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Competition Group Of The Year: Cleary

By **Bryan Koenig**

Law360 (February 7, 2020, 3:58 PM EST) -- Cleary Gottlieb Steen & Hamilton LLP helped clients navigate several massive transactions, and considerable antitrust scrutiny, last year, including T-Mobile's purchase of Sprint and the Walt Disney-Fox tie-up, earning it a spot as one of Law360's 2019 Competition Groups of the Year.

Cleary's work representing T-Mobile is not yet done, with the companies still waiting on a decision from the New York federal judge overseeing a challenge to the merger brought by more than a dozen Democratic attorneys general. But simply securing approval from the U.S. Department of Justice in July and the Federal Communications Commission in October was itself a feat that pitted the firm's spectrum of skills against intense agency scrutiny and the general presumption that tie-ups reducing the number of competitors in the wireless market from four to three are anti-competitive, although the merger clearance deal here imagines Dish as a fill-in for Sprint.

"The agencies required a level of detail and precision and proof beyond anything that I've seen before. And Mark [Nelson] delivered it. I mean, we were down to talking about cell sites in particular locations," said antitrust partner George S. Cary. "The agencies did extensive due diligence. And at the end of the day, they were convinced that this deal was in the interest of American consumers."

What sold the agencies was the promise of next-generation wireless technology, known as 5G, whose full benefits the companies contend they can only realize by combining resources. But 5G technology was "uncharted territory" for the agencies, according to Nelson, an antitrust partner who led the review process.

"We tried to play to the agencies' strengths and encourage them to cross-fertilize with each other. We viewed it as, the more knowledgeable the people are on the other side of the table from us, the better off we'll be," Nelson said.

That knowledge came through a fire hose. According to Nelson, the two companies produced 10 years' worth of material when the default is two years, amassing over 30 million pages of documentation.

"It was like a typical second request times five," Nelson said.

Navigating the material requests along with the multiple forums reviewing the merger, from the federal enforcers to a California agency, as well as the overbearing political element, played to Cleary's unique strengths, according to Cary and Nelson.

"What is unique about Cleary is the ability to combine the litigation expertise with the regulatory approval expertise. And the economics at the highest level. I think all of those skills, which are the centerpiece of how we organize our practice, were called upon in this case to a level that I have not seen before," Cary said. "Requiring all of those abilities at their peak levels in all of those multiple dimensions of our practice."

The 12 months that kicked off in October 2018 was a busy merger year for Cleary, which boasts about 200 antitrust attorneys, concentrated primarily in Washington, D.C., and Brussels and representing a core practice for the firm.

That period saw European Commission approval in November 2018 of The Walt Disney Co.'s planned $71.3 billion deal for Twenty-First Century Fox Inc.'s entertainment assets after the company agreed to unload interests in the History Channel and several other networks. The DOJ cut its own merger clearance deal months earlier and the transaction closed in May 2019.

European approval was a very different affair than it was in the U.S. and for more than one reason, according to Cary. For one, Cleary was hired by different parties on different sides of the Atlantic: It worked for Disney in Europe and Fox in the U.S. And the Europeans had a "different conception" of the markets involved, according to Cary, who said commission enforcers viewed Hollywood films as separate from other kinds of movies.

Cleary's deft hand was also important when working with Juul Labs Inc. when Altria Group Inc. agreed in December 2018 to buy a $12.8 billion stake in the private equity-backed e-cigarette startup.

That deal allowed Altria to quickly pump the cash infusion into Juul before going through antitrust clearance because it initially came with a 35% nonvoting ownership interest that the parties sought to convert into voting stock only afterward. Navigating the transaction was all about structure, according to partner Jeremy J. Calsyn.

Not all of Cleary's wins came from mergers. In January 2019, while representing NSK Ltd., it helped convince a Michigan federal judge to reject class certification in the first certification ruling in long-running multidistrict litigation over auto part price-fixing. The decision was specific to the purchase of bearings, with the judge finding that the three would-be class representatives were small distributors of mostly repair parts who don't adequately represent the class.

Cleary's approach in that case was getting in front of the judge ahead of the pack because it felt it had the winning arguments, according to Calsyn, who argued the matter.

"That strategy paid off. And we defeated class certification. Which is a pretty amazing thing to do," Calsyn said, especially in the face of criminal guilty pleas and fines entered by many of the defendants, including NSK.

After the first class certification was defeated, the plaintiffs dramatically scaled down the class they were seeking to represent, cutting down a damages claim pegged at around $7 billion to the hundreds of millions, according to Calsyn.

“You look at the exposure and you look at the case we were up against,” he said. “I think the outcome is really unbelievable.”

--Additional reporting by Matthew Perlman, Chelsea Naso, Benjamin Horney, Anne Cullen, Rachel Graf and Eric Kroh. Editing by Bruce Goldman.