

Competition Group Of The Year: Cleary

By **Bryan Koenig**

Law360 (January 30, 2024, 2:02 PM EST) -- Cleary Gottlieb Steen & Hamilton LLP saw one hotly contested merger through to closing, forced the Justice Department to settle another case and helped guide one of the largest-ever tech deals across the regulatory finish line, earning its place as one of Law360's 2023 Competition Groups of the Year.

Like 2022 before it, 2023 saw Cleary going toe-to-toe with U.S. Department of Justice antitrust enforcers in important merger litigation, bringing to bear a team of over 50 competition attorneys.

In September 2022, a D.C. federal judge ruled against a DOJ challenge to UnitedHealth's \$13.8 billion bid for Cleary-represented Change Healthcare, rejecting allegations of horizontal overlap for first-pass claims-editing technology as well as vertical concerns the pairing would incentivize UnitedHealth to boost UnitedHealthcare, the country's largest insurer, by abusing Change's access to rival data.

The merger closed in early October 2022, and the DOJ abandoned a planned appeal of the loss in March.

Later in 2023, the DOJ challenged Assa Abloy's \$4.3 billion pickup of Spectrum Brands' hardware and home improvement business, only to settle that lawsuit in the middle of trial in May, resolving allegations over direct horizontal overlap for building door locks.

The door locks resolution, which Cleary helped negotiate as counsel for Assa Abloy alongside Hogan Lovells, was the first — and so far only — merger clearance settlement under a Biden-era DOJ policy to shun most such deals on the belief many past agreements weren't strong enough to safeguard competition.

And the DOJ made clear at the time it was unhappy with the results, saying the risks of continuing litigation made this an acceptable outcome.

"We view that as a pretty significant win, especially in this antitrust environment," said Cleary partner Jeremy J. Calsyn.

One of the firm's biggest victories was a fight that never happened, thanks to the abating of antitrust concerns raised by United Kingdom and European enforcers over chipmaker Broadcom Inc.'s \$61 billion



acquisition of VMware Inc., a cloud services provider.

Cleary served as Broadcom's lead global antitrust counsel on the deal, which managed to clear competition enforcer scrutiny in multiple international jurisdictions in a time of intense focus on technology transactions.

"Competition authorities looked at a number of different theories, including conglomerate effects," said Leah Brannon, a partner at Cleary. "And the team worked across the globe to secure clearance everywhere."

The European Commission and the U.K.'s Competition and Markets Authority had both raised concerns over the deal. Yet the CMA ultimately concluded in July it didn't pose anticompetitive harms in the country.

EU officials were mollified that same month by a deal that required Broadcom to allow other companies — including another chipmaker, Marvell Technology Inc. — access to tools and support they would need to develop rival hardware products.

Calsyn said the firm's advocacy was likely important to winning approval.

"It wasn't a situation where an agency just took a pass," he said. "Clearly, there were in-depth reviews and a lot of different ideas and theories that had to be assessed and rebutted."

Broadcom provides hardware components that connect servers to storage or networks. VMware is a software supplier offering virtualization software that is compatible with a wide range of hardware, including that provided by Broadcom.

The Federal Trade Commission also launched an in-depth investigation into the deal but never sought to challenge it.

Another victory came last March, when a Tennessee federal judge took the rare step of tossing a proposed monopolization class action lodged against private equity-owned cheerleading equipment and apparel company Varsity Brands, represented by Cleary and Baker Donelson Bearman Caldwell & Berkowitz PC, in a decision based solely on plaintiffs' discovery violations.

The dismissal nixed only one part of larger litigation, but for Cleary, it still represents a crucial development.

"Proof that you can beat these things. It just really takes time and focus," Brannon said.

--Additional reporting by Najiyya Budaly and Renee Hickman. Editing by Linda Voorhis.
