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M&A REPORTER: Q3



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Rise of Private Merger Challenges?

By Kevin Hahm, Ryan Phair, Carter Simpson, and Jack Martin

The widely held notion among antitrust practitioners that private merger challenges are rare, and successful challenges still rarer, is belied by the history of private merger challenges as part of the original design of the merger enforcement system, as well as the recent uptick in such challenges. In the [Summer 2021 volume](#) of the American Bar Association's *Antitrust* magazine, we discuss how the M&A antitrust risk of private merger challenges has increased.

Private merger challenges have been a cornerstone of merger enforcement since the passage of the Clayton Act in 1914. Prior to the Clayton Act, mergers were only subject to challenge by the Department of Justice ("DOJ"). Congress passed the Clayton Act with the purpose of expanding merger control by specifically targeting mergers and augmenting enforcement through a newly created independent agency – the Federal Trade Commission ("FTC") – as well as private parties. These enforcers were empowered to "have injunctive relief... against threatened loss or damage by a violation of the antitrust laws," including the merger provisions of Section 7.¹ Not merely an incidental player in this merger enforcement scheme, the statute essentially sanctions private parties to act as "private attorneys general" in such matters.² Yet, despite this clear statutory authority, private parties historically have not filed anywhere near the same number of merger challenges as have the DOJ and the FTC.

While the historical paucity of private challenges is likely due, in part, to Supreme Court cases that denied standing to horizontal competitors complaining about harm from potential procompetitive mergers, these decisions did not prevent competitors from bringing claims related to *anticompetitive* effects of mergers. Indeed, claims by competitors related to anticompetitive effects from a merger—particularly in the context of foreclosure—now appear to be on the rise.

Our article notes the increase in the number of private merger challenges over the past 20 years.³ From a review of public records, several recent private merger challenges appear to have proved "successful." Those cases provide valuable lessons about competitors standing to seek injunctive relief, the availability of divestiture as a remedy, the risk of post-closing challenges, and the importance of foreclosure as a theory of harm.

Steves v. Jeld-Wen, a case where the plaintiff was both a competitor and a customer, shows the practical viability of post-closing injunctive relief. Steves and Sons, Inc. and Jeld-Wen, Inc. sold interior molded doors, but Jeld-Wen was also one of three upstream manufacturers of doorskins, the primary input for finished doors. The DOJ investigated Jeld-Wen's acquisition of Craftmaster International, another vertically integrated door manufacturer, and took no action. Steves brought suit under Section 7 and secured jury awards for past damages and future lost profits, although the latter award was later vacated. In a subsequent remedy proceeding, the judge also ordered Jeld-Wen to divest a Pennsylvania factory,⁴ a first for a private merger challenge.⁵

The Steves case highlights several risks that M&A practitioners should note. First, that challenges by private parties (as well as the government) can occur post-closing; Steves filed suit four years after the merger was consummated. Second, courts can order post-closing divestiture as a remedy to a successful merger challenge. Finally, in keeping with other cases, the success of recent private merger challenges is where courts have rejected the argument that failure by the federal antitrust agencies "to object to the merger should be regarded as conclusive of its legality."⁶

¹ Section 16 of the Clayton Act, 15 U.S.C. § 26.

² *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1179 (N.D. Cal. 2013) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977)) (alteration in original).

³ The authors have prepared a table of private merger challenges since 2000 that documents these filing figures and provides summaries of the cases and other information. The table can be found on the ABA's website at https://www.americanbar.org/content/dam/aba/publishing/antitrust_magazine/atmag-summer-2021/supplements/private-merger-challenges-table.pdf. In addition, a "live" version of the table, which will be updated regularly, can be found at <https://www.huntonak.com/Media/Private-Merger-Enforcement-Chart-Addendum.pdf>.

⁴ The DOJ submitted a Statement of Interest supporting the Towanda plant's divestiture as "the best way to preserve and restore competition in the relevant market threatened by, or already harmed by, an anticompetitive merger." Statement of Interest, *Steves and Son, Inc. v. Jeld-Wen, Inc.*, 3:16-CV-00545-REP (E.D. Va. June 6, 2018), <https://www.justice.gov/atr/case-document/file/1069011/download>.

⁵ The divestiture would take the place of the future lost profits award. See *Steves and Sons v. Jeld-Wen, Inc.*, No. 3:16-CV-545, 208 WL 4844173 (E.D. Va. Oct. 4, 2018).

⁶ *AlliedSignal v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir. 1999).

Lessons from the Buy-Side on Acquiring Businesses with Outstanding PPP Loans

By Austin Maloney

As M&A activity has increased over the past 18 months, the significant number of potential acquisition targets that received a loan pursuant to the US Small Business Administration's (SBA) Paycheck Protection Program (PPP) has caused confusion for some potential buyers. A target company having an outstanding PPP loan should not impair an acquisition or delay closing if handled properly in advance of closing. Below we discuss three common scenarios and best practices for buyers when consummating acquisitions of targets that are PPP borrowers.



- **Target has received documented forgiveness of its PPP loan.**

If the target states that it has received documented forgiveness of its PPP loan, a prudent buyer should request the documented evidence of such forgiveness. Upon review of such documentation, a buyer can proceed without regard to the PPP loan as the target—as borrower under the PPP loan—has satisfied all of its obligations with respect to the PPP loan. A buyer should still request representations regarding the loan application and the use of the funds in accordance with PPP program guidelines to protect against any future audit risk.

- **Target has applied for, but not yet received, forgiveness of its PPP Loan.**

We have seen many instances in the past six months where a target has submitted a forgiveness application to the SBA or its PPP lender but has not received a decision with respect to forgiveness of its PPP loan. Buyers should seek to identify an outstanding forgiveness application as early as possible in the acquisition process to ensure that a target has time to work with its PPP lender in order to allow the transaction to proceed smoothly. The key action items when a target has a pending forgiveness application with respect to a PPP loan are:

1. Engage the PPP lender and make them aware of the transaction. Every PPP lender has its own internal process for addressing potential acquisitions with respect to a borrower and the target should engage its PPP lender as soon as possible to avoid any surprises or unnecessary delays.

2. The target should enter into an escrow agreement pursuant to which the outstanding amount of the PPP loan is deposited into escrow and subsequently receive written consent of the PPP lender to the contemplated transaction. Per [SBA regulations](#), the full amount of the outstanding balance of the PPP loan must be deposited into an interest-bearing escrow account controlled by the PPP lender. Transaction parties should be aware that these types of escrow arrangements may look different than typical M&A escrow agreements. A few examples of this that we have seen recently are:

- a.) Certain PPP lenders have required that escrowed funds be in hand before issuing a written consent. This stands in contrast to most escrow and payoff arrangements, where funds are paid with other closing proceeds. In some cases, this means that funds need to be wired to the PPP lender in advance of closing. Hunton Andrews Kurth has worked with buyers and sellers to create arrangements to provide both parties comfort when PPP lenders impose such a requirement.
- b.) Certain PPP lenders, for regulatory reasons, have authorized a separate entity to serve as the escrow agent. As long as the escrow account remains under the control of the PPP lender, this structure is acceptable under SBA regulations.
- c.) Notably, buyers should not have to be party to an escrow agreement for the outstanding amount of a PPP loan, but they can provide the funds for such escrowed amount.

Top 5 Industries for number of M&A deals closed in Q3:



**BUSINESS/
PRODUCTIVITY
SOFTWARE**



**COMMERCIAL
SERVICES**



**ASSET
MANAGEMENT**



**FINANCIAL
SOFTWARE**



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September 28, 2021



• Target has not applied for forgiveness of its PPP loan.

If a target has not applied for forgiveness, it must seek prior approval from the SBA with respect to any “change of ownership” transaction. The PPP lender is ultimately responsible for submitting the request to the SBA. The target will need to work with its PPP lender to provide the following information:

1. The reason why the target (as PPP borrower) cannot fully satisfy (through payoff in full or forgiveness) the PPP loan or escrow an amount equal to the PPP loan as described above;
2. The details of the contemplated transaction;
3. A copy of the executed PPP Note;
4. Any letter of intent and/or purchase and sale agreement setting forth the responsibilities of the PPP borrower, the seller (if different from the PPP borrower), and the buyer;
5. Disclosure of whether the buyer has an existing PPP loan and, if so, the SBA loan number; and
6. A list of all owners of 20 percent or more of the buyer.

The SBA commits to providing a response to such request within 60 days of receipt of a complete request. Any approval by the SBA will be conditioned upon the buyer assuming all of the PPP borrower’s obligations under the PPP loans, including responsibility for compliance with PPP loan terms. The SBA requires evidence that the purchase and sale agreement includes such terms or that a separate assumption agreement evidencing the existence of such terms is submitted to the SBA.

Regardless of the status of the loan, a buyer of a PPP borrower should seek indemnification from the PPP borrower for liability relating to its obtaining the PPP loan and any non-compliance with PPP requirements. The SBA has a six-year timeframe for bringing claims with respect to noncompliance with PPP requirements.

The largest deal announced so far in 2021 is valued at \$43 billion.

Spotlight on Delaware

By Steve Haas

Over the past quarter, there has been significant movement in the Delaware courts concerning mergers and acquisitions. M&A team co-chair Steve Haas has a long history with the Delaware courts and has authored the following client alerts, providing insider expertise regarding recent developments. Steve is a fellow in the American College of Governance Counsel, elected to the American Law Institute, and an appointed member of the Committee on Corporate Laws of the Business Law Section of the American Bar Association. Several of his articles have been cited by the Delaware Court of Chancery and the Delaware Supreme Court.

- [Dilutive Stock Issuances, Deadlocks, and Delaware Law: *Blasius* Lives, September 10, 2021](#)
- [Delaware Court Addresses Fraud Claims in M&A No-Recourse Transaction \(aka the Enduring Legacy of *Abry Partners*\), September 7, 2021](#)
- [Delaware Chancery Rejects a Buyer's MAE Claim \(Again\), August 26, 2021](#)
- [Delaware Guidance on Controlling Stockholder Transactions under MFW, August 25, 2021](#)



\$851.51 billion
currently invested in
announced/in-progress
deals vs. **\$118.47 billion**
at the same time in 2020.

INSIGHT

Two Recent Developments
Relating to the FTC's
Merger Notification and
Review Process

September 15, 2021



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