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Just in Time for Christmas? Revisions to Hart-Scott-Rodino Rules Are on Track for December Debut

By Harry T. Robins

The FTC Premerger Notification Office ("PNO") is currently considering various amendments to the Hart-Scott-Rodino Act rules ("HSR Rules") addressing transactions involving non-corporate entities, such as partnerships and limited liability companies ("LLCs"). These proposed changes were published for a comment period that expired on June 4, 2004. The proposed HSR rules are expected to become effective as proposed in December 2004, or possibly sooner.

The core proposed rule changes can be summarized as follows:

Proposed HSR Rules At A Glance

- Acquisitions of "control" in an existing LLC or partnership will become potentially reportable events under the HSR Act. Such acquisitions are currently not subject to the HSR Act's reporting requirements.
- Transfers of assets between two commonly controlled partnerships or LLCs will be exempt from the HSR Act.
- The formation of LLCs and partnerships will become potentially reportable events under the HSR Act. Again, such actions are now not covered by the HSR Act.
- The acquisitions of voting securities of an issuer holding only exempt assets will in all cases be exempt from the HSR Act.

Acquisitions of Control of Non-corporate Entities

Under the current HSR Rules, the acquisition of 100% of an existing partnership or LLC is a potentially reportable event, but an acquisition of 99% or less of the interests in a partnership or LLC is not reportable. In contrast, an entity that already controls a partnership or LLC and that intends to acquire the remaining interests in such entity must report such acquisition prior to consummation, assuming the relevant size-of-person and size-of-transaction tests are met. Put simply, the current rules capture transactions of little (if any) competitive significance and provide a loophole for transactions that may be of competitive consequence.

Under the PNO's proposed HSR Rule changes, for the first time, an acquisition of control of an unincorporated entity will be a

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Third Circuit Shatters Conspiracy Victory for Flat Glass Defendants

By Edward D. Cavanagh

The Third Circuit has reversed the trial court's grant of summary judgment in favor of PPG Industries, Inc., the sole non-settling defendant in the flat glass price fixing cases. *See In re Flat Glass Antitrust Litigation*, ___ F.3d _____, 2004 WL 2177638 (3d Cir. Sept. 30, 2004). In holding that the record presented sufficient evidence for a reasonable jury to find a conspiracy to fix the price of flat glass, the Third Circuit provides a detailed analysis of "the recurring question of what quantity and quality of evidence" is necessary to create a jury question on the issue of conspiracy. With respect to a separately alleged conspiracy in automotive replacement glass, the Third Circuit upheld summary judgment for PPG.

A series of private antitrust suits were filed against major glass manufacturers following revelations by two executives of a PPG rival, Liberty-Owens Ford ("LOF"), of an industry-wide price fixing conspiracy in the early 1990s. The two LOF executives had been fired following their indictment on unrelated charges of conspiracy, mail and wire fraud, and money laundering. The two were eventually acquitted of those charges, but in the course of the investigation leveled price fixing charges against LOF. All defendants in the private suits settled, except for PPG.

On PPG's motion for summary judgment, the court was faced with the difficult task of distinguishing between unlawful conspiratorial conduct and lawful parallel behavior. Because the glass industry was oligopolistic, it was plausible the companies might collude; but it was equally plausible that companies may be

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potentially reportable event. An acquisition of additional interests by a person who already has control of the non-corporate entity will be exempt. An entity controls a partnership or an LLC if it has the right to at least 50% of the profits or 50% of the assets of that LLC or partnership upon its dissolution.

Intra-person Transfers Between Non-corporate Entities

A transfer of assets between a corporate parent and its subsidiary or between two subsidiaries controlled by the same parent are exempt under the current regulatory regime on the basis that such intra-person transfers have no meaningful competitive effect. However, if the assets are transferred between two partnerships or LLCs controlled by the same person or from a partnership or LLC to a controlling partner or member, such acquisitions are not exempt despite the fact that such intra-person transfers between non-corporate entities have no competitive consequence. Consequently, under the PNO's proposed rule changes, such intra-person asset transfers between non-corporate entities, including partnerships and LLCs, will be exempt.

Formations of Non-corporate Entities

Also under the current rules, the formation of a partnership is not a reportable event despite the fact that the transaction may have substantive antitrust implications by combining separately controlled competing assets. The formation of an LLC in which one party contributes cash and the other contributes business assets is also not reportable under the HSR Act. The proposed amendments to the HSR Rules would capture such transactions.

Extend Rule 802.4 to All Exempt Assets

Current HSR Rule 802.4 provides that the acquisition of the voting securities of an issuer holding certain exempt assets (but not all exempt assets) is exempt if the nonexempt assets held by such issuer are valued at $50 million or less. For example, the acquisition of the voting securities of an issuer holding only gas reserves of less than $500 million in value is exempt, but the acquisition of an issuer holding only cash is not exempt. The PNO has proposed extending Rule 802.4 to all types of exempt assets. This change would ameliorate the dissimilar treatment of asset and voting securities acquisitions under the HSR Act.

The proposed changes concerning the acquisition of control of non-incorporated entities and the formation of such entities, if approved in their present form, mark a dramatic departure from what are now time-honored procedures. As a result, some transactions, once deemed to fall outside the purview of the reporting requirements of the HSR Act, will now be subject to the Act. Given that violations of the HSR Act can result in a fine of $11,000 per day of violation, the need for careful consideration of the possible HSR Act ramifications of these soon-to-be covered transactions is clear.

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Third Circuit Shatters Conspiracy Victory for Flat Glass Defendants

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engaged in interdependent behavior and simply playing "follow the leader." The Court noted that it usually looks to "plus factors" to separate collusive conduct from lawful independent actions and identified three plus factors: (1) motive to enter into a conspiracy; (2) evidence that defendants acted contrary to their independent interests; and (3) "evidence implying a traditional conspiracy." The court found evidence of all three plus factors. First, PPG had a motive to conspire because the market for flat glass was oligopolistic and thus conducive to collusion. Second, evidence showed that PPG acted contrary to its self-interest by joining in price increases not justified by economic conditions. Moreover, the entry of a new firm into flat glass without any change in the industry's cost or demand structures suggested that the alleged conspirators had been reaping monopoly profits. Third, the court found that "traditional" evidence of collusion sealed the case for conspiracy and demonstrated that evidence of the first two factors – motives to conspire and actions against self-interest – were the result of an agreement and not mere interdependence. The court found especially persuasive documentary evidence outlining the conspiracy which had been submitted to the Antitrust Division as part of LOF's amnesty application and evidence of collusion in three specific price increases.

The lower courts continue to struggle with the issue of sufficiency of proof of conspiracy in antitrust cases. They continue to focus on "plus factors" to distinguish unlawful conspiracy from lawful parallel conduct, but at the same time acknowledge that evidence of plus factors is itself ambiguous. Accordingly, the courts tend to look for traditional evidence of conspiracy, and the stronger that proof, the more likely the finding of an illicit agreement. Still, with subtle distinctions emerging among the circuits on the issue of quantum and quality of proof necessary to avoid summary judgment, it is likely that the Supreme Court will soon be addressing this issue.

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Practice Alert! Know Your Obligations to Preserve Electronic Data

By Robert B. Wiggins

As antitrust practitioners know, and their clients appreciate, responding to a document request in an antitrust matter – whether part of a second request, grand jury investigation, or class action matter – can involve the collection, review, and production of thousands, if not millions, of pages of information, as well as gigabytes upon gigabytes of electronic data. Indeed, largely due to the amount of electronic data involved in such productions, and some of the unique features of such data, such as the ease with which vast quantities of such information can be stored and the relative ease with which such information can be altered or destroyed, there is a growing body of case law concerning the obligations of counsel to protect discoverable information with which antitrust practitioners and clients should be familiar.

Zubulake v. UBS Warburg LLC, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (*Zubulake V*), is perhaps the best example of this case law, or at least one of the most frequently cited cases for its discussion of counsel's on-going obligations to protect discovery materials. In this opinion, the fifth in a two-year employment discrimination dispute, the court thoroughly examined the obligations that counsel and their clients each have in preserving potentially discoverable data. The court observed:

- Counsel has the duty to communicate effectively to the client its discovery obligations so that all relevant information is discovered, retained, and produced.
- In order to accomplish its first obligation, counsel must identify sources of discoverable information once the duty to preserve arises, which occurs, as the court observed in an earlier decision, "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (*Zubulake IV*) (based on circumstances of this case, duty to preserve arose 4 months before the actual filing of an EEOC action and fully 10 months ahead of the filing of the federal complaint).

- In identifying sources of discoverable information, counsel must speak not only to the key players in the case, but to those people who have prepared information for those persons, as well as personnel familiar with the client's electronic and hard-copy document storage policies and procedures, including personnel within the client's IT department.
- When the duty to preserve attaches, counsel must put in place a litigation hold and must take steps to see that it is distributed to all employees who may be in possession of discovery materials.
- Counsel must see that the hold instructions are reiterated on a periodic basis and, along with the client, take appropriate steps to see that the instructions are followed.
- Counsel must take steps to ensure that employees understand that the breadth of their preservation obligations extends to electronic media.
- Counsel must take steps to see that relevant electronic evidence is segregated or otherwise safeguarded.

The Zubulake *decisions, along with other similar cases, raise important issues for counsel and their clients concerning not only how information is collected, reviewed, and produced as part of an investigation or litigation matter, but also when counsel and their clients need to take significant, affirmative steps to see that discoverable information is preserved.*

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Still Searching for the Meaning of the FTAIA: Federal District Court Sustains Sherman Act Claim by Foreign Distributor Suffering Injury in India

By Mark P. Edwards and Jonathan D. Fischbach

If the immediate reaction of one lower court to the Supreme Court's ruling this past June in *F. Hoffman-La Roche, Ltd. v. Empagran S.A.* is a barometer of *Empagran* decision's legacy, defendants may continue to have difficulties eliminating at the pleading stage even those antitrust claims that have only attenuated effects on United States commerce. In *Empagran*, the Supreme Court attempted to resolve a split in the circuits over the interpretation of the Foreign Trade Antitrust Improvements Act ("FTAIA"), which limits the overseas reach of the Sherman Act. The Supreme Court held that plaintiffs who suffer competitive harm outside the United States may not properly sue in American courts under the Sherman Act where "the adverse foreign effect is independent of any adverse domestic effect." Hence, the Supreme Court held that there would be no subject matter jurisdiction over a lawsuit brought by foreign purchasers of vitamins alleging that a global price-fixing conspiracy had caused anticompetitive harm in overseas markets, if the conspiracy's foreign effects and domestic effects were "independent" of one another.

Nevertheless, less than two months after *Empagran*, the United States District Court for the District of Connecticut refused to dismiss antitrust claims in *MM Global Services, Inc. v. The Dow Chemical Company,* which had all the appearances of a case susceptible to a motion to dismiss. Affiliated chemical distributors doing business in Asia alleged that their U.S.-based suppliers had imposed minimum resale prices on sales they made in India. The plaintiffs in *MM Global* were non-exclusive distributors in India for, first, Union Carbide and, after the defendants' merger, Dow Chemical Company. Plaintiffs sued when Dow terminated them as distributors for most product lines. Under the terms of the parties' distributorship arrangement, plaintiffs were restricted to selling the defendants' chemicals and polymers only in India. The complaint alleged no resale price-fixing anywhere else, including the United States.

Prior to the decision in *Empagran*, Dow and Union Carbide had unsuccessfully moved to dismiss plaintiffs' claims pursuant to Section 6(a)(1) of the FTAIA, which prohibits the application of the Sherman Act to anticompetitive conduct occurring in foreign commerce, unless that conduct "has a direct, substantial, and reasonably foreseeable effect on domestic trade or commerce." On that occasion, the court denied the defendants' motion, despite finding that the alleged resale price-fixing in India resulted only in domestic "spillover effects" that artificially inflated prices for the same chemicals in the United States. Although that finding seemed inconsistent with the court's ultimate conclusion that the plaintiffs could satisfactorily prove a *direct* effect on United States commerce, the district court was not deterred by the defendants' Section 6(a)(1) argument.

After *Empagran*, Dow and Union Carbide renewed their motion to dismiss, but this time directed the court to the Supreme Court's holding that a separate part of the FTAIA – Section 6(a)(2) – deprives federal courts of subject matter jurisdiction over claims brought by foreign plaintiffs who allege foreign competitive harm that is "independent" of any domestic competitive harm. The *MM Global* court recognized that *Empagran* had limited the federal courts' subject matter jurisdiction to instances where the defendant's conduct harms domestic commerce, as well as foreign commerce, and that domestic harm also causes the plaintiff's particular injury. The court said in further recognition of *Empagran*'s meaning that, where the plaintiff's harm results only from the conduct's foreign effects, and not its domestic effects, "the plaintiff's injury is independent from the domestic effect and the court has no jurisdiction."

Nevertheless, the *MM Global* court found that it had subject matter jurisdiction, even though the court did not explain how the plaintiffs suffered any *domestic* harm from the alleged resale price-fixing in India. The court's reasoning is not entirely clear, but it seemed to rest its surprising conclusion on a conclusory allegation in the complaint that the resale price-fixing in India affected prices in the United States, and "as the result of such effect on competition, [the] [p]laintiffs were injured by being precluded from effectively and fully competing and maximizing their sales of [p]roducts."

The holding in *MM Global* is difficult to reconcile with the *facts* alleged in the complaint, which asserted that the resale price-fixing occurred only in India. The holding is also difficult to reconcile with *Empagran*, which stressed that the FTAIA should be construed to limit the reach of the Sherman Act, and thus avoid "unreasonable interference with the sovereign authority of other nations" to regulate their domestic affairs. Yet the practical effect of the *MM Global* ruling is that the grievances of foreign distributors that have suffered competitive harm overseas from anticompetitive conduct occurring only overseas have been made subject to Sherman Act scrutiny in an American court.

The Supreme Court's adoption in Empagran *of an "independent foreign harm" test to measure subject matter jurisdiction under the FTAIA, rather than a more bright-line standard, may explain the anomalous result in* MM Global*. The* MM Global *plaintiffs exploited that ambiguity by characterizing the* Empagran *decision as "expressly limited to whether the Sherman Act conferred jurisdiction over foreign effects that are 'entirely independent' of domestic effects."*

Under the MM Global *plaintiffs' flawed theory, which was apparently adopted by the court,* Empagran *has preserved subject matter jurisdiction for cases brought by foreign firms operating overseas where an "effect" on United States commerce, even an indirect and attenuated one, results from foreign anticompetitive conduct. That result is at odds with the language of Section 6(a)(1) of the FTAIA, and runs contrary to the Ninth Circuit's recent ruling, by split decision, in* United States v. LSL Biotechnologies, Inc.*, where the court determined that an alleged restrictive agreement between the defendant and an Israeli company*

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Still Searching for the Meaning of the FTAIA: Federal District Court Sustains Sherman Act Claim by Foreign Distributor Suffering Injury in India

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concerning the sale of long-shelf-life tomato seeds in North America was too remote to be considered a "direct" effect. Moreover, in LSL, *the appellate majority determined that the gravamen of the government's complaint, that the agreement made it less likely that the Israeli company would develop better tasting winter tomatoes and that the agreement would permit the defendants to charge more for seeds than otherwise, failed to define a "direct" effect on U.S. commerce as required by the FTAIA.*

The decision is also seemingly at odds with the Supreme Court's interpretation of Section 6(a)(2) in Empagran. *As a result, antitrust plaintiffs with essentially foreign antitrust claims may for the time being rely on the* MM Global *court's two rulings interpreting the FTAIA in an effort to thwart motions to dismiss.*

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Alleged Shipping Cartel Steams Toward Arbitration

By Peter E. Halle

The United States Court of Appeals for the Second Circuit recently compelled victims of a criminal horizontal price fixing conspiracy to arbitrate their civil damages claims. The decision – if the United States Supreme Court does not grant *certiorari* and reverse – protects the members of a criminal cartel from the jury system. The decision goes much further than simply enforcing an arbitral clause between two contracting parties. Instead, it prevents a victim of a horizontal conspiracy from proceeding in court against co-conspirators with whom it had no arbitral agreement whatsoever.

Why did the victims find themselves in this predicament? They signed form contracts containing broad, non-specific arbitral clauses. The ruling should motivate a review by businesses of all stripes of all of their contracts to see whether they contain arbitration clauses, and if they do, whether the clauses are "broad." It behooves suppliers of products and services to put "broad" arbitration clauses in their contracts with their customers if they do not already do so. The definition of "broad" is one of those definitions that is in the proverbial "eye of the beholder" – broad enough to encompass horizontal antitrust conspiracy claims. Of course, one can always put a specific provision in an arbitral clause requiring arbitration of antitrust claims; if that is in the contracting parties' contemplation. But that is often not practical or politic if only one side – the supplier – would potentially benefit. An option for customers faced with a contract containing an arbitration clause is to insist on language from their suppliers that specifically excludes antitrust claims from arbitration.

The background of this case is gleaned from a criminal information, plea agreement, and sentencing memorandum published by the Antitrust Division. They show that a cartel operated from 1998 to the end of 2002 that raised prices to consumers who shipped products to and from the United States by "Parcel Tankers": specialized deep sea vessels designed to carry bulk liquid chemicals, edible oils, acids and other liquids in their compartments. The Antitrust Division believes that the volume of commerce affected by the conspiracy was at least $600 million.

Parcel Tanker customers entered into form "contracts of affreightment" or "Charter Partys" for each separate shipment with Parcel Tanker owners. The contracts contained what may be characterized as "broad" arbitration clauses that provided that "any and all . . . disputes of whatsoever nature arising out of [the contract] shall be put to arbitration . . . ." The Parcel Tanker owners were caught fixing prices and allocating customers after one of their number squealed to the authorities and was granted provisional amnesty for doing so. A large number of civil treble damage class actions followed and were consolidated into a multi-district litigation in the District of Connecticut.

The Parcel Tanker owners moved to compel arbitration pursuant to the arbitration clause found in each of the thousands of form contracts. The District Judge denied the motion, finding that the language of the arbitral clause was not broad enough to include an antitrust conspiracy within its four corners. After all, when the victims of the conspiracy contracted to transport their products by Parcel Tanker, they had no idea that the rates they were to be charged were the subject of a pre-existing illegal price fixing scheme between the Parcel Tanker owners. Moreover, the District Court found that the antitrust claims did not "arise out" of the contracts, but were ancillary to them. The Appeals Court disagreed. It reasoned that the antitrust plaintiffs were complaining about the inflated prices they paid under the contracts to the Parcel Tanker owners, and that price terms – no matter how they were set – were within the scope of the arbitration clause.

Although the arbitrability of antitrust claims has been a settled issue since the Supreme Court's ruling in Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc., *473 U.S. 614 (1985), the result in this case should be a wake-up call for any company that enters into contracts containing arbitration clauses because the Court of Appeals did not limit its opinion on arbitrability to parties who were in privity with one another. At first blush, this holding would seem to be of limited importance because there is joint and several liability for damages caused by antitrust violations. Thus, what difference would it make if you were compelled to arbitrate with the Parcel Tanker owner you contracted with, and who allegedly fleeced you, if you could turn around and sue the other Parcel Tanker owners who participated in the conspiracy because they were jointly and severally liable? After all, the victim did not agree to arbitrate with all the members of the cartel, only with the Parcel Tanker owner that signed the contract, carried the victim's cargo and charged the inflated price. Right?*

Wrong! As always, the "devil" is in the details. In this case the devil is hiding in Footnote 7 of a thirty-page slip opinion. The footnote provides that the arbitration clause can be invoked by all the Parcel Tanker owners, not just the one that signed the contract with the putative victim. "Each claimed injury under the Sherman Act arises from the fact that [the Victim] entered into a charter with a given owner. . .; each such charter included . . . [a] broad arbitration clause. Because. . . all of the owners conspired . . . to inflate the freight terms of any one such contract, any claim against an owner jointly liable for the injury caused by that contract is inextricably intertwined with the arbitral claim against the owner liable under that contract." Thus, the Court of Appeals found that the victims were estopped from claiming that the non-signatory owners could not invoke the arbitration clause to compel arbitration of their joint and several liabilities. "... [W]e easily conclude that non-signatory Owners 'ha[ve] a close relationship with the parties bound to arbitrate,' that a claim of joint and several liability 'concerns that relationship,' and that 'the dispute is closely linked to a dispute that is subject to arbitration in the underlying contract.'"

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Attention

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(jshenefield@morganlewis.com) and Don Klawiter (dklawiter@morganlewis.com) have extensive experience in representing parties in international antitrust arbitrations.■

An October Surprise? DOJ Issues Policy Guide on Merger Remedies

On October 21, 2004, the Antitrust Division of the Department of Justice released its first-ever written guidelines concerning the Division's approach to remedies in merger transactions. Although new to print, the *Antitrust Division Policy Guide for Merger Remedies* does not announce a stark departure from existing policy. Rather, the *Policy Guide* largely codifies long-standing practices, while providing the business community and the antitrust bar with a clearer understanding of the Division's merger review processes.

The *Policy Guide* outlines several overarching tenets that the Division will follow when examining a transaction and fashioning a remedy. These include:

- The DOJ will not accept a remedy unless there is a sound basis for believing a violation will occur.

  Commentary: In other words, the DOJ, as a matter of policy, will not accept a remedy until it has conducted a sufficient, and possibly lengthy, investigation and concluded that the transaction is probably unlawful, even if such an investigation may lead to significant delay and even where both the parties and the DOJ are eager to reach a settlement.

- Restoring competition is the central focus of any remedy.

  Commentary: Therefore, when making presentations to the DOJ about a proposed remedial solution, counsel and their clients must focus on the effect the remedy will have on restoring the competitive landscape and on the competitive concerns raised by the DOJ, and not on public policy or other themes having little to do with competition in the affected industry.

- The remedy must be enforceable, be unambiguous, and possess sufficient teeth to be obeyed.

  Commentary: In practice, the requirement for clarity and specificity is premised upon two potential issues: First, the concern that a judge, not familiar with the proceedings that led up to the settlement, must be able to interpret the decree at a later point in time. Second, the need to avoid potential loopholes and any attempts at circumvention of the decree.

The *Policy Guide* also provides information about the factors the DOJ will consider in fashioning a remedy in a particular transaction. Although not ground breaking, the following points warrant careful attention by in-house counsel, practitioners, and their clients when considering how to craft and present a divestiture scenario to the DOJ. Moreover, the *Policy Guide* makes clear that:

- structural remedies involving the divestiture of physical or intangible assets are preferred over conduct remedies because of the relative certainty of the former and because they avoid "costly government entanglement in the market";
- any divestiture plan must include everything necessary to allow the purchaser to become an effective, long-term competitor in a timely manner because the goal of the decree is to restore competition to pre-merger levels;
- because of the desire to create an effective, long-term competitor, there is a clear preference for divestitures that include whole, ongoing business entities or product lines, rather than piecemeal divestiture of those entities' component parts;
- any meaningful divestiture proposal must address both physical and intangible assets;
- the Division "does not discourage fix-it-first remedies," i.e., structural remedies that the parties implement and the Division accepts before a merger is consummated, which obviate the need for the Division to file a case; and
- the Division must approve any proposed purchaser so that it can determine that (1) the divestiture itself does not raise competitive concerns; (2) the putative buyer has adequate incentives to compete in the market; and (3) the buyer possesses the right skill set, e.g., business acumen or financing, to compete effectively in the market for the long term.

Last year, as reported in Morgan Lewis – On Competition, May/June 2003, p. 8, the FTC's Bureau of Competition issued its own policy statement on remedies. A comparison of the policies reveals a great deal of similarity, but there are a few important areas where the two approaches markedly diverge. For instance, the Division's newly published *Policy Guide* strongly disfavors the "Crown Jewel" method, adopted by the Bureau as a way to help ensure compliance with consent orders. Also in contrast to the Antitrust Division, the Bureau in certain circumstances places a great deal of emphasis on securing an up-front buyer for the assets to be divested.

A copy of the Antitrust Division's Policy Guide *is available at: http://www.usdoj.gov/atr/public/guidelines/205108.htm. The FTC's Bureau of Competition policy can be found at http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm. For additional information about the* Policy Guide *and related topics, please contact Washington, D.C. partners Will Tom (wtom@morganlewis.com) or Steve Mahinka (smahinka@morganlewis.com).*■

Articles & Speaking Engagements

Criminal Cartel Enforcement

Washington, D.C. partner Donald Klawiter (dklawiter@morganlewis.com) led a panel discussion before the ABA Section of Antitrust Law, Criminal Cartels, at the annual Fall Forum, on November 19, 2004.

FTAIA and Sherman Act Jurisdiction

Ned Cavanagh has authored an article entitled "*Empagran*: A Post-Script," which is forthcoming in the Civil Practice and Procedure Committee Newsletter of the ABA Antitrust Section.

On January 27, 2005, Ned and John Shenefield (jshenefield@morganlewis.com) will be speaking on the *Empagran* decision in NYC before the New York State Bar Association in a program sponsored by the NYSBA's Antitrust Section.

Sherman Act: Conspiracy

New York of counsel Ned Cavanagh (ecavanagh@morganlewis.com) has authored an article entitled "*Illinois Brick*: A Look Back and a Look Ahead" that will appear shortly in the *Loyola Consumer Law Review*.

Sherman Act: Monopolization

Washington partner Jonathan Rich (jrich@morganlewis.com) and Ned Cavanagh have authored a piece on the *Trinko* decision, which was decided earlier this year by a unanimous Supreme Court (*Morgan Lewis - On Competition*, March 2004, p. 6) that is forthcoming in *Icarus*, a newsletter publication of the Computer and Internet Committee of the ABA Antitrust Section.

Advertising/Trade Regulation

Aurelien Condomines (acondomines@morganlewis.com), an associate in the firms's Paris office, has just published an article entitled "Challenging a Competitor's Advertising Campaigns: An Effective but Possibly Dangerous Weapon" /"Contester en Justice la Publicité d'un Concurrent: Une Arme Efficace mais à Double Tranchant", published in *Recueil Dalloz* n° 39 p. 2842, November 4, 2004.

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