficiency of firms by enabling them to attain efficient levels of manufacturing, research & development, or distribution more rapidly than the firms could accomplish by internal growth.").

41 During the Warren Era, the Supreme Court adopted the policy that efficiencies created via merger were bad because they made it more difficult for less-efficient firms to compete. But in the decades since, there has been a shift in policy because the Court was never truly effective in protecting these small firms, and valuing small businesses over national chains is not always aligned with the promotion of competition, which is the true goal of antitrust law. *Id.* § 12.2a.

42 Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 704 (2017) ("If mergers of competitors never produced efficiency gains but simply reduced the number of competitors, a strong presumption against them would be warranted. But we tolerate most mergers because of a background, highly generalized belief that most—or at least many—do produce cost savings or improvements in products, services, or distribution.").

merger prices at or below pre-merger levels."[43] Per the DOJ-FTC Guidelines there exists a limited efficiencies defense, and the Agencies will consider the advantages of a merger if it seems the benefit of those efficiencies will be passed on to consumers.[44] And the benefits must be merger specific, meaning that the efficiency might only come about by way of the merger.[45]

B. *Private Right of Action Generally*

Private merger enforcement is clearly authorized by statute.[46] For any violation of the antitrust laws, plaintiffs may seek treble damages under section 4 of the Clayton Act or relief in equity under section 16 of the Clayton Act. Actions for damages are subject to a four-year statute of limitations, and relief in equity is limited by laches as an affirmative defense. For the remainder of this piece, I will focus specifically on private merger challenges seeking equitable relief under section 16 of the Clayton Act.[47]

II. PRIVATE MERGER CHALLENGES UNDER SECTION 16

For a plaintiff to succeed in a private merger challenge, she must meet multiple standing requirements. But once a plaintiff has cleared those hurdles, *California v. American Stores* established that the full panoply of equitable remedies are available to private plaintiffs under section 16.[48] In the 2021 *JELD-WEN* case, the Fourth Circuit upheld the only ruling in which divestiture has been awarded to a private plaintiff under section 16.[49] Below, I discuss the facts of the *JELD-WEN* case to provide context for my Part III discussion, in which I argue that the unique facts of JELD-WEN are the only explanation for the court granting such a drastic remedy to a private litigant, and courts seeking to interpret the ruling ought to limit it to its facts.

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43 HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 12.2b2.

44 U.S. DEP'T OF JUST. & FTC, *supra* note 27, § 10 ("[T]he Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market . . . .").

45 *Id.* (disclaiming asserted efficiency claims that are vague).

46 Private antitrust suits are quite common. In 2020 there were 598 private plaintiff suits and 28 government plaintiff suits. *See* ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2020 tbl.C-2 (2020), https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2020/03/31 [https://perma.cc/B9Z5-G5V9].

47 *See* HERBERT HOVENKAMP & PHILLIP AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 326a (4th ed. 2019) [hereinafter HOVENKAMP & AREEDA, ANTITRUST LAW] ("[I]njunction covers only future violations, for which damages are of course not recoverable. As a result, one receives damages for the consequences of previous violations and an injunction for threatened future violations, which are never recompensed by the damages award to the extent that the latter covers only the past.").

48 495 U.S. 271, 275 (1990).

49 *See supra* notes 8–9.

A. *Elements of Private Merger Challenges Under Section 16*

For a plaintiff to succeed in a private merger challenge, she must show (1) an injury (or prospective injury); (2) that said injury was caused by a violation of the laws of antitrust; and (3) that the injury is actually an "antitrust injury" as described below.[50]

Injury and causation in private antitrust enforcement are consistent with the requirements of Article III of the Constitution.[51] Proving an injury in fact is the logical starting point: the plaintiff must have suffered (or will suffer) harm.[52] Causation is equally important, and plaintiffs must show a direct link between their injury and the actions of the defendant(s).[53] Where there are multiple causes for a plaintiff's injury, courts will properly adjust the attributable damages based off of the plaintiff's alleged separation of causes.[54] For challenges of prospective mergers or other action in equity seeking injunctive relief, the injury requirement as articulated in the statute as "threatened loss or damage."[55]

The third requirement for private plaintiffs to seek relief is the "antitrust injury" doctrine established in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*.[56] The plaintiff in the case was a local bowling alley owner, and the defendant was a large, national bowling alley chain that bought up a few failing local bowling alleys, ultimately turning them into viable businesses.[57] The plaintiff brought a private suit under section 7 of the Clayton Act challenging a few of the purchases, arguing that had the national chain not intervened, those alleys would have inevitably gone out of business and not hung around to compete

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50 HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 16.3c.

51 *See, e.g.*, Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 140 F.3d 1228, 1232 (9th Cir. 1998) (emphasis in original):

> As a threshold matter, the court must determine whether the plaintiff has met the requirements for standing under Article III—that is, whether the plaintiff "has suffered an injury which bears a causal connection to the alleged antitrust violation." If the plaintiff meets the requirements for standing under Article III, the court must then determine whether the plaintiff also meets "the more demanding standard for *antitrust* standing."

(quoting Amarel v. Connell, 102 F.3d 1494, 1507 (9th Cir. 1996), as amended (Jan. 15, 1997)).

52 HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 16.3c ("A private antitrust plaintiff must establish . . . . that it suffered an injury . . . .").

53 *Id.* § 16.4b (noting that one of the most prominent tests for determining plaintiff standing in antitrust cases is the direct injury test, which determines whether the causal connection between the suffered injury and the defendant's violation was direct or indirect).

54 *Id.* § 16.3c ("Further, the plaintiff seeking damages will eventually have to separate out those damages caused by the antitrust violation from those caused by other factors.")

55 Clayton Act § 16, 15 U.S.C. § 26.

56 429 U.S. 477, 489 (1977). "Antitrust injury" is a requirement distinct from regular injury.

57 *Id.* at 479-81.

with the plaintiff's businesses.[58] The Supreme Court found for the defendants and, in doing so, they observed that many antitrust violations lead to harms to competitors "which are of no concern to the antitrust laws."[59] The Court held that not only must a plaintiff prove a violation of one of the antitrust laws, but also "antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."[60] Today, antitrust injury is a necessary element of all private antitrust suits.

In *Cargill v. Monfort of Colorado*, the plaintiff brought an action under section 16 to enjoin a potential merger that they claimed might lead to predatory pricing.[61] The Court held that while it was likely true that the defendant would become more efficient post-merger and might be able to sustain lower prices, the plaintiffs had not proven with sufficient evidence that the defendants planned to engage in below-cost pricing to drive rivals out of the market.[62] Private merger challenges are tricky because many times, mergers might actually *help* competitors. Concentrated markets are more susceptible to collusion and oligopoly pricing, which allows *everyone* in the market to reduce output and raise prices.[63]

In *Cargill*, the Supreme Court made clear that the antitrust injury doctrine extended equally to suits in equity and damages actions.[64] Before the *Cargill* decision, some courts held section 16's "threatened loss or damage" requirement in contrast with the "actual injury requirements" for a successful section 4 claim.[65] But the difference between the two mainly comes down to numerical certainty—damages must be quantifiable to be awarded under section 4; as a result, remedies under section 16 are available to a broader class of plaintiffs.[66] But both are appropriately limited by the antitrust injury doctrine.

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58 *Id.* at 481-82.

59 *Id.* at 487.

60 *Id.* at 489.

61 Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117 (1986).

62 *Id.* at 117-122.

63 *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 16.3a1 ("Horizontal mergers can facilitate monopolistic or collusive pricing by increasing concentration in the market. Consumers will pay higher prices, but the post-merger firm's output reduction and price increase will benefit other firms already in the market. They can charge higher prices under the 'umbrella' created by the larger, post-merger firm.").

64 479 U.S. at 122 ("We hold that a plaintiff seeking injunctive relief under § 16 of the Clayton Act must show a threat of antitrust injury, and that a showing of loss or damage due merely to increased competition does not constitute such injury.")

65 *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 16.3e.

66 *See* Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1357-58 (6th Cir. 1985) (citing Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir. 1980)) ("A higher threshold standard would be inconsistent with the prophylactic purpose of Section

There are two major types of equitable relief a plaintiff can seek in merger challenges: ex ante suits seeking injunctive relief, and ex post suits seeking divestiture. There are also conduct remedies available under the statute (A must sell B X number of units per year, etc.), but generally private plaintiffs seek either to block a merger from going into effect or to undo one. Conduct remedies can be costly to administer, and many times they are not a long-term solution.[67]

B. *The Foundation Laid by* California v. American Stores Co.

In *California v. American Stores*, the Supreme Court established that the full panoply of equitable remedies are available to private plaintiffs under section 16.[68] There, the state of California sought to enjoin a merger as a private plaintiff under section 16 of the Clayton Act.[69] Despite being a government actor, for most purposes the state attorneys general are treated as private plaintiffs when they endeavor to enforce the federal antitrust laws (as opposed to state antitrust laws).[70] American Stores and Lucky Stores, Inc. were two of the largest supermarket chains in California.[71] American Stores sought to acquire Lucky Stores, and "notified the Federal Trade Commission (FTC) that it intended to acquire all of Lucky's outstanding stock . . . ."[72] The FTC conducted an investigation and found the merger to be in violation

16 of the Clayton Act. Section 16 allows any person to sue for injunctive relief against *threatened* loss or damage by a violation of the antitrust laws. Section 16 is designed to stop anticompetitive behavior in its incipiency. As such, the courts have recognized a lower threshold standing requirement for section 16 than for section 4.") (internal quotations omitted) (emphasis in original); Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 407-08 (1st Cir. 1985) ("Congress empowered a broader range of plaintiffs to bring § 16 actions because the standards to be met are less exacting than those under § 4; under § 16, a plaintiff need show only a threat of injury rather than an accrued injury.").

67 *See, e.g.*, U.S. DEP'T. OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES § III.A (2004) [hereinafter U.S. DEPT. OF JUST., ANTITRUST DIVISION] ("A carefully crafted divestiture decree is simple, relatively easy to administer, and sure to preserve competition. A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent." (quoting United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 331 (1961) (internal quotations omitted))).

68 495 U.S. 271, 274-75 (1990) (holding that divestiture is an equitable remedy available for private plaintiffs under section 16 as "a form of injunctive relief . . . .").

69 *Id.*

70 This is also known as "quasi-public" enforcement. The states' attorneys general can enforce the federal antitrust laws on behalf of their citizens. When they do so, they are treated like private litigants, subject to most of the same requirements. *See* 15 U.S.C. § 15c ("Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State . . .to secure monetary relief . . . for injury sustained by such natural persons to their property . . . .").

71 *Am. Stores*, 495 U.S. at 275.

72 *Id.*

of section 7 of the Clayton Act, but they reached a settlement wherein American Stores would "hold separate" Lucky Stores, "preventing it from integrating the two companies' assets and operations until after it had divested itself of several designated supermarkets."[73] American Stores accepted the terms, the FTC gave final approval, and the companies were legally merged into a single corporate entity.

The next day, the state of California filed suit as a private plaintiff alleging the merger violated section 1 of the Sherman Act and section 7 of the Clayton Act. California argued that the merger would cause considerable loss and damage to the state as competition in many regions would be eliminated, and "prices of food and non-food products might be increased."[74] In its pleadings, the state did the following:

> [S]ought, *inter alia*, (1) a preliminary injunction requiring American to hold and operate separately from American all of Lucky's California assets and businesses pending final adjudication of the merits; (2) such injunctive relief, including rescission . . . as is necessary and appropriate to prevent the effects alleged in the complaint; and (3) an injunction requiring American to divest itself of all of Lucky's assets and businesses in the State of California.[75]

The District Court granted the state's motion for a temporary restraining order and entered a preliminary injunction. American Stores argued that the injunction was "tantamount to divestiture since the merger of the two companies had already been completed," but the court disagreed, holding "that since the FTC's Hold Separate Agreement was still in effect, the transaction was not a completed merger."[76] American Stores filed an interlocutory appeal, and the Ninth Circuit overturned the injunction as contrary to precedent.[77] California appealed, and the Supreme Court granted certiorari to resolve the circuit split over whether divestiture is an available remedy for private litigants under section 16 of the Clayton Act.

In the precedential Ninth Circuit opinion, the court "reasoned that the term 'injunctive relief' as used in § 16 is ambiguous and that it is necessary to review the statute's legislative history to determine whether it includes divestiture."[78] After reviewing the history, the Ninth Circuit found that minutes from a Judiciary Committee of the House of Representatives

73 *Id.* at 275-76.

74 *Id.* at 276 (internal citations and quotations omitted).

75 *Id.* (internal quotations omitted).

76 *Id.* at 277 (internal quotations omitted).

77 *Id.* at 277 (citing Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp., 518 F.2d 913 (9th Cir. 1975)).

78 *Id.* at 278.

provided strong evidence that the drafters of the legislation never intended to authorize private litigants to seek divestiture under section 16.[79]

The Supreme Court overturned the Ninth Circuit, explaining that "§ 16 states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order," rather it is clear from the language of the statute that Congress intended the "traditional principles of equity govern the grant of injunctive relief."[80] As a result, the Court held that "*the plain text of § 16 authorizes divestiture decrees to remedy § 7 violations*."[81] The court concluded with a few qualifiers:

> Our conclusion that a district court has the power to order divestiture in appropriate cases brought under § 16 of the Clayton Act does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief under § 15. In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief. . . . A private litigant, however, must have standing—in the words of § 16, he must prove "threatened loss or damage" to his own interests in order to obtain relief. . . .Moreover, equitable defenses such as laches, or perhaps "unclean hands," may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest.[82]

After trial, American Stores agreed to sell a number of stores to settle the remanded lawsuit.[83] *California v. American Stores* conclusively established that all equitable remedies are available to private litigants under the Clayton Act. However, despite being *able* to grant divestiture, no court had ever found a divestiture remedy appropriate until 2021.

C. *Divestiture as a Remedy in* Steves and Sons, Inc. v. JELD-WEN, Inc.

The Fourth Circuit decided *Steves and Sons, Inc. v. JELD-WEN, Inc.* in February of 2021.[84] It is the only known time a federal court has ordered divestiture in a private merger challenge. I describe the case in depth, as the

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79 *Id.* at 278-79.

80 *Id.* at 281 (quoting CIA. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F. 2d 404, 416 (1985)) (internal quotations omitted).

81 *Id.* at 282 (emphasis added); *see also id.* at 285 ("Section 16, construed to authorize a private divestiture remedy when appropriate in light of equitable principles, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger.")

82 *Id.* at 295-96 (emphasis added).

83 *American Stores' Merger Settlement*, N.Y. TIMES, May 17, 1990, at D5.

84 Steves and Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690 (4th Cir. 2021).

details will be important in my later discussion of the risks associated with private merger challenges.

This case arose in the American market for doorskins. The plaintiff, Steves and Sons, Inc., sells molded doors. The defendant, JELD-WEN, sells molded doors and manufactures doorskins, "some of which it uses in its own doors, and some of which it sells to other door manufacturers (the 'Independents'), including Steves."[85] All Independents, including Steves, must buy their doorskins from suppliers.

Prior to the merger, there were three doorskin suppliers in the market: "Masonite had 46% market share, JELD-WEN had 38%, and CMI had 16%."[86] Masonite, JELD-WEN, and CMI were vertically integrated, selling their own molded doors to end consumers and also selling doorskins to Independents. In May 2012, Steves signed a long-term supply agreement with JELD-WEN, which required Steves to purchase at least 80% of their doorskins from JELD-WEN, allowed Steves to break the agreement if JELD-WEN's prices were beat by a competitor, "contained quality assurances," and "provided for alternative dispute resolution procedures. . . ."[87] JELD-WEN could terminate the agreement with seven years' notice, and Steves with two years' notice, but "JELD-WEN's then-CEO told Steves that the company viewed this as a 'life time [sic] deal.'"[88]

JELD-WEN later acquired CMI, which had struggled in the preceding years.[89] Many bidders showed interest in purchasing CMI, including Steves, but CMI ultimately chose JELD-WEN. This reduced the number of national doorskin suppliers from three to two.

Steves and JELD-WEN had issues almost immediately. They argued about JELD-WEN increasing their prices above the rates specified in the contract (despite declining costs of production) and poor product quality.[90] "Internal documents from 2013 suggest that JELD-WEN understood that the merger gave it added leverage in contract negotiations with the Independents."[91]

In 2014, the only other doorskin supplier, Masonite, announced it would no longer sell doorskins to Independents. Masonite hoped for itself and JELD-WEN to maintain their duopoly in the doorskin market. Ultimately, Masonite wanted to foreclose the downstream market, as barriers to entry for doorskin manufacture were high and the dependent, purchaser-Independents

85 *Id.* at 699.
86 *Id.*
87 *Id.* at 700.
88 *Id.* (error in original).
89 *Id.*
90 *Id.* at 700-01.
91 *Id.* at 701.

would likely not survive long-term.[92] In September of 2014, JELD-WEN exercised its seven year termination option and thereafter would only supply doors to Steves, who had no other options, above the contract rate.[93] In 2015, the two companies triggered the dispute resolution process agreed to in their contract, and Steves asked the DOJ to investigate the merger.[94]

After a failed dispute resolution, Steves sued JELD-WEN in the United States District Court for the Eastern District of Virginia in June of 2016, alleging breach of contract claims and challenging the merger under section 7 of the Clayton Act.[95] Steves alleged JELD-WEN breached the Supply Agreement when it supplied doorskins of inferior quality for high prices.[96] "[T]he basis of Steves's antitrust claim was 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."[97]

Steves sought (1) past damages for breach of contract; (2) future damages on a theory of loss of access to doorskins; and (3) equitable relief and the unwinding of the merger.[98] JELD-WEN moved to dismiss the antitrust claim for failure to prove antitrust injury, and claimed that the equitable relief sought was barred by laches, as it had been four years since the merger.[99] The district court denied the motion and a similar motion for summary judgment.

To start, the district court held a jury trial on the damages claims.[100] The plaintiff's economics expert maintained that the extremely "high concentration in the doorskin market made the merger presumptively anticompetitive."[101] "The expert based this opinion not only on his belief that that JELD-WEN's enhanced market power enabled it to raise prices after 2012, but also on the merger's placement on the Herfindahl-Hirschman Index . . . ." ("HHI").[102] Per the DOJ-FTC guidelines, the pre-merger market was highly concentrated (3820 HHI) and extremely concentrated post-merger (5000 HHI), and the "roughly 1,200-point increase . . . [was] six times the threshold for presumed illegality."[103]

92 *Id.*

93 *Id.* at 701-02. There is a portion of this opinion devoted to trade secrets violations by Steves during a period where Steves was trying to determine whether it would be feasible to build their own doorskin plant. For the sake of concision, I omit those portions of the case.

94 *Id.* at 702.

95 *Id.* (citing 15 U.S.C. § 18).

96 *Id.*

97 *Id.* at 702-03.

98 *Id.* at 703.

99 *Id.*

100 *Id.*

101 *Id.* at 704.

102 *Id.*

103 *Id.* This fact alone likely contributed to the outcome in the case.

The district court also made a few evidentiary rulings in Steves's favor. For example, the court excluded evidence that the DOJ had investigated the merger twice and declined to bring charges at the conclusion of both investigations. Similarly, the court allowed Steves's 2012 statement on the merger into evidence, but did not allow the jury to know that the statement was made to the DOJ. Finally, the court excluded evidence of CMI's pre-merger financial issues. "In the court's view, this evidence couldn't support a weakened-competitor defense because CMI's doorskin business had done well before the merger and CMI had competitively preferable alternatives to merging with JELD-WEN."[104] All of these decisions were upheld on appeal.[105]

The jury ruled for Steves on the breach of contract claim and "[o]n the antitrust claim, the jury found that the merger violated § 7 of the Clayton Act; that this violation caused Steves to suffer an antitrust injury; and that Steves proved both past damages and future lost profits."[106] The jury awarded retrospective breach of contract damages, and prospective antitrust damages based on hypothetical lost profits.[107]

Next, the district court considered Steves's request for relief in equity under section 16 of the Clayton Act.[108] Steves's principal demand was for JELD-WEN to divest the large plant that they acquired as a result of merging with CMI. Steves also asked for "several 'conduct remedies' to complement divestiture."[109] The district court applied the test articulated in *eBay Inc. v. MercExchange, LLC*,[110] requiring Steves to prove the following to demonstrate that equitable relief was necessary: (1) a significant threat of irreparable antitrust injury, even if the injury hadn't happened yet;[111] (2) that monetary damages were inadequate to compensate for the injury; (3) that "considering

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104 *Id.*

105 *Id.* at 714-16. Evidence showing the DOJ investigated and declined to challenge a merger should be excluded. There are many reasons, having nothing to do with the merits of the case, why the Agencies might decline to challenge activity. Such evidence could be misleading. Excluding evidence of the failing company defense was proper because JELD-WEN had not put forth evidence to meet the required elements of the defense:

> (1) [T]he allegedly failing firm would be unable to meet its financial obligations in the near future; (2) it would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers that would keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger.

U.S. DEP'T OF JUST. & FTC, *supra* note 27, § 11 (2010).

106 *Steves*, 988 F.3d at 705.

107 *Id.*

108 *Id.*

109 *Id.*

110 *Id.* (citing 547 U.S. 388, 391 (2006)).

111 *Id.* at 705 (citing Zenith Radio Corp. v. Hazeltine Rsch., Inc., 395 U.S. 100, 130 (1969)).

the balance of the hardships between the" parties, relief in equity was warranted;[112] and (4) that "the public interest would not be disserved by a permanent injunction."[113] "On the issue of irreparable injury, Steves presented evidence of the company's importance to the Steves family, who had owned it for 150 years, and to its over 1,000 employees."[114] Regarding the balance of hardships, the parties disagreed about the amount of damage that a divestiture would do to JELD-WEN.[115] Relatedly, for the public interest factor, the parties disagreed about how viable the divested entity might be once separated from JELD-WEN.[116] Lastly, JELD-WEN argued that laches precluded relief in the case, as it had been four years since the consummation of the merger.[117] The district court granted Steves request for divestiture.

In the district court's view, Steves satisfied the first two factors because its 150-year-old family-owned business would likely collapse after September 2021 without equitable relief, and such a loss can't be measured purely in monetary terms. At factor three, the court found that the threat to Steves's survival outweighed JELD-WEN's hardships, which—while significant—could be mitigated by ordering the divested entity to sell JELD-WEN as many doorskins as it needed for two years. And at factor four, the court found divestiture to be in the public interest because it would restore competition to the doorskin market by creating a third supplier.[118]

The district court also "rejected JELD-WEN's laches defense."[119] The court held that JELD-WEN must show both "(1) that Steves unreasonably delayed in bringing suit and (2) that its delay prejudiced JELD-WEN,"[120] and the court found JELD-WEN had proven neither.[121]

The DOJ filed a brief stating that divestiture was generally the best remedy for an anticompetitive merger—the position the department has taken in recent decades where it challenged mergers.[122] The court noted the Department's five factors that it considers when evaluating whether a

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112 *Id.* (quoting eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006)) (internal quotations omitted).

113 *Id.* (quoting eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006)) (internal quotations omitted).

114 *Id.* at 706.

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.* at 707.

120 *Id.* (citing PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 121 (4th Cir. 2011)).

121 *Id.*

122 *Id.* at 706; *see also* U.S. DEPT. OF JUST., ANTITRUST DIVISION, *supra* note 67, § III.C ("The Division favors the divestiture of an existing business entity that has already demonstrated its ability to compete in the relevant market.").

divestiture would be proper.[123] Four of the factors turned on the identity of the buyer of the divested assets, and the Department of Justice alerted the court that until a buyer was identified, it was hard to judge the full potential results of a divestiture.[124] JELD-WEN raised concerns that if Steves was allowed to purchase the divested assets, there would be three vertically integrated companies in the market and there would be no increase in competition.[125] The district court addressed this issue by providing for a special master to oversee the auction.[126]

Ultimately, the district court ordered in relevant part (1) trebled damages for Steves's retrospective antitrust claim (breach of the supply agreement); (2) divestiture of the plant acquired by JELD-WEN, and a backup remedy of trebled projected monetary losses if the divestiture were not to go through for any reason; and (3) a court-appointed special master to supervise the plant in the interim.[127]

On appeal, JELD-WEN challenged "(1) whether Steves suffered antitrust injury; . . . (4) whether divestiture was the proper remedy; [and] (5) whether Steves's claim for future lost profits was ripe. . . ."[128] The Justice Department filed an amicus brief, in which it argued laches does not categorically bar divestiture post-merger, and "there's no evidentiary significance to the Department's choice not to challenge the underlying merger, as there are many reasons why the Department might make that choice."[129]

Writing for the Fourth Circuit, Judge Albert Diaz upheld the jury's finding that Steves had suffered an antitrust injury.[130] JELD-WEN argued that the damages in the case were breach of contract.[131] The court of appeals began by stating "[w]hether antitrust injury occurred is a question for the jury to decide, . . . and we must uphold the jury's finding unless no reasonable

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123 *Steves*, 988 F.3d at 706.

124 *Id.*

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> [L]etting Steves (who had expressed its intent to bid for Towanda) purchase the plant might not maximize competition. Doing so, the Department maintained, would create another vertically integrated doorskin supplier, rather than an independent one, and might disadvantage Steves's competitors in the molded-door market. Relying on the Department's statement, JELD-WEN contended that it would be improper for the court to order divestiture without first identifying a buyer.

Id.

126 *Id.* at 707.

127 *Id.* at 709.

128 *Id.* Issues on appeal not relevant to this discussion have been omitted.

129 *Id.*

130 *Id.* at 711.

131 *Id.* at 709.

jury could have reached that conclusion . . . ."[132] The court acknowledged that cases involving both antitrust and breach of contract claims "present a unique challenge," and that they must be certain that Steves's antitrust claim was not simply a breach of contract claim trying to weasel its way in to treble damages.[133] They "do this primarily by considering whether Steves would have suffered 'an identical loss' if JELD-WEN had breached the Supply Agreement absent the merger."[134]

The court also held the injury constituted an antitrust injury: without the merger Steves would have had one additional seller to choose from for doorskin supply; Steves was unable to buy replacement doorskins from the only other remaining doorskin provider, Masonite, because the duopoly had inspired the two firms to kill off Independents;[135] and "JELD-WEN sought to leverage its enhanced market power to hurt its customers, including Steves."[136]

The court then turned to JELD-WEN's attack on the divestiture order.[137] JELD-WEN argued that the laches defense was improperly denied, and the *eBay* factors were misapplied to the facts of the case.[138] As to the laches defense, the court stated JELD-WEN must prove both unreasonable delay and that this delay prejudiced JELD-WEN. The court held a four year delay is not presumptively too long and the laches defense always turns on the specific circumstances of the case.[139] Relevant here, Steves did not have notice of any antitrust injury sufficient to support a divestiture remedy until two years after the merger,[140] and even then it was bound by the dispute resolution process as laid out in the contract.[141] Further, "the district court didn't abuse its discretion in finding that Steves's delay was reasonable, and thus properly denied JELD-WEN's laches defense."[142] Ultimately, because "JELD-WEN didn't prove unreasonable delay," the court did not need to determine "whether the delay prejudiced JELD-WEN."[143]

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132 *Id.* at 710 (citing Int'l Wood Processors v. Power Dry, Inc., 792 F.2d 416, 431 (4th Cir. 1986) and Int'l Ground Transp. v. Mayor of Ocean City, 475 F.3d 214, 218 (4th Cir. 2007)).

133 *Id.*

134 *Id.*

135 *Id.* at 711.

136 *Id.*

137 *Id.* at 716.

138 *Id.*

139 *Id.* at 716-17.

140 *Id.* at 717.

141 *Id.* at 718 ("JELD-WEN's last argument about delay is that Steves lacks a good excuse for not seeking divestiture between 2014 and 2016. But evidence supports the district court's finding that Steves spent that time diligently exhausting its alternative remedies.").

142 *Id.*

143 *Id.* at 718-19.

The court then reviewed the district court's application of the four equitable factors as laid out in *eBay*.[144] It handled the first two factors together, "affirm[ing] the district court's finding that Steves's threatened collapse couldn't be repaired by money damages."[145] The court continued by stating the permanent loss of a business "is a well-recognized form of irreparable injury," and this business loss would be profound because Steves had been around for more than 150 years and was family-owned.[146]

The court of appeals then considered whether divestiture was an appropriate remedy. It found that any other conduct remedy would only have protected Steves in the short term, and it would have done nothing to increase competition in the market for doorskins, which was sorely needed for the future survival of both Steves and the other Independents.[147] The court then examined the district court's application of the third *eBay* factor, finding the balance of hardships tipped in Steves favor: without divestiture, Steves would go out of business.[148] Lastly, in reviewing the application of the fourth *eBay* factor, the court of appeals found the district court was correct in finding "divestiture to be in the public interest because it would add a third supplier to the doorskin market, thereby promoting competition."[149] The district court explored fully the viability of the hypothetical divested entity—as divestiture would be a waste if the divested entity would fail and therefore not increase competition in the market—and the court of appeals found the lower court was correct in finding the divested plant would be profitable under alternate ownership.[150]

Finally, the court of appeals reviewed JELD-WEN's challenge of the "damages award for future lost profits, which would only kick in if divestiture doesn't occur."[151] The court of appeals found that because claims for future lost profits are speculative, "Steves's future-lost-profits claim wasn't fit for judicial decision," and the court of appeals vacated that portion of the district court ruling.[152]

144 *Id.* at 719 (citing eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006)) ("A plaintiff must demonstrate: (1) that it [faces a significant threat of] irreparable [antitrust] injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.").

145 *Id.*

146 *Id.* at 719.

147 *Id.* at 720 ("[T]he district court reasonably found that a conduct remedy would only protect Steves temporarily.").

148 *Id.* at 721.

149 *Id.*

150 *Id.* at 721-24.

151 *Id.* at 724.

152 *Id.* at 725.

JELD-WEN was "the first time an antitrust lawsuit brought by one company against another—rather than by the US government—has resulted in a divestiture . . . ."[153] Only time will tell whether *JELD-WEN* is the beginning of a new era in private merger enforcement, but there is reason to hope that courts will not find such a remedy appropriate in almost any other factual scenario.

III. ANTITRUST POLICY AND THE INHERENT RISKS OF PRIVATE MERGER ENFORCEMENT

In this Section, I explore the implications of granting remedies under section 16 to private litigants in merger challenges. Despite the *JELD-WEN* ruling, private merger enforcement under section 16 of the Clayton Act should continue to be viewed with suspicion by the courts. More specifically, in evaluating the field of private merger challenges, courts ought to consistently apply the antitrust injury doctrine, prefer consumer plaintiffs over competitor plaintiffs, and view all post-merger consummation challenges with suspicion, seriously considering any laches defense raised.

A. *Comparing Government and Private Equity Suits*

There are several differences between public and private merger enforcement suits. A merger challenge brought by the government "is more likely. . .to reflect a thorough assessment of the situation and dispassionate conclusions regarding the public interest,"[154] whereas a private plaintiff is more likely to seek private gain or rectify a private loss.[155] While it is true that courts will decline to grant relief even in private cases when it is not in the public interest, there are noteworthy, albeit subtle, differences between public and private enforcement.[156]

Some rules of antitrust liability are so far-reaching that they "are administrable in practice only when there is a responsible filtering of the cases presented to the court and of the reorganizations proposed—something akin to the prosecutorial discretion of those who make arrests for relatively minor offenses."[157] Relief in equity in the merger context is extremely far-reaching:

153 Marvin Pipkin, *Steves Prevails in Historic Antitrust Litigation as JELD-WEN is Forced to Divest Towanda Plant, Restoring Competition to Doorskin Market*, BUS. WIRE (Aug. 2, 2021, 7:14 PM), https://www.businesswire.com/news/home/20210802005804/en/Steves-Prevails-in-Historic-Antitrust-Litigation-as-JELD-WEN-is-Forced-to-Divest-Towanda-Plant-Restoring-Competition-to-Doorskin-Market [https://perma.cc/FQ2Y-YU2L].

154 HOVENKAMP & AREEDA, ANTITRUST LAW, *supra* note 47, ¶303e1.

155 *Id.*

156 *Id.*

157 *Id.*

if they prevail on the merits, private plaintiffs are given the power to prevent mergers entirely or unwind them after consummation.

Because of the high stakes, these remedies are only advisable where the facts are unambiguous and significant, and "the government plaintiff is more likely than the private plaintiff to withhold suit in lesser instances."[158] But one must keep in mind the scarcity of government resources. It is possible that under some administrations, the government is resource-constrained to such a degree that their "prosecutorial discretion" might not reflect the merits of the cases they decline to bring.[159] Public enforcement is not a constant, and while the different policy goals of changing administrations are inevitable, private merger challenges can help to fill that void.[160] The importance of private plaintiffs is made clear by the text of sections 4 and 16 of the Clayton Act,[161] and opinions by the Supreme Court.[162]

To counter this lack of prosecutorial discretion in private merger enforcement, there are a number of considerations for private plaintiffs that narrow the circumstances within which a private litigant might seek relief in equity. Importantly, the government need only prove the defendant's antitrust violation to be awarded relief in equity. But the private litigant must prove the antitrust violation, plus standing and injury—meaning the private litigant must show actual or threatened harm to itself.[163]

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158 *Id.*

159 *See, e.g.*, Lisa Rein & Andrew Ba Tran, *Trump Keeps His Pledge to Shrink Size of Government*, SEATTLE TIMES, https://www.seattletimes.com/nation-world/trump-keeps-his-pledge-to-shrink-size-of-government [https://perma.cc/4YWP-4M96] ("Nearly a year into his takeover of Washington, President Donald Trump has made a significant down payment on his campaign pledge to shrink the federal bureaucracy, a shift long sought by conservatives that could eventually bring the workforce down to levels not seen in decades.").

160 *See, e.g.*, AM. ANTITRUST INST., ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S. 2 (2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL3.pdf [https://perma.cc/34XY-NYT3] ("The U.S. economy struggles with the cumulative effects of decades of under-enforcement *and* a step-down in current enforcement levels under the Trump administration.").

161 *See* Clayton Act §§ 4, 16, 15 U.S.C. §§ 15, 26 (explicitly authorizing private plaintiffs to seek treble damages or relief in equity for injury by any act(s) in violation of the antitrust laws); *see also infra* notes 169–70 and accompanying text.

162 *See* California v. Am. Stores Co., 495 U.S. 271, 284 (1990) (explaining that the structure of the Clayton Act makes apparent the importance of private litigants).

163 *See* Clayton Act § 16, 15 U.S.C. § 26:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . 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[.]

See also HOVENKAMP & AREEDA, ANTITRUST LAW, *supra* note 47, ¶ 303e3 (4th ed. 2019) ("[A]ctual or threatened harm to a person with standing is an essential element of the private plaintiff's equity case, but not

Further, in *California v. American Stores,* the Court explained that while relief in equity was clearly available to private plaintiffs under the antitrust laws, that "does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief . . . ."[164] The court went on to explain the aforementioned requirements for private plaintiffs: standing and threatened loss or injury.[165] Lastly, the court mentioned "equitable defenses such as laches, or perhaps 'unclean hands,' may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest."[166] In each private merger challenge, the tribunal must determine what facts specific to that case weigh for and against such remedies.[167]

"Private antitrust enforcement is an essential complement to its public counterpart and foundational in promoting competition, defending markets, and protecting consumers and workers."[168] The Supreme Court has made clear the importance of the role of private plaintiffs suing under the Clayton Act.[169] The existence of private enforcement is important to the overall health and effectiveness of the antitrust laws, and this comment should not be interpreted to suggest that an impending wave of unmeritorious claims by private plaintiffs must be stopped. Rather, this comment explores the concerns unique to private merger challenges under section 16, ultimately suggesting a careful and methodical approach as courts attempt to interpret the *JELD-WEN* decision.[170]

B. *Recommendations for the Review of Private Merger Challenges*

Despite the *JELD-WEN* ruling, courts should continue to review these suits with a critical eye and should largely confine *JELD-WEN* to its facts. Post-*JELD-WEN*, courts must continue to consistently apply the antitrust injury doctrine, prefer consumer plaintiffs over competitor plaintiffs, and always question the propriety of divestiture in post-merger consummation

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of the government's. In the government suit, by contrast, an injury to competition must be threatened but actual harm to any particular consumer need not be established.").

164 495 U.S. at 295.

165 *Id.* at 296.

166 *Id.*

167 Because remedies under section 16 are subject to "the same conditions and principles" applied by the courts of equity, they are discretionary by nature. Clayton Act § 16, 15 U.S.C. §26.

168 AM. ANTITRUST INST., *supra* note 160, at 26.

169 *See Am. Stores*, 495 U.S. at 284 ("The Act's other provisions manifest a clear intent to encourage vigorous private litigation against anticompetitive mergers.").

170 Courts have been careful and methodical in these cases in the past, as *JELD-WEN* is the first time a private plaintiff has been granted a divestiture remedy.

challenges. For reasons *infra* in Section III.A, courts must be on the lookout for merger challenges by private plaintiffs brought merely to hinder their competitors and better their position in the relevant industry.

1. Consistent Use of the Antitrust Injury Doctrine

Some worry that the *Cargill* decision was deleterious in its effects on private merger enforcement.[171] Before *Cargill*, many courts held that the antitrust injury doctrine did not apply to plaintiffs seeking equitable relief, and rather only applied to plaintiffs seeking trebled monetary damages under section 4 of the Clayton Act.[172] Professor Joseph Brodley argued that the high "antitrust injury" bar as articulated in *Cargill* created a crisis in private merger enforcement, in that it improperly restricted the ability of private plaintiffs to bring merger enforcement suits.[173]

I believe the *Cargill* decision was correct in its extension of the doctrine to cover all private suits.[174] There is still less of an evidentiary requirement in section 16 suits, as "threatened future loss or injury" is a lower burden than proving monetary damages with any certainty.[175] The *Cargill* decision simply stands for the idea that the alleged antitrust injury cannot be entirely speculative, meaning that future anticompetitive behavior cannot be presumed from an increase in market power alone. In the *Cargill* case, there was only evidence that the defendant might be able to achieve lower prices, which might have simply been due to efficiencies created by the merger.[176]

171 *See, e.g*, Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 3-6 (1995) (citing Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986), as the peak decision of the private merger enforcement crisis).

172 *Id.* at 5 ("The *Cargill* decision is notable . . .because the Court applied the antitrust injury doctrine to a merger injunction action.").

173 *Id.* at 3-6.

174 *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 16.3a (6th ed. 2020) (explaining the *Cargill* Court's reasonableness in applying the antitrust injury requirement to plaintiffs seeking equitable relief).

175 *See* Brodley, *supra* note 171, at 3-6 (1995); *see also* Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., 753 F.2d 1354, 1357-58 (6th Cir. 1985) ("A higher threshold standard would be inconsistent with the prophylactic purpose of Section 16 of the Clayton Act. Section 16 allows any person to sue for injunctive relief against *threatened* loss or damage by a violation of the antitrust laws. Section 16 is designed to stop anticompetitive behavior in its incipiency. As such, the courts have recognized 'a lower threshold standing requirement for section 16 than for section 4.'" (citing Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 210 (3d Cir. 1980))); Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F.2d 404, 407-08 (1st Cir. 1985) ("Plainly, Congress empowered a broader range of plaintiffs to bring § 16 actions because the standards to be met are less exacting than those under § 4; under § 16, a plaintiff need show only a threat of injury rather than an accrued injury.").

176 Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 115 (1986) (determining whether loss of profits in the circumstances of the case could constitute antitrust injury).

Proving potential future predatory pricing is a different thing entirely, as even plaintiffs with actual proof of below-cost pricing must still show the ability of the culprit to recoup their losses.[177] What is more, most modern scholars agree that efficiencies from mergers are valuable.[178]

Professor Brodley's fear of a crisis in private antitrust enforcement in the United States turned out to be an undulation in the ever-fluctuating levels of private enforcement.[179] Additionally, the anxiety expressed by Professor Brodley and others about the narrowed ability of private plaintiffs to bring injunctive suits due to a failure to meet the antitrust injury bar rests upon a supposed equivalence between public enforcement and properly motivated private enforcement. But private antitrust enforcement has never been equally as available as public enforcement.[180] The antitrust laws are clear: the private rights of action allowed under sections 4 and 16 of the Clayton Act require real or threatened harm.[181] It is undeniable that the legislative history of the 1976 Antitrust Improvement Act expresses a desire for private parties to help enforce antitrust law.[182] And it is undeniable that the Supreme Court itself has stated that "the purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."[183] But that understanding of the law cannot get around the standard requirements for private litigants under the Clayton Act: the statute requires threatened or

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177 Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (explaining that what's necessary to hold "a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under §2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.").

178 *See supra* notes 40–45 and accompanying text.

179 *See supra* note 46.

180 *See* William H. Page & John E. Lopatka, *Antitrust Injury, Merger Policy, and the Competitor Plaintiff*, 82 IOWA L. REV. 127, 138 (1996) ("Private and public enforcement are complementary, assuring that adequate remedies exist for the full range of antitrust offenses. The antitrust injury doctrine complements the role of prosecutorial discretion in public enforcement by assuring that suits are consistent with antitrust goals.").

181 *See* Clayton Act § 4, 15 U.S.C. § 15 ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."); Clayton Act § 16, 15 U.S.C. § 26 ("Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . .").

182 H.R. REP. NO. 94-499, pt. 1, at 3 (1976) ("The purpose of H.R. 8532 [amending the Clayton Act] is to provide a new federal antitrust remedy which will permit State attorneys general to recover monetary damages on behalf of State residents injured by violations of the antitrust laws.").

183 Zenith Radio Corp. v. Hazeltine Rsch., Inc., 395 U.S. 100, 130-31 (1969).

actual injury as a required element of any private claim.[184] The antitrust injury doctrine merely connects a violation of the laws of antitrust with the requirements of standing as laid out in the text of the Clayton Act.[185] A lack of confidence about harm or prospective harm and the connection between that harm and a violation of a law of antitrust *should* be a barrier to suits.[186]

JELD-WEN was unique in the certainty of antitrust injury. There was evidence that the two remaining firms in the doorskin market had plans to "squeeze out" the Independents. The Independents were consumers, so they were hurt by the price increase in a way that competitors would not be. JELD-WEN was reducing quality and increasing prices. And without the merger between JELD-WEN and CMI, Steves and the other Independents would have had an additional potential supplier of doorskins, which is a big deal when your market post-merger has only two options.

But there are many cases in which the antitrust injury doctrine serves as a shield against improperly brought antitrust suits.[187] Without the limitations of the antitrust injury doctrine, there is potential for abuse of the equitable remedies available under section 16 for plaintiffs who know they are unable to prove section 4 damages with any certainty, but still desire to hinder the business of their competitors.

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184 Clayton Act §§ 4, 16, 15 U.S.C. §§ 15, 26. Much has been made of the "private attorney general" metaphor, but I believe it is best regarded as nothing more than a metaphor. The hypothetical perfectly motivated private antitrust plaintiff who seeks to vindicate the public interest *still* cannot act as a public enforcer. The statutes simply do not allow for it.

185 *See* Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95 (5th Cir. 1988) (denying the merger challenge for lack of evidence showing likelihood of future anticompetitive behavior). *But see* R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102 (2d Cir. 1989) (finding that a merger in a highly concentrated market which would result in just two firms was evidence enough of potential harm to warrant a trial on the merits).

186 As Professor Hovenkamp has observed,

> For example, the private citizen does not ordinarily have standing to sue another for drunken driving unless that citizen has suffered injury to her person, property, or family. By contrast, the state can interdict drunken driving even when the driver has caused no injury at all in the particular case. Its power results from the fact that drunken driving is known to have harmful consequences and it is less socially costly to arrest the driver before rather than after these consequences occur. The private plaintiff's interest, by contrast, is purely remedial.

HOVENKAMP & AREEDA, ANTITRUST LAW, *supra* note 47, ¶ 303e3.

187 *See, e.g.*, Pool Water Prods. v. Olin Corp., 258 F.3d 1024, 1036 (9th Cir. 2001) ("The critical question for determining whether there is antitrust injury is whether the harm is of the kind the antitrust laws were meant to protect against . . . . As stated above, reduced profits from lower prices and decreased market share is [sic] not the type of harm Section 4 was meant to protect against. Accordingly, the district court did not err in holding plaintiffs failed to establish antitrust injury." (citing Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 109 (1986); Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477, 485-86 (1977); Rebel Oil Co., Inc. v. ARCO, 51 F.3d 1421, 1433 (9th Cir. 1995))).

This is an important point. Where the government generally seeks divestiture to remedy an anticompetitive merger, government suits exist in an entirely separate world of motive and burden of proof.[188] Private plaintiffs, on the other hand, are not (primarily) motivated by a desire to increase consumer welfare. For that reason, where there are available and quantifiable monetary damages, courts should view them differently than they might in a government suit and order remedies accordingly. Such drastically different outcomes based on changing factual circumstances demonstrates the importance of stringent application of the antitrust injury doctrine by the courts.

In *JELD-WEN*, favoring monetary damages was complicated by evidence that JELD-WEN and Masonite intended to cut off their supply of doorskins to all Independents to vertically integrate and wipe out that level of the market. JELD-WEN's increasing prices and decreasing quality made matters worse. But had JELD-WEN's vertical integration led to increased quality and decreased prices for end-consumers, there very well could have been reason for the district court to come to a different conclusion on the matter of remedies.

2. Preferring Consumer Plaintiffs Over Competitor Plaintiffs

As previously stated, the consumer versus competitor distinction is important in our analysis of the merits of a case seeking equitable relief. I believe it is among the most important distinctions, and courts endeavoring to apply *JELD-WEN* ought to hold that aspect of the case in their minds as significant. By nature of consumers' (and business customers') desire for robust competition and competitive prices, it is far more likely that the goals of these plaintiffs are aligned with the broader policy goals of United States antitrust law.[189] "The preferred plaintiff in a merger case is the consumer, who is benefitted by the merger's increased efficiency but injured by its post-merger price increase."[190] However, consumer challenges are rare.[191]

188 *See* discussion *supra* Section III.A.

189 *See, e.g.*, Cmty. Publishers, Inc. v. DR Partners, 139 F.3d 1180, 1183 (8th Cir. 1998) ("[T]he District Court found a threat of antitrust injury based upon [plaintiff's] status as a purchaser of advertising in the Morning News. [Plaintiff] alleged that a combination of the Times and the Morning News would raise advertising rates as a result of the two newspapers' dominant market position. The threat of higher prices resulting from dominant market power being a primary concern of Section 7, the District Court correctly determined that [Plaintiff] had shown antitrust injury.").

190 *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, at § 16.3a3; *see also* Brodley, *supra* note 171, at 24 ("Although consumers generally have more compatible enforcement incentives than other types of litigants, they lack capability as merger litigants and have rarely brought suit.").

191 *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 14, § 16.3a3 ("[C]onsumer challenges are relatively infrequent.").

Corporate customers are a less ideal merger-challenge plaintiff than the end-consumer because the corporate customer might stand to gain in ways not totally related to increased competition. For example, in *JELD-WEN*, Steves was on the short list of firms interested in purchasing the doorskin plant if the court were to order divestiture (which it did).[192] But generally it can be said that plaintiffs who are oriented vertically with respect to defendants in the case (as a opposed to horizontally) are more likely to be motivated by factors in alignment with the goals of the antitrust laws because they are negatively impacted by decreased quality, decreased output, and higher prices.[193]

Still, it is uncommon for consumers to face economic harm sufficient to justify the cost of challenging a merger.[194] That is part of what makes the facts of *JELD-WEN* so anomalous. The Independents were business customers purchasing mass quantities of doorskins, so they were *hurt* by the duopoly's increase in doorskin price (as opposed to a competitor who would be *helped* by the oligopoly pricing). The harm that befalls consumer plaintiffs and their motivations in challenging anticompetitive merger activity is likely more in line with the public benefit than a competitor-plaintiff might be. The appropriateness of the divestiture remedy turned in part on the position of Steves with respect to the doorskin manufacturers. Steves was in the best position to challenge the anticompetitive behavior allowed by the newly minted duopoly.

While it is doubtful that consumer suits will ever rise to the frequency of competitor suits, courts should presume a closeness between the vindication of public policy and the goals of the consumer-plaintiff in a private merger challenge. This recommendation goes hand in hand with my suggestion that courts should faithfully apply the antitrust injury doctrine: consumers are far more likely to meet the antitrust injury requirement.[195]

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192 Steves and Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690, 723 (4th Cir. 2021).

193 *See, e.g.*, the discussion of the impacts of the JELD-WEN merger on Steves *supra* notes 84–88 and accompanying text.

194 Consol. Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 260 (2d Cir. 1989) ("Consumers are unlikely to face the prospect of suffering a sufficient amount of damage to justify the cost of seeking a pre-acquisition injunction.").

195 While state enforcement actions are not the focus of this comment, states make ideal plaintiffs for similar reasons. State AGs should continue to be robust enforcers of the federal antitrust laws, and courts ought to look upon these cases favorably. It is a rare case that consumer injury will be enough to compel a lawsuit, but a state acting as parens patriae has motives very much in line with the goals of the laws of antitrust. *See* Robert F. Roach, *Bank Mergers and the Antitrust Laws: The Case for Dual State and Federal Enforcement*, 36 WM. & MARY L. REV. 95, 103-08 (1994) (discussing the parens patriae standing of state AGs to enforce federal antitrust laws).

3. The Earlier, the Better

For "unscramble the egg[]"[196] reasons, pre-merger suits should be viewed more favorably than post-merger suits seeking divestiture. Section 16 allows persons to sue for injunctive relief where they fear loss or damage as a result of a violation of the antitrust laws,[197] and "[s]ection 16 is designed to stop anticompetitive behavior in its incipiency."[198] However, pre-merger challenges by private litigants are almost always unsuccessful because they are unable to produce adequate evidence in support of an inference of likely future injury.[199] I offer no solutions to this problem, but only remark that the private enforcement system would be more effective and less wasteful were private litigants able to challenge clearly anticompetitive mergers before they are consummated.[200] I view preliminary injunctions as more in line with the incipiency focus of the antitrust laws, but the barriers facing pre-merger challenges by private litigants are too complex to deal with here.[201] Here, I will focus more heavily on post-merger suits because JELD-WEN was a post consummation challenge, and post-merger suits present unique challenges for courts.

Temporal limitations on merger challenges "serve[] the same functions in antitrust as elsewhere in the law": to weed out stale claims, "to put old liabilities to rest," and to create incentives for wronged parties to investigate

196 *See* ANTITRUST MODERNIZATION COMM'N: REPORT AND RECOMMENDATIONS 47 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf [https://perma.cc/29DU-2ZA4] (equating "recreating a competitively viable firm" to "unscrambl[ing] the eggs . . . .").

197 *See* Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., Inc., 753 F.2d 1354, 1357-58 (6th Cir. 1985) ("Section 16 allows any person to sue for injunctive relief against *threatened* loss or damage by a violation of the antitrust laws.").

198 *Id.* at 1358.

199 *See* AM. ANTITRUST INST., *supra* note 160, at 27 (citing DeHoog v. Anheuser-Busch Inbev SA/NV, 899 F.3d 758 (9th Cir. 2018); Taleff v. Southwest Airlines Co., 554 Fed. App'x. 598 (9th Cir. 2014); Malaney v. UAL Corp., 434 Fed. App'x. 620 (9th Cir. 2011); Golden Gate Pharmacy Servs., Inc. v. Pfizer, Inc., 2010 WL 1541257 (N.D. Cal. 2010)) ("Private merger claims brought before consummation, which are often effectively follow-on claims to federal review under [Hart-Scott-Rodino], almost always fail. The major hurdle is the difficulty of showing likely injury prospectively, insofar as there is no actual evidence of harm or record of bad conduct.").

200 I discuss this issue again briefly in Section III.C, *infra*.

201 *Christian Schmidt Brewing Co.*, 753 F.2d at 1358; *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 317-18 (1962) ("[I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum."). It is also worth mentioning that because of this incipiency focus of the Clayton Act, the public enforcement mechanisms are generally better suited to address anticompetitive mergers because they do not have to meet the standing requirements that a private litigant must.

their claims in a timely manner.[202] The laches defense presumably is analyzed with respect to the time of the merger, unless it is the case that a plaintiff's awareness of its antitrust injury does not come about until later: there are situations, like *JELD-WEN*, where it is not obvious at the time of the merger that the would-be defendant would abuse its newly gained market power to intentionally harm competitors or purchasers.[203]

"[C]ourts often use the Clayton Act's four-year statute of limitations for damages claims as a guideline for analyzing laches defenses to injunctive claims."[204] But the laches defense is flexible in ways that the statute of limitations is not: defendants must show (1) unreasonable delay on the part of the plaintiff and (2) prejudice as a result of said delay.[205] Unreasonable delay and prejudice are never more salient than where a private plaintiff seeks retroactive relief in equity, such as divestiture of acquired assets. As time passes from the consummation of a merger, the two previously separate entities integrate personnel, policies, practices, assets, decisionmaking processes, and future plans.[206] More importantly, this new firm must be able to make strategic decisions and plan for its own future. Forced divestiture years after the fact may create massive amounts of intangible loss that will never be regained by competitors or consumers. Even in this case, JELD-WEN undoubtably made decisions for the future based on their massively expanded doorskin-manufacture capacity.[207] The disproportionate application of the laches defense against private plaintiffs as opposed to against the government makes sense. The longer a merger is allowed to stand (and the greater the prejudice against the merged firm is risked by divestiture), the more important the proper motivations and vindication of the public interest become.[208]

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202 HOVENKAMP & AREEDA, ANTITRUST LAW, *supra* note 47, ¶ 320a.

203 *See* Rotella v. Wood, 528 U.S. 549, 554 (2000) (explaining that under the Clayton Act, "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." (quoting Zenith Radio Corp. v. Hazeline Rsch., Inc., 401 U.S. 321, 338 (1971) (internal quotation marks omitted))).

204 Steves and Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690, 707 (4th Cir. 2021) (citing Oliver v. SD-3C LLC, 751 F.3d 1081, 1085-86 (9th Cir. 2014)).

205 *Id.* (citing PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 121 (4th Cir. 2011)).

206 The time it takes for two firms to integrate is different from industry to industry and situation to situation. But JELD-WEN started using CMI's plants for their own production purposes from the very beginning.

207 Also, in *JELD-WEN*, the court seemed to consider policy reasons unrelated to the merger in evaluating the laches defense. *JELD-WEN*, 988 F.3d at 707 ("Steves's pursuit of alternative solutions before suing shouldn't be held against it because public policy supports such efforts.").

208 *See* Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1235 (8th Cir. 2010):

> In this case, Plaintiffs waited nearly two months after A–B and InBev announced their agreement to merge before filing this lawsuit. Defendants advised that the transaction could close as early as November 12, yet Plaintiffs did not file a motion for preliminary

"Apart from enjoining recent but illegal mergers,"[209] I question the wisdom of allowing private litigants to order the restructuring of an entire industry. Such far-reaching, serious remedies can greatly affect people who are not even party to the litigation. Court-ordered "[d]ivestiture can affect the viability of otherwise profitable companies, the status of preexisting contracts, and the fortunes of rivals."[210] Concerns about ripple effects should not be dispositive in a public suit, nor in a private suit, but courts should treat private litigants seeking divestiture as a remedy with heightened skepticism.[211]

For the reasons previously mentioned, courts should seriously consider arguments made by defendants in support of a laches defense.[212] The facts of each individual case must be analyzed for the prejudicial effect of delay in bringing suit. A considered approach to any laches defense will put potential plaintiffs on alert, and where the deadweight loss from divestiture increases as firms integrate further, this notice is warranted.[213]

> injunction until November 3, and then only because the court imposed this deadline. When dealing with transactions of this nature, these were inexcusable delays . . . . In some cases, lack of diligence in seeking § 7 relief has completely barred the equitable remedy of divestiture. . . . But even if Plaintiffs were not so dilatory as to trigger the defense of laches, their failure to obtain a preliminary injunction that would make the divestiture remedy "easy to administer and sure" must be taken into account in fashioning an appropriate remedy some years later.

(internal citations omitted).

209 HOVENKAMP & AREEDA, ANTITRUST LAW, *supra* note 47, ¶ 326b.

210 *Id.*

211 *See* Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 883 F. Supp. 1247, 1264 (W.D. Wis. 1995), *aff'd & rev'd in part by* 65 F.3d 1406 (7th Cir. 1995) ("It is questionable whether divestiture of a long completed transaction is an appropriate remedy in a private action under the Sherman Act. In any event it is not an appropriate remedy here . . . . Divestiture would have a large impact on third parties . . . that have not been before this Court to protect their interests.").

212 *See, e.g.*, Fed. Home Loan Bank Bd. v. Elliott, 386 F.2d 42, 53-54 (9th Cir. 1967) ("Among the various kinds of relief which might have been requested by plaintiffs, was an injunction to prevent the consummation of the merger . . . . However, suits were not filed until immediately after consummation of the merger. This relief was therefore not then available."); Antoine L. Garabet, M.D., Inc. v. Autonomous Techs. Corp., 116 F. Supp. 2d 1159, 1173 (C.D. Cal. 2000) ("In this case, the Court has no difficulty concluding that the Plaintiffs failed to exercise proper diligence in the pursuit of their claim(s). Even if they had filed suit . . . just one to three days before the merger was consummated, it is quite possible that their failure to take any action for months after knowing about the merger may still have proven fatal to their claims for equitable relief.").

213 Here I should note divestiture is, and should be, viewed favorably in government enforcement actions even post-merger. This remedy is easy to administer because it does not require lengthy court supervision like many conduct remedies do, and many times its impact on long-term competition is more certain. For the reasons discussed above, this same preference is not appropriately applied to remedies for private litigants. *Cf.* U.S. DEPT. OF JUST., ANTITRUST DIVISION, *supra* note 67, § III.C (explaining that divestiture is the preferred remedy for public merger enforcement actions brought after the merger has been consummated). "The speed, certainty, cost, and efficacy of a remedy are important measures of its potential effectiveness. Structural remedies are preferred to conduct remedies in merger cases [brought by the government]

C. *Ideal Private Merger Enforcement*

Ideally in private enforcement, the projected benefits to consumer welfare from increased competition that are expected to come about within a reasonable time period post-divestiture ought to clearly outweigh the loss of any efficiencies that arose as from the merger and any other collateral losses, like the firing of employees during divestiture. Obviously, measuring these potential impacts would be nearly impossible. But this framework might still prove useful. For example, in *JELD-WEN* the expected benefits from an increase in competition appeared to be quite high, as JELD-WEN had already begun decreasing their quality and increasing the prices of its products. The efficiencies that came about as a result of the merger might have been great, but not great enough to lower prices or improve quality. And JELD-WEN offered little hard evidence of undue hardship on employees or other externalities. But when the pros and cons are viewed in such a way, it becomes clear that the earlier an anticompetitive merger is unwound, the more likely it becomes that the resulting increase in competition would increase consumer welfare more than it would cause economic waste and undue hardship.

As a closing note, it is true that in many situations where a private plaintiff brings a merger challenge, private plaintiffs could have brought their claims under the Sherman Act or other provisions of the antitrust laws. The FTC has taken that approach in the recent litigation against Facebook regarding WhatsApp and Instagram.[214] Where many years have passed since the consummation of the merger, it is likely that some claims would be better brought as a direct challenge to the anticompetitive behavior, rather than the merger.

CONCLUSION

Private merger enforcement is part of the overall antitrust enforcement schema designed and intended by Congress. This understanding of the importance of private plaintiffs in the overall system has been echoed by the Supreme Court, but private merger enforcement is rife with potential pitfalls. While the Fourth Circuit *JELD-WEN* "case is a poster child for divestiture,"[215] there is reason to doubt the propriety of divestiture remedies for private plaintiffs under many other factual circumstances. Private merger

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because they are relatively clean and certain, and generally avoid costly government entanglement in the market." *Id.* § III.A.

214 *See* First Amended Complaint, *supra* note 19, at 76-78 (bringing claims under section 2 of the Sherman Act rather than challenging the merger under section 7 of the Clayton Act).

215 Steves & Sons, Inc. v. JELD-WEN, Inc., 988 F.3d 690, 724 (4th Cir. 2021).

enforcement under section 16 of the Clayton Act should continue to be reviewed pragmatically. Courts should consistently apply the antitrust injury doctrine, prefer consumer plaintiffs over competitor plaintiffs, and view post-merger consummation challenges with heightened suspicion. The risks of improper actions are serious: improper divestiture remedies create economic waste for everyone and inappropriately grant market-shaping powers to competitors.

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