

Editors' Note

Dear Readers,

Welcome to "Antitrust News in Five Minutes." We designed it to fill a gap in antitrust newsletters. We do not try to be comprehensive, and will not run long articles. Instead, we offer *quick-read* alerts on the most important antitrust developments that could affect your business. Please tell us how we can make this more useful to you.

Blackberry access: If you prefer to receive this newsletter on your Blackberry, please send an email to Steven.Levitsky@dl.com with "Blackberry" in the subject field.

If you have any questions, please call or email your Dewey & LeBoeuf lawyer or one of us.

Steven Levitsky
David Turetsky

DEWEY & LeBOEUF

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David Turetsky is co-chair of the Antitrust Practice Group. He was Deputy Assistant Attorney General for Antitrust during the Clinton Administration; a senior legal officer of a telecom company; twice a federal

court and FCC-appointed management trustee for businesses required to be divested under merger consent decrees; and antitrust advisor to the Obama DoJ transition team. He handles litigations, mergers, investigations, compliance, regulatory and competition policy matters for US and global clients in sectors such as tech, media, telecom, insurance, electricity, energy, transportation, sports, consumer products and manufacturing.

David.Turetsky@dl.com | 202 346 8077



Steven Levitsky concentrates on complex international mergers and joint ventures, and competition issues in the insurance and energy industries. He has supervised US and international competition clearances for such transactions as MetLife's \$11.8 billion acquisition of Travelers from Citigroup; The St. Paul's \$16 billion merger with Travelers Property Casualty; AEGON's \$5.4 billion sale of Transamerica Financial Services to General Electric; and National Grid's \$8.9 billion acquisition of Niagara Mohawk.

Steven.Levitsky@dl.com | 212 259 8309

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U.S. House approves McCarran repeal for medical and health insurance/ Permits FTC to study the insurance industry

The major health insurance overhaul was passed by the U.S. House of Representatives last week. It includes a provision repealing the federal antitrust exemption for health and medical malpractice insurance. The bill also would change federal law to allow the Federal Trade Commission (FTC) to study the insurance industry (as it can do for most industries) with no limitation as to type of insurance that could be included.

The Senate is expected to vote on its own version of health insurance reform soon. If that legislation passes, the House antitrust provisions would be among the possible provisions that could emerge from a conference in a unified bill, whether or not the Senate bill includes similar provisions.

Intel and AMD settle antitrust private claims for \$1.25 billion

On November 12, Intel agreed to pay Advanced Micro Devices (AMD) \$1.25 billion to settle all of AMD's antitrust claims worldwide.

AMD's lawsuits have led to government investigations in the

US and abroad. The European Commission (EC) fined Intel more than €1 billion earlier this year for these alleged practices. See the next story for a lawsuit just brought by the New York Attorney General (NY AG) a week before the private settlement. The FTC is also known to be investigating these practices as well.

New York AG brings antitrust case against Intel

Andrew Cuomo, the NY AG, filed an antitrust case against Intel on November 4, charging the company with a "worldwide, systematic campaign of illegal conduct." It asks for treble damages for antitrust injuries suffered by the state itself and by New York citizens.

The complaint charges that Intel paid kickbacks to computer manufacturers to get them to buy exclusively from Intel, and not to buy competing products from other chip makers, especially AMD. According to the complaint, the annual payments were so large that some computer manufacturers became reliant on them.

The effect of these practices, Cuomo charged, "not only unfairly restricted potential competitors but also hurt average consumers who were robbed of better products and lower prices."

Intel itself dismissed the charges as "the same tired line of reasoning that AMD has pursued since 2005."

NY Intel complaint illustrates need for ongoing antitrust training

Paragraph 59 of the Cuomo antitrust complaint against Intel serves as a general reminder of the need for ongoing antitrust training for all levels of corporate employees, especially those who make competitive policy or deal with competitors, customers or suppliers.

Paragraph 59 reads:

59. Other emails [from Intel to computer manufacturers] suggest that internal Intel discussions which might raise antitrust issues were consciously not reduced to writing at all, or carried on in an instant messaging format less likely to be retained. In an April 2006 email one executive concluded an emailed list of "key issues" with the suggestion: "Let's talk more on the phone as it's so difficult for me to write or explain without considering anti-trust issue." In a June 2006 email string regarding Intel's rebate strategy vis-à-vis Toshiba "to compete against AMD" a senior Intel executive ended the email discussion with the directive: "Dude, c'mon. IM [instant messaging] please."

Note: Private and government antitrust investigations routinely reveal that employees at all

levels fail to understand that all communications have the potential to be recorded, discovered and revealed.

Sun/Oracle merger, cleared in US, meets opposition in EU

The EU competition regulator issued objections to the Sun/Oracle merger. That merger was already cleared by US antitrust authorities, who did not require any changes.

The EU regulator argued that the combination of Sun's open source MySQL database product with Oracle's database products would restrict competition.

MySQL is open-source software. (Open source software allows users to make changes to software that would otherwise be prohibited under copyright law.)

The EU claimed that, in spite of the open source accessibility, it would be still difficult for a competitor to reduce the alleged anticompetitive effects of the merger. This provoked a response from the U.S. Department of Justice (DOJ), explaining the Department's different analysis and conclusion, saying in part that "there are many open-source and proprietary database competitors. We remain hopeful that the parties and the EC will reach a speedy resolution that benefits consumers in the commission's jurisdiction."

FTC investigating CVS-Caremark business practices

CVS-Caremark's 10-Q filing reports that the FTC is conducting a non-public investigation of its business practices.

CVS-Caremark, the country's largest retail pharmacy, merged with Caremark, the largest pharmacy benefits manager, in a \$27 billion transaction in 2007.

The FTC investigation purportedly results from complaints made by local pharmacists to the FTC to re-examine the impact of the merger, and specifically whether CVS has used improper practices to steer Caremark clients to CVS pharmacies. The National Community Pharmacists Association issued a statement on the FTC investigation:

In seeking approval for the CVS Caremark merger, company officials said they would be 'agnostic as to where the consumer fills their prescription.' Since then those words have rung hollow for patients and community pharmacists.

"Patients consistently complain of higher prices, fewer choices and privacy violations. Patients cite steep penalties for choosing other pharmacies, if they're allowed a choice at all. Aggressive marketing tactics tap into vast databases of private medical records. Meaningful

competition has been severely diminished.

The company denied any violations of law.

Title insurance plaintiffs return

We reported in earlier issues on ongoing dismissals of antitrust class actions around the country that had charged title insurers with conspiring to fix prices. Many of these complaints had charged that the "illegal conduct" was achieved through government-mandated rate-setting procedures.

The earlier complaints were dismissed based on antitrust immunities, including the filed-rate doctrine. (The filed-rate doctrine holds that rates made with a regulatory agency cannot normally be challenged by private antitrust plaintiffs.)

In New Jersey, the court dismissed a complaint, even though it claimed that the New Jersey regulatory agency did not conduct meaningful oversight of the rates. The new complaint (the second amended complaint) offers a slight variation on this theme and now claims that the defendants (the title insurers) created a scheme to avoid New Jersey agency oversight. It states:

The effect of this under-regulation has been to permit the defendants to file — and obtain approval for —

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rates for insurance and attendant services at supra-competitive levels.

Similar charges were made in other complaints that have already been dismissed.

Russia: FTC and DoJ sign cooperation agreement with Russian antitrust agency

The two US antitrust agencies made an antitrust cooperation with the Russian antitrust agency. It provides for reciprocal information exchanges and policy consultations on antitrust policy.

Some Canadian antitrust lawyers questioned whether this was the most efficient allocation of antitrust resources.

China: Panasonic/Sanyo clearance goes beyond the border/provides important merger-analysis guidance

China's merger authority (MOFCOM) gave conditional approval to Panasonic's acquisition of Sanyo, imposing conditions that affected the merger parties' business outside of China.

The application was received January 21, 2009. MOFCOM then asked for more materials and investigated further. The final decision was issued on Nov. 3, 2009.

Scope of the examination: MOFCOM's investigation asked for input from other authorities and from associations in the relevant industries. It also issued questionnaires, and conducted interviews and onsite investigations with competitors and downstream users of relevant products. MOFCOM consulted with Panasonic on possible solutions.

Conclusion and conditions imposed: MOFCOM concluded that the transaction could restrict or exclude competition for three products: the coin-shape lithium secondary battery, the civil NI-MH battery and the automotive NI-MH battery.

The conditions imposed require:

- (i) Divesting Sanyo's coin-shape lithium secondary battery business located in a specific county in Japan to an independent third party, and requiring Sanyo to license the technology to the buyer;
- (ii) Divesting Panasonic's or Sanyo's civil NI-MH battery business in specific locations in Japan and China to independent third parties, and licensing the related technology; and
- (iii) Divesting the automotive NI-MH battery business in a specific location in Japan, again with the obligation to license the associated technology.

The parties have 6 months to divest with a grace period of another 6 months, subject to MOFCOM's prior approval. The buyers also are subject to MOFCOM's approval.

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Canada: competition authorities zero in on farmers' market

The Canadian Competition Bureau sent a letter to the local farmers' market in Ottawa. It reminded them that price fixing will become a criminal offense under Canadian law in 2010.

The letter was apparently provoked by complaints that prices at the farmers' market were double what the same merchants charged at other locations in Ottawa.

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Editors

Steven Levitsky, *New York*

*David Turetsky, *Washington, DC*

Advisory Board

Aldo Badini, *New York*

Beth Bradshaw, *Chicago*

John Collins, *New York*

Peter Crowther, *London*

David Feher, *New York*

Margaret Keane, *Silicon Valley*

Michael King, *Chicago*

Ren Jiang, *Hong Kong*

Jeffrey L. Kessler, *New York*

James Lerner, *New York*

*Eamon O'Kelly, *New York*

*A. Paul Victor, *New York*

Sergei Volfson, *Moscow*

*Antitrust Practice Co-Chair

Our Antitrust practice has more than 60 lawyers, many with special areas of concentration. Our 25 offices in 15 countries allow us to handle our clients' antitrust problems around the world.

Worldwide Offices

New York

1301 Avenue of the Americas
New York, NY 10019-5389
tel +1 212 259 8000
fax +1 212 259 6333

125 West 55th Street
New York, NY 10019-5389
tel +1 212 424 8000
fax +1 212 424 8500

London

multinational partnership
No. 1 Minster Court
Mincing Lane
London EC3R 7YL
tel +44 20 7459 5000
fax +44 20 7459 5099

Washington, DC

1101 New York Avenue, NW
Washington, DC
20005-4213
tel +1 202 346 8000
fax +1 202 346 8102

Albany

99 Washington Avenue
Suite 2020
Albany, NY 12210-2820
tel +1 518 626 9000
fax +1 518 626 9010

Almaty

Ken Dala Business Center
5th Floor
Prospekt Dostyk, 38
Almaty 050010
tel +7 727 250 7575
fax +7 727 250 7576

Beijing

Beijing Kerry Center
South Tower
Suite 1429
No. 1 Guanghai Road
Beijing 100020
tel +86 10 6583 9500
fax +86 10 6583 9600

Boston

260 Franklin Street
Boston, MA 02110-3173
tel +1 617 748 6800
fax +1 617 439 0341

Brussels

Arts/Lux Building
Rue du Luxemburgstraat
14A
B-1000 Brussels
tel +32 2 227 0900
fax +32 2 227 0909

Chicago

Two Prudential Plaza
180 North Stetson Avenue
Suite 3700
Chicago, IL 60601-6710
tel +1 312 794 8000
fax +1 312 794 8100

Doha

Qatar Financial Centre
Branch
Al Fardan Office Tower
8th Floor
61 Al Funduq Street
P.O. Box 31316
Doha
tel +974 410 1717
fax +974 410 1500

Dubai

Suites 102-104, Level 1
The Gate Village Building 4
Dubai International Financial
Centre
P.O. Box 506675
Dubai
tel +971 4 425 6300
fax +971 4 425 6301

Frankfurt

Skyper
Taunusanlage 1
60329 Frankfurt
tel +49 69 3639 30
fax +49 69 3639 3333

Hong Kong

Citibank Plaza
2008, ICBC Tower
No. 3 Garden Road
Central, Hong Kong
tel +852 3697 7000
fax +852 3697 7099

Houston

RRI Energy Plaza
1000 Main Street
Suite 2550
Houston, TX 77002
tel +1 713 287 2000
fax +1 713 287 2100

Johannesburg

11th floor, The Forum
Building
2 Maude Street
P.O. Box 781033
Sandton, Johannesburg
2196
tel +27 11 911 4300
fax +27 11 784 2855

Los Angeles

333 South Grand Avenue
Suite 2600
Los Angeles, CA
90071-1530
tel +1 213 621 6000
fax +1 213 621 6100

Madrid

Calle de Velázquez, 57
28001 Madrid
tel +34 91 781 55 00
fax +34 91 577 90 48

Milan

Via F.lli Gabba 4
20121 Milan
tel +39 02 3030 9330
fax +39 02 3030 9340

Moscow

Nikitsky Pereulok 5
125009 Moscow
tel +7 495 737 5000
fax +7 495 737 5050

Paris

multinational partnership
51, rue Pierre Charron
75008 Paris
tel +33 1 53 93 77 00
fax +33 1 42 56 08 06

Riyadh

Khalid A. Al-Thebity Law Firm
affiliated office
King Fahad Road
Sky Towers - 8th Floor
P.O. Box 300807
Riyadh 11372
tel +966 1 416 9990
fax +966 1 416 9980

Rome

Via Giovanni Battista De
Rossi, 30
00161 Rome
tel +39 06 4520 6220
fax +39 06 4520 6230

San Francisco

One Embarcadero Center
Suite 400
San Francisco, CA
94111-3619
tel +1 415 951 1100
fax +1 415 951 1180

Silicon Valley

1950 University Avenue
Suite 500
East Palo Alto, CA
94303-2225
tel +1 650 845 7000
fax +1 650 845 7333

Warsaw

Stock Exchange Building
ul. Książęca 4
00-498 Warsaw
tel +48 22 690 6100
fax +48 22 690 6222

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