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SECOND CIRCUIT CONSTRUES FTAIA IN DISMISSING CLAIMS AGAINST BANK AUSTRIA

By John H. Shenefield, Jonathan M. Rich, and J. Clayton Everett, Jr.

The Second Circuit has added the next chapter to the quickly expanding volume of cases defining the extraterritorial reach of the Sherman Act. In June, the Supreme Court held in *Empagran, SA v. F. Hoffmann-La Roche, Ltd.* that the U.S. courts lack jurisdiction to entertain U.S. antitrust claims arising from the independent foreign effects of anticompetitive conduct, even if the same conduct also independently produced substantial effects in the United States. The *Empagran* decision did not, however, answer the question of whether the U.S. courts may exercise jurisdiction over foreign injury claims when the U.S. and foreign effects of conduct are in some way interrelated. Although not completely answering that open question, the Second Circuit's recent decision in *Sniado v. Bank Austria AG* makes clear that simply alleging a "worldwide conspiracy" affecting both the United States and other countries does not provide a sufficient basis for jurisdiction over foreign injury claims.

Sniado involved allegations that a host of European banks conspired to fix fees charged

for exchanging one European currency for another in the period preceding introduction of the Euro. The named plaintiff, an American citizen who claimed injuries arising from currency exchanges he made while traveling in Europe, sought treble damages under the U.S. antitrust laws on behalf of himself and all other U.S. citizens who used any of the defendant banks to exchange European currencies. The district court initially dismissed the case for lack of subject matter jurisdiction, holding that the Foreign Trade Antitrust Improvements Act ("FTAIA") precluded U.S. courts from taking jurisdiction over claims arising from the foreign effects of conduct violating the U.S. antitrust laws. Following the lower court's dismissal of the action, and relying on its intervening decision in *Kruman v. Christie's Int'l PLC*, the Second Circuit vacated the district court's dismissal late last year.

Defendants sought review of the Second Circuit's decision by the Supreme Court, which had already decided to consider *Empagran, SA v. F. Hoffmann-La Roche, Ltd.*, a case out of the

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ORACLE VICTORY CONTINUES STRING OF GOVERNMENT DEFEATS

By Willard K. Tom and Randall H. Conner

On September 9, 2004, U.S. District Court Judge Vaughn Walker handed DOJ a major defeat by rejecting its attempt to enjoin Oracle from acquiring PeopleSoft. A September 10 Morgan Lewis newsflash (<http://www.morganlewis.com/pubs/oracle.pdf>) discusses some of the implications of the case for market definition, customer testimony, economic expert witnesses, and competitive effects evidence.

Judge Walker's opinion in *Oracle* concludes the worst month in recent memory for federal antitrust enforcers. On August 13, D.C. District Court Judge John D. Bates denied the FTC's request for a preliminary injunction barring Arch Coal from acquiring two mines in the Southern Powder River Basin of Wyoming. Like Judge Walker, Judge Bates (1) rejected

the government's view of the relevant product market, (2) rejected the government's theory of competitive effects, and (3) downplayed customer testimony opposing the transaction. In a terse opinion issued August 20, the U.S. Court of Appeals for the D.C. Circuit declined to block the merger pending appeal, although it disavowed the district court's suggestion that the government's theory was "novel."

The government received more bad news on August 31, when Eastern District of Kentucky District Court Judge Karl S. Forester dismissed the Antitrust Division's case against the Dairy Farmers of America ("DFA"), a milk marketing cooperative. The government (joined by the Commonwealth of Kentucky) charged that DFA, which already owned a 50 percent interest in a milk processing plant in London,

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SECOND CIRCUIT CONSTRUES FTAIA IN DISMISSING CLAIMS AGAINST BANK AUSTRIA

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D.C. Circuit that involved similar issues regarding the extraterritorial scope of the Sherman Act. After deciding in *Empagran* that the FTAIA bars claims arising from the independent foreign effects of conduct that violates the Sherman Act, the Supreme Court remanded the *Sniado* case to the Second Circuit for further proceedings.

The Second Circuit requested briefing from the parties to determine whether *Empagran* was dispositive of the claims asserted in *Sniado*. The plaintiff acknowledged in *Sniado* that the basis for the Second Circuit's earlier decision did not survive *Empagran*, but nevertheless argued that "the Sherman Act reaches a foreign injury that is not independent of the foreign conspiracy's effect on United States commerce." Although not completely dismissing this argument, the Second Circuit held that the plaintiff's generalized allegations of a "worldwide conspiracy" affecting both U.S. and foreign markets were "too conclusory" to support the exercise of subject matter jurisdiction. The appellate court therefore vacated its previous decision and affirmed the district court's dismissal of the complaint, refusing to allow the plaintiff further opportunity to amend his complaint or to take discovery in support of his interdependence theory.

The Second Circuit's decision in Sniado provides little guidance about what degree of "interdependence," if any, is sufficient to establish a predicate for subject matter jurisdiction in a U.S. antitrust action seeking damages for foreign injuries. It does make clear, however, that alleging a "worldwide conspiracy," without more, is insufficient.

Other courts are likely to weigh in soon on the question left open by Empagran. The Third Circuit, facing an appeal from dismissal of foreign injury claims, recently remanded the Graphite Electrodes case to the district court for further proceedings in light of Empagran and instructed the district court "should it deem it necessary or helpful . . . to give the parties the opportunity to present evidence as to whether the alleged anticompetitive conduct's domestic effects were linked to the alleged foreign harm."

In addition, the parties in the Empagran case are currently briefing a related issue in the D.C. Circuit after remand from the Supreme Court. The D.C. Circuit has requested briefing to determine (a) whether plaintiffs waived the argument that the relationship between the U.S. and foreign effects of defendants' alleged conduct provides a basis for the U.S. courts to exercise jurisdiction over their foreign effects claims; and (b) if the argument has not been

waived, whether the trial court or the D.C. Circuit should decide the issue in the first instance. Plaintiffs filed their brief on these issues on August 9. The Empagran defendants filed their responses on September 9, 2004. ■

ORACLE VICTORY CONTINUES STRING OF GOVERNMENT DEFEATS

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Kentucky, had illegally acquired a 50 percent non-voting interest in a second milk processing plant in Somerset, Kentucky. Judge Forester found that DFA's acquisition of a non-voting interest in the Somerset plant did not amount to "control" of the plant sufficient to trigger a presumption of illegality. Judge Forester then rejected the government's contention that DFA's involvement in the affairs of both plants increased the likelihood of collusion between the plants. Defendants had presented testimony that the operators of each plant did not consult with DFA regarding their marketing plans or activities. The government presented no opposing evidence. Judge Forester therefore concluded that the government's case rested on "ephemeral possibilities" and did not establish a reasonable probability of diminished competition.

In DFA, Arch Coal, and Oracle, the federal judiciary applied the skepticism it displayed towards the government's challenges to hospital mergers to the government's activities in three diverse industries: milk processing, coal mining and computer software. The courts have reaffirmed the government's obligation to satisfy with hard evidence every element of its case. The courts have also made clear that customer testimony opposing the transaction will not mitigate failure to satisfy each element of the claim. For the business community, it appears clear that a determined defense of a pro-competitive transaction stands a much-improved chance of success.

Will Tom (wtom@morganlewis.com) is a partner in the firm's Washington, D.C. office and has significant experience in representing parties before both the Department of Justice and Federal Trade Commission in merger matters. Will served as Deputy Director of the Bureau of Competition at the Federal Trade Commission from 1997 to 2000 and as Assistant Director for Policy and Evaluation from 1995 to 1997.

Prior to joining the FTC, he was counselor to the Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. Randy Conner (rconner@morganlewis.com) is an associate in the Washington, D.C. office and has extensive experience analyzing competition issues associated with technology in both merger and non-merger matters. ■

FTC CONSENT SETTLEMENTS CONTINUE CLOSE SCRUTINY OF PHARMACEUTICAL INDUSTRY

Two recent FTC consent agreements – the first involving the pioneer manufacturer of a product designed to combat Break Through Cancer Pain ("BTCP") and the other concerning a maker of over-the-counter ("OTC") OTC children's liquid ibuprofen – demonstrate that the FTC continues to apply close scrutiny to pharmaceutical industry participants and to activities and practices within the industry. The FTC and the Department of Justice Antitrust Division can be expected to continue to closely monitor and take enforcement actions against life sciences industry companies, as outlined in their recent, voluminous joint report entitled *Improving Health Care: A Dose of Competition* (July 2004) (available at www.usdoj.gov/atr/public/health_care/204694.htm).

- *In the Matter of Cephalon, Inc. and CIMA LABS, INC.*

In this case, the consent agreement allows Cephalon, Inc. to conclude its \$515 million acquisition of CIMA LABS, INC., under the condition that Cephalon grant Barr Laboratories, Inc., a manufacturer of generic pharmaceuticals, an irrevocable license to manufacture and sell a generic formulation of ACTIQ, Cephalon's fentanyl-based BTCP medication. At present, Cephalon is allegedly the only company selling that type of medication in the U.S. According to the complaint, CIMA, although not currently offering a similar product, was positioned to be the next entrant in the market for BTCP medication.

The FTC alleged that the U.S. market for BTCP drugs was the relevant market for examining the proposed transaction. The

MONTI REPLACED BY NEELIE SMIT-KROES

The new President of the European Union, Italian Prime Minister Silvio Berlusconi, has replaced European Commissioner Mario Monti as the head of the EC's antitrust enforcement authority. The Dutch Commissioner Neelie Smit-Kroes has been selected as Monti's replacement as top competition cop. Although lacking a formal background in competition, Smit-Kroes holds a degree in economics and is President of the University of Nyenrode. She is a member of the Dutch Conservative Liberal Party, the VVD. She has served as Minister for Transport and Communications in the 1980s, during which time she started the process of privatization of KPN and PTT Post.

Commission distinguished BTCP drugs from other types of pain relievers by contending that BTCP drugs: (1) help to reduce or eliminate the spikes of severe pain that chronic cancer patients experience; (2) provide a faster onset of pain relief than other treatments; and (3) can be self-administered in convenient and portable dosages. Under this definition, the market for drugs used to treat BTCP is a monopoly, with Cephalon marketing the only BTCP medication that has been approved by the Food and Drug Administration ("FDA") for such use. CIMA, although not currently manufacturing or selling a BTCP product, was allegedly developing OraVescent fentanyl ("OVF"), and intended to seek FDA approval by late 2004 or early 2005. OVF is a fast-dissolving, effervescent, fentanyl tablet that the FTC expects to enter the U.S. market in either 2006 or 2007 and is the BTCP drug allegedly best positioned to compete with Cephalon's ACTIQ. Both ACTIQ and OVF are formulations of the same readily available, non-patented active ingredient, fentanyl.

Having defined the market as consisting only of Cephalon and the potential entrant CIMA, the FTC asserted that the proposed acquisition would violate Section 5 of the FTC Act and Section 7 of the Clayton Act because it would cause significant anticompetitive harm in the U.S. market for BTCP products. The FTC further asserted that, with only one firm currently marketing a BTCP drug to U.S. consumers, CIMA's entry likely would increase competition, absent the contemplated transaction. As a result, allowing Cephalon to control both ACTIQ and OVF would reduce the number of future competitors from two to one, resulting in consumers having to pay higher prices for BTCP medication. Also, according to the complaint, the FTC feared that Cephalon's ownership of both products would allow it to undermine generic ACTIQ entry by shifting patients to the patent-protected OVF product prior to generic launch, thus depriving consumers of the full benefits of generic competition.

According to a three person majority of the FTC Commissioners, the proposed consent agreement alleviates the allegedly anticompetitive impact of Cephalon's acquisition of CIMA in the U.S. market for BTCP drugs by requiring Cephalon to grant a third-party company, Barr, a fully paid, irrevocable license to make and sell a generic equivalent of ACTIQ in the United States that will be launched as soon as the FDA approves OVF, and in any event no later than February 2007. The proposed consent in this matter also contains a number of provisions designed to help Barr "jump start" its entry into the putative market for BTCP. First, Cephalon must transfer the know-how and intellectual property related to all versions of ACTIQ to Barr immediately

under a licensing and supply agreement. Second, if Barr is unable to manufacture an FDA-approved version of ACTIQ by the date the licenses take effect, Cephalon would then be required to supply Barr with a version of ACTIQ that it can market in generic form. Third, the consent prohibits Cephalon from making certain regulatory filings that would delay FDA approval of Barr's generic ACTIQ to ensure that Barr will be in a position to launch its generic no later than Cephalon's launch of CIMA's OVF.

The Commission approved the consent order by a 3-1-1 vote, with Commissioner Pamela Jones Harbour recusing herself, and with now recently departed Commissioner Mozelle Thompson dissenting. In his dissent, Commissioner Thompson criticized the majority for its apparent willingness to tolerate a merger between the only two pioneer companies manufacturing a BTCP product, assuming CIMA successfully launches its product, and thereby eliminate potential pioneer competition in an effort to facilitate the entry of a generic product.

Cephalon was represented before the FTC by Washington, D.C.-based Antitrust Practice partner Will Tom (wtom@morganlewis.com), former Deputy Director of the FTC Bureau of Competition.

- *FTC v. Perrigo Co. and Alparma Inc.*

In this case, Perrigo and Alparma agreed to settle charges arising from a 1998 agreement between the two companies concerning OTC, store brand children's liquid ibuprofen. Under the consent agreement, Perrigo will pay \$3.75 million and Alparma will pay \$2.5 million to the FTC. The companies will pay an additional \$1.5 million to state attorneys general to resolve claims arising out of the same matter.

The facts giving rise to this action date back to 1996, when both Perrigo and Alparma each filed ANDAs with the FDA for approval to sell store-brand versions of children's liquid Motrin. In anticipation of FDA approval, expected by the companies in June 1998, both Perrigo and Alparma sought to establish a customer base for their respective products. According to the FTC's complaint, this head-to-head duel led to substantially lower prices for store-brand OTC children's liquid ibuprofen. In April 1998, FDA regulations were modified in a manner that resulted in Alparma receiving 180 days of market exclusivity, i.e., the FDA would not approve Perrigo's product until 180 days after Alparma began marketing its product.

As alleged by the FTC, Perrigo, faced with Alparma's regulatory advantage, approached Alparma and sought to negotiate an agreement that would allow it to sell its product during the exclusivity period. The parties failed to reach such an agreement, but then,

according to the complaint, the parties signed an agreement in June 1998 that had the effect of allocating to Perrigo the sale of OTC children's liquid ibuprofen for seven years. In exchange for agreeing not to compete, Alparma received an up-front payment and a royalty on Perrigo's sales of children's liquid ibuprofen. The complaint further asserts that Perrigo proceeded to launch its children's liquid ibuprofen product in January 1999 and that, within six months of launch, Perrigo raised prices to those customers who had obtained lower prices when Perrigo and Alparma were competing for customers.

According to the FTC, Perrigo and Alparma still are the only two companies to obtain FDA approval for an OTC version of liquid ibuprofen that is bioequivalent to children's liquid Motrin. To date, Alparma has not marketed its product, despite having received FDA approval to do so in April 1999. The complaint further contends that the 1998 agreement between Perrigo and Alparma unlawfully drove up prices for wholesale customers – including supermarkets, drug chains and mass merchandisers – and violated the FTC Act.

The complaint in this matter, authorized by a 5-0 vote of the FTC Commissioners, is of special note because of the disgorgement remedy sought from both parties in this matter. According to a press release issued by then FTC Chairman Timothy Muris, "[t]his case is the first Commission implementation of the disgorgement policy statement issued by the FTC in July 2003." The disgorged funds are to be used by the FTC to compensate customers harmed by the companies' alleged misconduct. The proposed orders in this matter also bar each company from repeating the alleged unlawful conduct, subject to certain exceptions identified in the orders. The settlements also contain certain record-keeping provisions to allow the FTC to monitor compliance.

Perrigo was represented in this matter by Washington, D.C.-based Antitrust Practice partner Scott Stempel (sstempel@morganlewis.com). ■

PRIOR PLANNING A MUST FOR RECIPIENTS OF STATE AID

By Jean Leygonie and Aurélien Condomines

Firms that receive certain types of prescribed State aid face substantial issues in minimizing the risks and costs associated with such actions. Under article 87 of the Treaty of Rome, "any aid granted by a Member State or through State resources in any form whatsoever which distorts competition by favoring certain undertakings on the production of certain

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goods shall, insofar as it affects trade between Member States, be incompatible with the Common Market." Although Article 87 and other provisions of European law set forth exceptions to this prohibition, the tendency of the European Commission and of the European courts has been to construe broadly the definition of "aid" in the context of Article 87. Indeed, potentially any advantage provided directly or indirectly by a Member State of the European Union may fall under the scope of the above-mentioned provision.

State aid received in violation of European Community law must be returned by the recipient, along with interest that accrues from the date the State aid was granted. Because of the way aid grants are processed and approved, the requirement to repay the aid with accrued interest raises several issues for the recipient company. First, the procedures

for requesting aid before the Commission do not contemplate an active role by the recipient company. Second, member States do not always make sure that the aid provided complies with European rules. Third, in those cases in which the aid is granted by a local authority, those authorities do not always have the necessary knowledge to make the assessment of whether the aid violates Article 87's proscriptions. Companies should thus make sure, at the initial stage of devising any business strategy involving State aid, that the aid is designed in such a way that it complies with both European and national rules.

Under article 88 of the Treaty of Rome, Member States intending to grant aid must inform the European Commission prior to granting such aid. Once informed, the Commission may review the aid. During this review period, the member State is not allowed to grant the aid concerned. Interestingly, such notification is not required when the contemplated State aid is to be granted on the basis of a national regime of State aid (granted either by the State

or by local public authorities) that has already been approved by the European Commission.

This system raises a number of risks for a company that receives aid. First, aid that has not been notified properly or that has been granted without prior Commission approval is deemed "unlawful." Any competitor of the recipient company can bring an action before national courts to annul the granting of the "unlawful" aid, and possibly also to request damages. Second, State aid that has been found to be incompatible with the Common Market by the Commission must be returned to the State which granted it, at an interest rate fixed by the Commission and payable from the date the aid was received. Given that proceedings before the European Commission may last several months (or years), the amounts at stake may be substantial. Finally, the implementation of entire projects may be jeopardized if improperly granted State aid is withdrawn.

A particular feature of the proceedings before the Commission in matters of State aid is that the recipient Company has virtually

FTC AND DOJ ISSUE REPORT ON HEALTH CARE; FTC REPORTS ON PETROLEUM INDUSTRY

On July 23, the FTC and DOJ issued a much anticipated report covering the dynamics of the health care sector of the economy. The report, entitled *Improving Health Care: A Dose of Competition* (available at <http://www.ftc.gov/opa/2004/07/healthcarerept.htm>), which is the product of a two-year collaborative effort by the federal antitrust agencies, makes six recommendations designed to serve as "guideposts for policy makers who want to ensure access to quality care and help consumers make informed choices" according to Timothy Muris, the recently retired Chair of the FTC. The recommendations:

- recognize the need to improve the information available to consumers about quality and price;
- urge the states to remove restrictive laws, such as Certificate of Need laws, that impede the competitive process;
- suggest that governments closely examine the role of subsidies and the possible impact such subsidies have on the health care market place;
- warn against the enactment of collective bargaining laws of physicians, which, according to the report, will lead to higher prices without an increase in quality of service;
- caution all states to exercise care in regulating the transparency for pharmacy benefit manager programs; and
- observe that mandated insurance benefits can lead to a diminution in competition between insurers and in a reduction of consumer choice.

The jointly authored report also discusses the enforcement priorities for both agencies in this area. For example, the report notes that both agencies are looking into physician-sponsored joint ventures that have payment-by-performance plans. Similarly, the authors of the report observe that further research is needed in the

field of hospital mergers to refine product market analysis. The report also observes that the for-profit or nonprofit status of a hospital should have no effect on merger analysis. The contracting practices of Group Purchasing Organizations, according to the report, will be examined under traditional antitrust principles. Finally, the report reiterates the long-held enforcement view that under appropriate circumstances, criminal sanctions are available for violations of the law.

On August 13, the FTC's Bureau of Economics issued a report entitled *The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement* (available at <http://www.ftc.gov/opa/2004/08/oilmergersrpt.htm>). The report, which is divided into nine chapters, focuses on five major themes: (1) worldwide concentration of crude oil has not been significantly affected by oil company mergers; (2) concentration at most levels of the industry remains low to moderate; (3) the FTC, through active enforcement, has played an important role in checking concentration in the industry; (4) economies of scale are important in the industry and are increasingly so; and (5) industry developments have lessened the incentive for vertical integration in the industry.

The report does not address the possible link between mergers and increasing gasoline prices, a link asserted in a May 2004 report that was issued by the General Accounting Office, but which was later described by FTC General Counsel William Kovacic during congressional hearings as "fundamentally flawed."

The report was issued on a vote of 4 to 0. Commissioner Pamela Jones Harbour, who said in a separate statement that she would have deferred publication until the issue of gasoline pricing had been addressed, abstained from the vote. Commissioner Mozelle W. Thompson also issued a separate statement at the time of the report's release.

no opportunity to defend its case. Under established procedures, the State that is offering the aid notifies the Commission of the intended grant, and presents arguments for approval to the European Commission. For this reason, and because the price of error can be high, it is crucial for companies intending to receive aid, whether in general or in the context of a given project, to make sure – before receiving the aid – that:

- the aid granted is designed in such a way as to be most likely to be accepted by the Commission or to fall outside the scope of European rules, and

- all necessary measures are taken by the State in order to comply with its obligations to notify the Commission.

Even when the State aid is granted on the basis of a national regime already approved by the European Commission, the recipient of the State aid must verify that it complies with all of the conditions subject to which the European Commission has approved the aid.

The assessment to be made by the recipient of State aid may well involve analysis of both national and European rules. Given the possibility that the aid granted could be construed to violate EC law, it is important for the

intended recipient of such aid to take an active interest in how the aid package is constructed and presented to the relevant authorities and to engage knowledgeable counsel to assist in this endeavor. Moreover, the recipient of the aid can take an active role in designing a contemplated aid package, within the boundaries of what is permitted under applicable national laws, that will have the best chances of being accepted by the European Commission. Past experience has shown the importance of addressing such issues in the initial stage of any business strategy involving State aid.

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ARTICLES & SPEAKING ENGAGEMENTS

On August 6, 2004, San Francisco partner George Cumming (gcumming@morganlewis.com) participated as a speaker and panelist at a joint meeting of the Business Law and Antitrust Law Sections of the American Bar Association, held during the ABA's annual meeting in Atlanta, GA. George delivered a paper on the "Antitrust/Intellectual Property Law Interface in High Tech Markets."

Caswell O. Hobbs III (chobbs@morganlewis.com), a partner resident in the Washington, D.C. office, has an article scheduled for publication in the September *Harvard Business Review* entitled "The Confession Game Plan – The Best Way to Contain an Antitrust Crisis is To Be the First to Come Clean." Cas also spoke at the September 22, 2004 FTC Symposium on the 90th Anniversary of the Federal Trade Commission: "Antitrust and Consumer Protection – Exploring the Common Ground." Finally, Cas will be speaking on U.S. Merger Developments at the International Bar Association 2004 Conference in Auckland, New Zealand on October 25, 2004.

Lessons learned from the success of San Francisco partner Jeffrey Kingston (jkingston@morganlewis.com) in representing Sun Microsystems before the European Commission in Sun's action against Microsoft are presented in a paper prepared by Jeff entitled "*Commission v. Microsoft: The European Commission Provides a Sensible Framework for Combating Monopoly Leveraging Through Refusal to Deal in Network Industries.*" Copies are available upon request from the author. Jeff spoke on this topic at the Communications and Competition Law Conference, which was sponsored by the International Bar Association and held on May 18, 2004 in Rome, Italy, and at the symposium "Opening Windows: The Economics of the Microsoft Case," which was sponsored by Lexecon, Ltd., in Brussels, Belgium on May 19, 2004.

Washington, D.C. partners Stephen Paul Mahinka (smahinka@morganlewis.com) and Kathleen M. Sanzo (ksanzo@morganlewis.com) authored, "New Medicare Act Provides New Competitive Landscape for the Pharmaceutical Industry," *Food and Drug Law Institute Update 36* (July/August 2004).

Harry Robins (hrobins@morganlewis.com), an associate in the firm's New York office, spoke on a panel at the ABA Annual Meeting of the Business Law Section on August 7, 2004. Harry's topic was: "Proposed HSR Rule Changes: A Primer for the Business Lawyer."

An article by Gerrit Schohe (gschohe@morganlewis.com), a partner resident in the firm's Brussels office, entitled "May the Commission Select the Debtor of State Aid Repayment? Where the Commission's Power over State Aid Ends" will be published in the next issue of *European State Aid Quarterly*. Gerrit's lecture on the status of the complainant against the grant of state aids ("le statut

du plaignant") will be held at the Free University of Brussels and be published in a book that the university will compile thereafter.

John Shenefield (jshenefield@morganlewis.com), a partner resident in Washington, D.C., gave a speech entitled "Thoughts on Complying with the Enterprise Act: The American Experience" at the Institute of Directors, London, on June 8, 2004, and had an article published in the *Antitrust Bulletin* (Spring-Summer 2004 issue) entitled "Coherence or Confusion: The Future of the Global Antitrust Conversation." John also spoke before the Regulatory Policy Institute, Merton College, Oxford, on "Managing a Multinational Cartel Investigation: The Defense's Perspective" on September 14, 2004.

Antitrust Practice partner Will Tom (wtom@morganlewis.com), also resident in the Washington, D.C. office, spoke at the Structuring, Negotiating & Implementing Strategic Alliances 2004 program at PLI in New York on July 23, 2004.

Washington, D.C. Antitrust Practice partner Don Klawiter (dklawiter@morganlewis.com) spoke at the British Institute of International and Comparative Law's Competition Law Forum on September 15, 2004 in London. Don discussed the criminalization of antitrust offenses, cartels, leniency, and class actions with a panel of enforcement officials from the United States, the European Commission, and the United Kingdom. On September 24, Don was at the Canadian Bar Association's Annual Fall Conference on Competition Law. His topic was "Decriminalization and Effective Enforcement: The View From the South." On October 1, Don will be the principal lecturer on criminal antitrust enforcement at the Antitrust Masters Course, where he also led a workshop on antitrust compliance at the same event.

Don, along with Washington, D.C. associates Nathan J. Muyskens (nmuyskens@morganlewis.com) and Gerald P. Konkel (gkonkel@morganlewis.com), recently authored "The Competition Law Tidal Wave in Japan: The Corporate Compliance Response," in *Global Competition Review. Special Report: The Asia Pacific Antitrust Review 2004*.

On July 15, 2004, Tara L. Reinhart (treinhart@morganlewis.com), an Antitrust Practice partner resident in the firm's Washington, D.C. office, participated in a D.C. Bar panel titled "Antitrust Investigations in the Era of Enron and WorldCom: Tactical and Ethical Issues." Tara and her fellow panelists, who included members of the private bar and government enforcers, debated the ethical issues that arise during antitrust grand jury investigations, including representation of employees by outside corporate counsel, the propriety of "drop-in" visits on employees by law enforcement officials, coordination among enforcement agencies around the globe, and corporate targets' failure to retain documents.

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Jean Leygonie (jleygonie@morganlewis.com) is the managing partner of the firm's Paris office. Jean focuses primarily on mergers and acquisitions and joint ventures, and has an active practice in competition law. He was recently identified as a Highly Recommended Lawyer in the field of Mergers & Acquisitions by *Global Counsel* in its 2003/2004 edition. Aurélien Condomines (acondomines@morganlewis.com) is an associate in the Paris office. Aurélien has significant experience with respect to antitrust matters and cross-border transactions. ■

FTC REINSTATES UNOCAL COMPLAINT

By Willard K. Tom and Randall H. Conner

Over the last few years, the Federal Trade Commission has aggressively pursued patent owners that have allegedly concealed intellectual property from standards bodies in order to obtain increased market power by asserting a patent related to a standard. The FTC's recent decision in *In the Matter of Union Oil Company of California*, 2004 WL 1632816 (F.T.C. July 6, 2004), offered a slight twist on that fact pattern, because it involved a governmental standard. It thus raised the issue of antitrust immunity for acts of petitioning the government, rooted in First Amendment values.

In a decision released July 6, 2004, the Federal Trade Commission reinstated its complaint charging Unocal with engaging in unfair methods of competition through deliberate misrepresentations to the California Air Resources Board ("CARB"), an administrative body tasked with the creation of standards relating to the development of reformulated gasoline. The complaint also alleged that Unocal made similar misrepresentations to competitors and to private industry groups that participated in the CARB proceedings.

The Commission's decision overturned an order by Administrative Law Judge D. Michael Chappell finding Unocal entitled as a matter of law to *Noerr-Pennington* immunity from the antitrust laws. The *Noerr-Pennington* doctrine protects the right of private parties to petition the government. The Commission's *Noerr-Pennington* analysis distinguished between two types of petitioning that may remain subject to the antitrust laws: "sham" petitioning and misrepresentations in the context of non-sham petitioning. Sham petitioning occurs when a petitioner seeks to use government process, as opposed to the results of government process, as a weapon against its competitors. The Commission agreed with Judge Chappell that the

sham exception to the *Noerr-Pennington* doctrine, as traditionally understood, did not apply to Unocal's petitioning activity.

As to non-sham petitioning, the Commission declared that a proper analysis will consider both the context of the proceeding and the nature of the communications. To evaluate the context of a proceeding, the adjudicator should examine (1) the government's expectations of truthful representation; (2) the degree of governmental discretion; (3) the extent of governmental reliance on the petitioner's factual assertions; and (4) the causal link between the petitioning conduct and the government's action. A proper analysis of the nature of the communications will focus on (1) the deliberateness of the falsehoods; (2) the extent to which the statements can be verified as false; and (3) the degree to which the falsehoods undermine the legitimacy of the government's actions.

Having concluded that *Noerr-Pennington* immunity did not apply as a matter of law to Unocal's petitioning activities, the Commission then addressed Unocal's alleged misrepresentations to third parties that participated in the CARB proceedings. Judge Chappell had found Unocal's statements to third parties "incidental" to Unocal's petitioning activity and hence entitled to *Noerr-Pennington* immunity. The judge had reasoned in the alternative that to the extent the complaint alleged that Unocal's misrepresentations formed an independent basis for antitrust liability, the Commission lacked jurisdiction to determine the truth or falsity of the statements because making such a determination would require resolution of "substantial patent issues" such as validity and infringement.

The Commission overturned Judge Chappell on both counts. First, the Commission characterized Unocal's statements to third parties as direct, not merely incidental to petitioning activity, and hence actionable under the antitrust laws even if Unocal's petitioning activity enjoyed *Noerr-Pennington* immunity. The Commission also found no basis to conclude that it lacked jurisdiction over

substantial questions of patent law. The Commission held that the Federal Trade Commission Act contains no such limitation. The Commission also found that 28 U.S.C. §1338(a) does not limit the Commission's jurisdiction over patent issues. This statute grants the district courts jurisdiction exclusive of the courts of the states over civil actions arising from Congressional legislation relating to patents. The Commission observed that "this proceeding is not a 'civil action'; the FTC is not one of the 'courts of the states'; and this proceeding does not 'aris[e] under' a patent statute."

Noting the substantial delay caused by resolution of Unocal's motion, the Commission instructed Judge Chappell to move the proceeding "quickly" to resolution.

The FTC has long publicized its intention to change the law to make it less hospitable to attempts by private parties to use the power of government to achieve anticompetitive ends. See MORGAN LEWIS ON COMPETITION, May/June 2003. Unocal's motion to dismiss has merely given the Commission an opportunity to present its resolution of the deliberate misrepresentation problem now, rather than after an administrative trial on the merits. Given the substantial patent royalties that remain at stake, it is likely that these issues will be raised again after trial and that this case will find its way to the federal courts. The Commission's view of its jurisdiction over patent issues was also expected, given its extremely high level of activity in the patent arena.

For more information on these issues, please contact Willard K. Tom (wtom@morganlewis.com) or Randall Conner (rconner@morganlewis.com). ■

FTC VOTES TO CLOSE BAT INVESTIGATION

By Jason A. Lomax

The Federal Trade Commission has voted to close its investigation into the proposed merger between RJ Reynolds Tobacco Holdings, Inc. ("RJR") and British American Tobacco plc's U.S. subsidiary Brown & Williamson ("B&W"), the second and third

PRESIDENT APPOINTS TWO TO FTC; NAMES CHAIR OF U.S. SENTENCING COMMISSION

President Bush recently made two recess appointments to fill vacancies at the FTC. In one, Deborah Majoras, who was nominated by the President on May 11, 2004, and whose nomination had been stalled by Senators Ron Wyden (D-OR) and Barbara Boxer (D-CA), was appointed to the FTC and upon appointment designated as the Chairperson of the FTC to replace retiring Chair Timothy J. Muris. In the second, Jon D. Leibowitz was appointed to be a Commissioner of the Federal Trade Commission and to fill the position vacated by Mozelle W. Thompson. Mr. Leibowitz had been first nominated for the post on April 8, 2004. In a third recess appointment, the President appointed Ricardo Hinojosa as chair of the U.S. Sentencing Commission.

largest American cigarette manufacturers. The vote to close the investigation was 4 to 0, with Commissioner Pamela Jones Harbour recused from the matter. As a part of the FTC's commitment to provide transparency in its decision-making process, the Commissioners issued a joint statement explaining the decision, with a separate concurring statement issued by then Commissioner Mozelle W. Thompson.

In their joint statement, the Chairman and two Commissioners concluded that the transaction is not likely to lessen competition substantially in the U.S. market for cigarettes. The Commissioners reasoned that B&W's market share overstates its premerger significance and found that the companies are not each others' closest competitors, before reaching the conclusion that the merged entity would not be able to elevate prices or suppress output on a unilateral basis. Furthermore, despite significant market shares in a total cigarette market, the Commissioners did not recognize a significant product overlap because B&W's business is mostly made up of discount brands, as opposed to the premium brands sold by RJR and other cigarette companies, which are heavily promoted to attract smokers under 30 years of age who likely will be brand loyal for many years. The Commissioners noted that the closest brands of the parties are B&W's Kool and RJR's Salem, respectively the third and fourth largest premium menthol brands. The Commissioners found that there was not significant competition between the two brands because they have different tastes and appeal to different demographic groups. Rather, the merger may actually help create a stronger competitor against the leading premium menthol brands.

In addition, the Commissioners concluded that the transaction is unlikely to facilitate or enhance coordinated interaction among the major manufacturers in the U.S. cigarette market. This is because the market for cigarettes is subject to many complexities, continual changes, and uncertainties that would complicate monitoring a consensus among the major competitors. The Commissioners explained that, not only are cigarette brands highly differentiated, but the competitive decisions of the major manufacturers are influenced by long-term considerations because smoking is addictive and brand loyalty high. In his concurring statement, however, Commissioner Thompson wrote separately to express concerns about the potential susceptibility of the relevant market to coordinated interaction.

It may seem surprising that the FTC decided not to challenge a merger between large competitors in a concentrated market, and indeed the FTC staff lawyers had urged the Commissioners to challenge the deal. In their

joint statement, however, the Commissioners observed that only half of the mergers with similar concentrations level have been challenged since 1996. Like the cruise liner case last year – another merger of top players in a highly concentrated market that the Commission did not challenge – this is a reminder that market shares are not necessarily the best indicator of competitive harm.

Jason Lomax (jlomax@morganlewis.com) is an associate in the firm's Antitrust Practice, resident in the Washington, D.C. office. Jason's practice focuses mainly on analyzing mergers and acquisitions and assisting clients in navigating the Hart-Scott-Rodino process. ■

COMING THROUGH THE BACK DOOR? ADVANCED MICRO SYSTEMS GAINS ACCESS TO INTEL DOCUMENTS

In an interesting procedural turn of events, the Supreme Court has ruled that a litigant before the European Commission ("EC") antitrust authority may use a little-used U.S. statute to seek the assistance of a U.S. district court to compel the production of information in a proceeding before the foreign tribunal. In *Intel Corporation v. Advanced Micro Devices, Inc.*, the Supreme Court was called upon to interpret 28 U.S.C. §1782(a), a statute that Congress enacted to assist "foreign tribunals" in obtaining evidence in the United States.

The matter under examination began when Advanced Micro Devices ("AMD") filed an antitrust complaint against Intel, a competitor, with the Directorate-General for Competition of the EC. During proceedings before the EC, AMD recommended that the EC seek documents that Intel had produced in a private antitrust suit that had been previously filed in the United States. When the EC declined to do so, AMD then went to federal court in California seeking an order requiring Intel to produce the documents so that AMD could provide them to the EC. AMD based its request on 28 U.S.C. 1782(a), which provides that a federal court may order a person to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal . . . upon the application of any interested person." The district court denied AMD's petition, but the Court of Appeals for the Ninth Circuit reversed. The Supreme Court affirmed, holding that §1782(a) authorized, but did not require, the district court to aid AMD in its efforts to compel discovery from Intel.

In reaching its conclusion, the Supreme Court first found that a complainant before the European Commission, such as AMD,

qualifies as an "interested person" within the scope of §1782(a), thus rejecting Intel's attempt to narrow the definition of "interested persons" to litigants, foreign sovereigns, and a sovereign's designated agents. The Court next determined that the information sought by AMD would be used in "a foreign or international tribunal," reasoning that the Commission qualifies as a "tribunal" when it acts as a first-instance decision maker. In reaching this part of its decision, the Court emphasized that the EC was a "proof taker" and that information available to the Court of First Instance and the European Court of Justice would be limited to the evidence produced before the EC competition authority. The Court, examining the legislative history of the statute, also determined that the "proceeding" for which discovery is sought under §1782(a) need only be reasonably contemplated, and need not be "pending" or "imminent."

Although the Court determined that the statute *could* be used by AMD in its matter before the EC, the Court did not order the production of the sought-after information; instead, it remanded the matter to the lower court to make a final determination in this matter. In doing so, the Court offered a number of factors to be used by the lower court to guide its decision making. The first factor concerns whether the party from whom discovery is sought is a participant in the foreign proceeding. If so, according to the Supreme Court, the need for §1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in a matter arising abroad. The second factor for the lower court to consider concerns the nature of the foreign tribunal, the character of proceedings underway abroad, and the receptivity of the foreign government, court, or agency to federal-court judicial assistance. The third factor for consideration concerns whether the request for assistance conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States. Finally, unduly intrusive or burdensome requests may be rejected or trimmed according to the Court. ■

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ANTITRUST PRACTICE
PARTNERS AND OF COUNSEL

WASHINGTON	Peter E. Halle	202.739.5225	phalle@morganlewis.com
	Michael S. Kelly	202.739.5210	mkelly@morganlewis.com
	Donald C. Klawiter	202.739.5222	dklawiter@morganlewis.com
	Stephen Paul Mahinka	202.739.5205	smahinka@morganlewis.com
	Tara L. Reinhart	202.739.5442	treinhart@morganlewis.com
	Jonathan M. Rich	202.739.5433	jrich@morganlewis.com
	John H. Shenefield	202.739.5220	jshenefield@morganlewis.com
	Scott A. Stempel	202.739.5211	sstempel@morganlewis.com
	Willard K. Tom	202.739.5389	wtom@morganlewis.com
	Robert B. Wiggins	202.739.5040	rwiggins@morganlewis.com
PHILADELPHIA	Jay H. Calvert, Jr.	215.963.5462	jcalvert@morganlewis.com
	Mark P. Edwards	215.963.5769	medwards@morganlewis.com
	Joseph B.G. Fay	215.963.5509	jfay@morganlewis.com
	William P. Quinn, Jr.	215.963.5775	wquinn@morganlewis.com
	Charles J. Reitmeyer	215.963.5652	creitmeyer@morganlewis.com
NEW YORK	Eugene F. Bannigan	212.309.6815	ebannigan@morganlewis.com
	Edward D. Cavanagh	212.309.6017	ecavanagh@morganlewis.com
	Bernard J. Garbutt III	212.309.6084	bgarbutt@morganlewis.com
SAN FRANCISCO	George A. Cumming	415.442.1198	gcumming@morganlewis.com
	Michael B. Green	415.442.1193	mgreen@morganlewis.com
	Jeffrey S. Kingston	415.442.1322	jkingston@morganlewis.com
	James N. Penrod	415.442.1535	jpenrod@morganlewis.com
	Kent M. Roger	415.442.1140	kroger@morganlewis.com
	William J. Taylor	415.442.1315	wtaylor@morganlewis.com
LOS ANGELES	Richard S. Odom	213.612.7340	rododom@morganlewis.com
	Andrea Sheridan Ordin	213.612.1090	aordin@morganlewis.com
CHICAGO	Thomas A. Marrinson	312.324.1120	tmarrinson@morganlewis.com
	John D. Shugrue	312.324.2535	jshugrue@morganlewis.com
PRINCETON	Alfred J. Lechner, Jr.	609.919.6670	alechner@morganlewis.com
BRUSSELS	Gerrit Schohe	32.2.507.75.42	gschohe@morganlewis.com
	Izzet M. Sinan	32.2.507.75.22	isinan@morganlewis.com
FRANKFURT	Jürgen Beninca	49.69.714.007.19	jbeninca@morganlewis.com
	Christian O. Zschocke	49.69.714.007.18	czschocke@morganlewis.com
LONDON	Robert A. Goldspink	44.20.7710.5517	rgoldspink@morganlewis.com
PARIS	Jean Leygonie	33.1.53.30.4410	jleygonie@morganlewis.com
TOKYO	Motonori Araki	81.3.5219.2504	maraki@morganlewis.com

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Congratulations to:

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- John Clay Everett, Assistant to the Chair-Elect
- Willard K. Tom, Editorial Chair, 2004 Annual Review of Antitrust Law Developments, Section of Antitrust Law, and Council Member, Section of Business Law
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