

Competition MVP: Cleary Gottlieb's George S. Cary

By Aaron Vehling



Law360, New York (December 16, 2014, 4:23 PM ET) -- In nearly 40 years in competition law on the regulatory and private practice side, Cleary Gottlieb Steen & Hamilton LLP partner George S. Cary has become a go-to attorney for high-profile competition litigation and for prominent mergers, such as Medtronic Inc.'s \$43 billion acquisition of Covidien PLC, earning him a spot on Law360's list of Competition MVPs.

Cary, an attorney in the firm's Washington, D.C., office since 1998 and a former deputy director for the U.S. Federal Trade Commission's Bureau of Competition, has been at the forefront of a handful of major cases and deals this past year.

Not only has he overseen the Medtronic-Covidien inversion deal, but he has also helped Family Dollar Stores Inc. navigate the antitrust implications of buyout bids from rivals Dollar General Corp. and Dollar Tree Inc. Cary also defended Sanofi-Aventis U.S. LLC in a monopolization lawsuit brought by rival Eisai Co. Ltd., challenging Sanofi's loyalty discounts for its anti-coagulant drug Lovenox.



George S. Cary

"It is rare to find an antitrust lawyer that practices at the highest level in both antitrust litigation and merger work," Cleary Gottlieb managing partner Mark Leddy said. "His experience as both a line prosecutor and a high-level FTC enforcement official, his broad government and private litigation experience, and his robust knowledge of economics make him a formidable antitrust advocate."

In June 2014, Minnesota-based Medtronic's proposed acquisition of the Ireland-based Covidien drew the attention of antitrust regulators across the world, both for its sheer size and, in the U.S. at least, because the Obama administration began clamping down on tax inversion deals — which in this case involves the company moving domicile from the U.S. to Covidien's Dublin headquarters.

However, by early December, China's competition watchdog had followed other regulators, including the FTC, in signing off on the \$42.9 billion deal, handing the two companies global approval to complete their merger.

A deal that complex caught the attention of regulators because of the vast and diverse product portfolios of both medical-device makers, with competition bureaus in the U.S., the European Union, Korea, China and elsewhere each finding a particular area of focus. Cary was in charge of the deal in all jurisdictions, coordinating the local legal teams to clear hurdles in about five-and-a-half months, in what he called a "record pace."

"It was a massive effort," Cary said. "The results could not have been better."

Cary has worked for the FTC in two different stints, but most recently from 1995 to 1998 he was responsible for merger enforcement. He had spent 10 years as an antitrust litigator in Los Angeles prior to returning to the FTC, and he was lead trial counsel for the FTC in its successful challenge of the Staples and Office Depot merger, considered at the time the most significant merger deal of that decade.

"Knowing what kinds of themes they are likely to use, how they think about things, and how they make their decisions is very valuable," Cary said. "The flip side is also the case when private practitioners move to the government."

That experience will help Cary as he engages in merger work this year for Family Dollar, which has brought him to center stage in two rivals' bids to buy up the popular discount store. Cary, along with Cleary Gottlieb partner Brian Byrne, assessed the antitrust risk of Dollar General's \$9.1 billion hostile takeover bid, urging the Family Dollar board to reject it.

Cary is also representing Family Dollar before the FTC in its quest for merger clearance for Dollar Tree's \$8.5 billion bid for the company, a deal that was announced in July and is favored by Family Dollar's board.

Both Dollar General and Dollar Tree have offered the FTC concessions, such as divesting of hundreds of stores, in order to achieve clearance. Family Dollar's shareholders are set to vote on the deal on Dec. 23.

In addition to mergers, Cary's dual experience has also proved helpful in high-profile antitrust litigation.

In March, Cary convinced a New Jersey federal court to dismiss Eisai's lawsuit against Cary's client, Sanofi, accusing Sanofi of entering into de facto exclusive-dealing contracts by offering loyalty discounts to hospitals that purchased large amounts of Lovenox.

Eisai, which makes an anti-coagulant called Fragmin, filed its suit against Sanofi in 2008, seeking billions in damages.

"The other side was basically trying to make a case that they have been disadvantaged by being excluded from the marketplace," Cary said.

After finding that the case should be analyzed under a "price-cost test," U.S. District Judge Mary L. Cooper ruled that Sanofi had not violated the Sherman Act because it hadn't sold Lovenox to hospital groups at below-cost prices.

Cary said the case presents an antitrust issue that comes up often: competitors using antitrust laws to their competitive advantage. Judge Cooper chose correctly on the issue, he said, because there was

nothing in the record to indicate that Eisai could not have matched the discounts itself and tried to compete on price.

That ruling — the first to use as its basis a Third Circuit decision in 2012 involving the price-cost test in *ZF Meritor LLC v. Eaton Corp.* — is currently under appeal before the Third Circuit.

"Our job is to keep the court's eye on the ball in terms of its role of focusing on promoting competition," Cary said.

Going forward, Cary said, he will stay in private practice, tapping into the toolbox of skills he has acquired in both public service and in private practice since he first began practicing law in the 1970s as young FTC litigator.

"It's good that we have this culture in the U.S. that allows people to go back and forth," Cary said. "Bringing understanding to both sides yields better decision-making."

--Additional reporting by Allissa Wickham, Chelsea Naso and Karlee Weinmann. Editing by Jeremy Barker.