



# MORGAN LEWIS ON COMPETITION

A NEWSLETTER FROM THE ANTITRUST PRACTICE ■ [www.morganlewis.com](http://www.morganlewis.com)

JULY 2005

## D.C. CIRCUIT REBUFS CLAIMS BY FOREIGN PURCHASERS

By J. Clayton Everett, Jr.

In a much anticipated decision, a three-judge panel of the D.C. Circuit held that foreign purchasers of vitamins may not pursue claims under the U.S. antitrust laws for damages allegedly suffered as the result of worldwide cartel activity in the vitamins industry. The panel's decision resolves an important issue left open by the Supreme Court's decision last year in the same case, *Empagran, SA v. F. Hoffmann-La Roche, Ltd.*, and effectively bars all foreign purchaser suits challenging worldwide price-fixing cartels (at least in the D.C. Circuit).

*Empagran* is a class action brought on behalf of all persons and companies that purchased vitamins for delivery outside the United States. Plaintiffs allege that dozens of vitamins manufacturers, located throughout the world, engaged in a conspiracy or conspiracies to fix prices for vitamins and to allocate vitamins customers. Defendants moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the Foreign Trade Antitrust Improvements Act (FTAIA) requires that, to be successful, claims by foreign purchasers must arise from the U.S. effects of conduct challenged under the antitrust laws. Defendants argued that plaintiffs' injuries — caused by transactions conducted in foreign countries — did not "arise from" the U.S. effects of defendants' conduct. The district court agreed and dismissed the complaint.

The D.C. Circuit overturned the dismissal. The panel assigned to the case concluded that

foreign purchasers may pursue claims under U.S. antitrust laws as long as they can establish that the alleged conduct harmed someone in the United States.

Defendants appealed the D.C. Circuit's decision to the Supreme Court. In a unanimous decision, the Court held that U.S. antitrust laws do not provide a remedy for foreign purchasers who suffer injuries caused by the foreign effects of challenged conduct. The Court reserved decision, however, on whether foreign purchasers may pursue claims in cases where the U.S. and foreign effects of challenged conduct are interrelated, an issue that was not briefed before the Supreme Court.

After remand, plaintiffs argued that the defendants' alleged conduct created interrelated U.S. and foreign effects that caused plaintiffs' injuries. Specifically, plaintiffs argued that vitamins markets are worldwide. Arbitrage between regions eliminates any sustained price differences. Because defendants had to fix prices in the U.S. in order to fix prices in other countries, plaintiffs' injuries suffered outside the United States could have "arisen from" the U.S. effects of defendants' conduct, thus satisfying the FTAIA's requirements.

The D.C. Circuit panel disagreed with plaintiffs' interpretation of the FTAIA's "arising from" requirement. Plaintiffs' construction would allow U.S. courts to exercise jurisdiction whenever the U.S. effects of challenged conduct were a "but for" cause of plaintiffs'

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## ANTITRUST SENTENCING IN A POST-BOOKER/FANFAN WORLD

By Tara L. Reinhart

In January of this year, the Supreme Court issued its decision in the consolidated cases of *United States v. Booker* and *United States v. Fanfan*. The *Booker/Fanfan* decision held that all facts used to increase a criminal sentence need to be either found beyond a reasonable doubt by a jury or admitted by the defendant. The Court also held that during sentencing, judges must use the United States Sentencing Guidelines in an advisory role instead of a mandatory one.

This decision changed the law in a manner that may benefit corporations when the Department of Justice Antitrust Division (DOJ) seeks to fine corporate defendants an amount above the statutory maximum. Pursuant to *Booker/Fanfan*, when the DOJ seeks a fine for an antitrust violation in excess of the statutory maximum, it must prove beyond a reasonable doubt the gain or loss attributable to the crime.

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# Morgan Lewis

C O U N S E L O R S A T L A W

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## D.C. CIRCUIT REBUFFS CLAIMS BY FOREIGN PURCHASERS

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alleged injuries. But the FTIA, according to the panel, requires plaintiffs to establish that the U.S. effects of defendants' conduct were the "proximate cause" of plaintiffs' injuries. The court did not define a specific proximate cause standard, but it did point to two cases that would meet the standard. Both cases involved unusual factual circumstances where the U.S. and foreign effects of anticompetitive conduct were inextricably intertwined.

*The Empagran plaintiffs have promised to seek en banc review of the panel's decision. If the decision stands, it will sound the death knell for foreign purchaser suits challenging worldwide price-fixing agreements (at least in the D.C. Circuit). If the "arbitrage theory" proposed by plaintiffs does not satisfy the proximate cause standard, it is hard to imagine a situation in which the U.S. effects of price-fixing agreements could "proximately cause" injuries in non-U.S. markets. The panel's standard leaves some room for suits by persons injured in non-U.S. markets, but only in unusual factual circumstances.*

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## ANTITRUST SENTENCING IN A POST-BOOKER/FANFAN WORLD

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The DOJ has claimed that the *Booker/Fanfan* decision will have little impact on its practices in most criminal antitrust cases. In a paper presented to the ABA Antitrust Section's Spring Meeting in March, Deputy Assistant Attorney General for Criminal Enforcement Scott D. Hammond emphasized that "heavy reliance on [the Sentencing Guidelines] is the only way to avoid unwarranted sentencing disparity." Mr. Hammond pointed out that the *Booker/Fanfan* decision requires district courts to consider the Sentencing Guidelines, along with sentencing factors found in 18 U.S.C. § 3553(a), to determine sentencing in antitrust matters.

However, Mr. Hammond conceded that the DOJ would change its practices with respect to those cases where it seeks a fine above the Sherman Act statutory maximum. In prior cases, the DOJ has sought above-maximum fines pursuant to 18 U.S.C.

§ 3571(d), which permits a court to fine a corporate defendant an amount not exceeding twice the gain or loss attributable to the crime. In the past ten years, the DOJ has obtained more than 45 corporate settlements that exceeded the statutory maximum. Mr. Hammond stated that in response to *Booker/Fanfan*, the DOJ will allege the amount of gain or loss in indictments and (if necessary) will "allege the gain or loss attributable to the entire cartel, not just the defendant" to obtain the appropriate fine. In addition, when a defendant agrees to pay an above-maximum fine, the DOJ will require the defendant to execute a plea agreement that includes language addressing the gain or loss attributable to the crime.

Some have opined that the *Booker/Fanfan* decision will aid corporate defendants because the DOJ may find it difficult to prove to a jury the amount gained or lost due to the crime. However, Mr. Hammond noted that the DOJ has faced this burden since 2000, when the Supreme Court decided in *United States v. Apprendi* that a jury must find facts that are used to increase the penalty for a crime beyond a reasonable doubt. Since 2000, the DOJ has obtained 18 settlements above the statutory maximum. Mr. Hammond reported that the DOJ obtained two such settlements after *Booker/Fanfan*.

Mr. Hammond emphasized that the DOJ will terminate plea negotiations if a company seeks to negotiate a plea while contesting the DOJ's analysis of the amount gained or lost due to the crime. In practice, this means that a company will go to the "back of the line" if other companies show interest in cooperating with the DOJ's investigation. The DOJ's position will likely motivate companies to seek the benefits of early cooperation.

*In the post-Booker/Fanfan world, the incentive of corporate defendants to settle criminal allegations with the DOJ remains strong. For one, companies that plead early may persuade the DOJ to grant their executives immunity from prosecution. Additionally, a company that pleads early has an opportunity to limit the DOJ's charges because the DOJ may not have uncovered the full scope of the conspiracy. Early plea negotiations may also persuade the DOJ to attribute a lesser share of the crime to the*

*company, thereby lowering the amount that the DOJ will seek.*

*A likely increase in the penalties associated with cartel activity also heightens the incentive to plead rather than litigate. On April 30, the United States Sentencing Commission forwarded to Congress its proposed amendments to the Sentencing Guidelines. These proposed amendments would increase the penalties for antitrust offenses to match the recently increased penalties for other white-collar offenses such as fraud and obstruction of justice. Specifically, the amendments would increase the base offense level to 12 and reconfigure the volume-of-commerce table that delineates how much of an increase in penalty a defendant receives relative to the size of the conspiracy. The proposed amendments also incorporate the increases to the statutory maximum penalties that Congress enacted in 2004. The 2004 legislation raised the maximum jail sentence for an antitrust violation to ten years and raised the maximum fine for a corporation to \$100 million. Unless Congress changes the Sentencing Commission's proposed amendments, they will become effective November 1, 2005.*

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## ANTITRUST MODERNIZATION COMMISSION GETS TO WORK

By J. Clayton Everett, Jr.

The Antitrust Modernization Commission (AMC), consisting of 12 Commissioners appointed equally by the President, the House of Representatives and the Senate, was formed "to examine whether the need exists to modernize the antitrust laws and to identify and study related issues." The AMC has set its agenda, developed work plans and otherwise prepared for the work ahead, and is planning to produce a report to the President and Congress outlining the Commissioners' recommendations for

improving the operation of U.S. antitrust laws. The AMC expects to submit its report in April 2007.

The AMC has spent the past year setting its agenda and creating nine "working groups" of Commissioners to identify issues and prepare study plans in the following general areas: (1) antitrust enforcement institutions; (2) exclusionary conduct; (3) immunities and exemptions; (4) international antitrust; (5) merger enforcement; (6) antitrust in the "new economy"; (7) regulated industries; (8) remedies; and (9) the Robinson-Patman Act. Each working group identified issues to study, which the AMC then narrowed with the help of public comments. The issues for study include substantive questions of antitrust law (e.g., in what circumstances refusals to deal violate Section 2) and procedural questions relating to the efficient administration and enforcement of U.S. antitrust laws.

In a meeting on May 9, the AMC approved plans for a series of public hearings to study the issues it has identified. The AMC intends to hold 35 such hearings. The first public hearing, which will focus on the

availability of U.S. antitrust laws to redress injuries suffered outside the United States, will take place on June 24. The AMC makes information about specific hearings and other AMC matters available at [www.amc.gov](http://www.amc.gov).

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## GERMANY'S FCO IMPOSES FINES TOTALING €130 MILLION ON GERMAN INSURERS

By Christian O. Zschocke and Torsten Schwarze

On March 23, 2005, Germany's antitrust watchdog, the Federal Cartel Office (*Bundeskartellamt* or FCO) imposed fines totaling €130 million on ten insurance companies (including Europe's biggest insurer, Allianz, and nine of Germany's largest insurance companies such as AXA, Gerling, HDI and Gothaer) and on board members of those companies. The FCO is still investigating eight other insurance companies and additional decisions on fines are expected in the summer of 2005.

The FCO's decision follows an investigation (triggered by customer complaints) that started in 2002 with dawn raids on 13 companies. The alleged violations of German and European competition law primarily concerned the markets for industrial

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## FTC SETTLES UNOCAL MATTERS

On June 10, the Federal Trade Commission announced two consent orders that resolve its concerns regarding Chevron Corporation's (Chevron's) proposed \$18 billion acquisition of Unocal Corporation (Unocal) and settle the Commission's 2003 monopolization complaint against Unocal alleging anticompetitive abuses of the regulatory process related to the California Air Resources Board's (CARB's) reformulated gasoline (RFG) regulations.

In its 2003 administrative complaint, the FTC alleged that in the 1990s Unocal illegally acquired monopoly power in the technology market for producing RFG by misrepresenting, among other things, that Unocal's research was nonproprietary and in the public domain, while at the same time pursuing a patent that would enable it to charge substantial royalties once CARB incorporated the research into its RFG regulations. The complaint further alleged that Unocal engaged in deceptive and exclusionary conduct through its participation in two private industry groups — the Auto/Oil Air Quality Improvement Program and the Western States Petroleum Association. The FTC alleged that Unocal's enforcement of its RFG patents could result in consumers paying hundreds of millions of dollars per year.

The FTC's complaint concerning Chevron's proposed acquisition of Unocal alleged that the transaction would violate Section 7 of the Clayton Act and Section 5 of the FTC Act. The Commission's concerns related to Chevron's potential acquisition and enforcement of Unocal's RFG patents. According to the complaint, once Chevron owned Unocal's patents, it would be able to use its position to coordinate with its downstream competitors, to the detriment of consumers.

Under the terms of the consent orders, Chevron and Unocal will cease enforcing Unocal's relevant patents, will not undertake any new enforcement efforts related to the patents, and will cease all attempts to collect damages, royalties, or other payments related to the use of any of the patents. These obligations will become effective on the date Chevron consummates its acquisition. Within 30 days of the merger's effective date, the companies will file the necessary documents with the U.S. Patent and Trademark Office to disclaim or dedicate to the public the remaining term of the relevant U.S. patents.

In addition, the companies will dismiss all pending legal action related to alleged infringement of the patents, including the two actions currently pending before the U.S. District Court for the District of California. Finally, the consent orders contain standard record-keeping and reporting requirements to ensure the companies' compliance with their terms. The companies also must distribute copies of the orders to relevant parties. The orders will expire 20 years after the date they become final.

The Commission's vote to accept the consent orders and place copies on the public record was 4-0-1, with Chairman Deborah Platt Majoras recused. The consent orders were subject to public comment until July 9, 2005, after which the Commission began determination about whether to make them final.

## GERMANY'S FCO IMPOSES FINES TOTALING €130 MILLION ON GERMAN INSURERS

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and transport insurance. According to the FCO, the insurance companies have conspired since the middle of 1999 to reduce premium and conditions competition and to restructure the market for industrial insurance. The conspiracy allowed each insurance company to increase premiums or imitate competitors' terms vis-à-vis clients without fear of reaction from competitors. The FCO calculated the fines by determining the profits achieved in the relevant period as a result of the antitrust violation. Then, depending on the role of each company in the conspiracy, the FCO multiplied the company's surplus profits by a factor of 1.5 or 2.

The FCO has not yet disclosed the amount of the fine imposed on each of the companies. However, most of the insurance companies have already said that they will appeal to the Higher Regional Court of Düsseldorf.

*The FCO's decision against the German insurance industry emphasizes its determination to fight cartels in all industrial sectors, using the threat of heavy fines on companies and their managers. The FCO, like the European Commission, appears determined to establish more effective mechanisms for the enforcement of competition law.*

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*has an active competition law practice, and he has represented clients before the FCO and the European Commission. Torsten Schwarze is an associate in the firm's Frankfurt office.*

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## KOVACIC A POTENTIAL NOMINEE TO FTC

By Alexis J. Gilman

Recent news articles have mentioned William Kovacic, a professor at George Washington University Law School and general counsel to the Federal Trade Commission from 2001 to 2004, as a potential nominee to the Commission to replace Commissioner Orson Swindle, whose term has expired. The opening is for a Republican seat on the Commission (no more than three of the Commission's five members can belong to a single political party). A recent report indicates that former FTC Chairman Timothy Muris and other Republicans have urged the White House to nominate Mr. Kovacic.

Many in the antitrust community view Mr. Kovacic as a strong candidate, given his work at the FTC, his focus on international convergence in antitrust law, his academic experience, and his extensive writing on antitrust and economic issues. Mr. Kovacic's

work in the international convergence arena has won high praise throughout the antitrust community. At the FTC, Mr. Kovacic provided much of the impetus for the International Competition Network, an organization dedicated to growing international consensus regarding competition policy. Among other notable achievements, he has served as an advisor on antitrust and consumer protection issues to the governments of Egypt, El Salvador, Georgia, Mongolia, Morocco, Nepal, Russia, Ukraine, Vietnam and Zimbabwe. Mr. Kovacic also has a well-deserved reputation as an outstanding lecturer and teacher, with a rare ability to integrate the disciplines of law and economics in a manner that is interesting to both lawyers and economists.

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## THE FTC'S ANNUAL REPORT: A CONTINUED FOCUS ON MERGER REVIEW

By Jason A. Lomax

Earlier this year, Federal Trade Commission Chairman Deborah Platt Majoras issued the agency's annual report, entitled

## FTC CLOSES ARCH COAL INVESTIGATION

On June 13, the Federal Trade Commission announced its decision to close its investigation into Arch Coal, Inc.'s (Arch's) acquisition of the Triton Coal Company's (Triton's) North Rochelle coal mine, saying that it will not continue with administrative litigation challenging the deal. The vote to close the investigation and discontinue administrative action was 4-1, with Commissioner Pamela Jones Harbour dissenting. The Commission majority issued a statement, Commissioner Harbour issued a dissenting statement, and Commissioner Thomas B. Leary issued an additional statement.

The Commission's decision ends an unsuccessful bid to prevent or reverse the transaction. On April 1, 2004, the Commission filed a complaint in the United States District Court for the District of Columbia seeking a preliminary injunction to block the transaction. On August 13, 2004, the district court denied the Commission's motion for a preliminary injunction. The Court of Appeals for the District of Columbia then denied the Commission's motion for an injunction pending appeal, and Arch and Triton subsequently consummated the transaction. On September 10, 2004, the Commission withdrew the matter from administrative litigation.

The Commission's statement noted that it strongly disagreed with the district court's holding that it was "novel" for the Commission to advance a theory based on the likelihood of coordinated decisions on output, and that this novelty made the Commission's burden of proof "more difficult." However, in its order denying the Commission's request for an injunction pending appeal, the court of appeals expressly rejected this holding by the district court, stating that "the court agrees with the FTC that there is nothing novel about the theory it has advanced in this case."

The Commission concluded that further litigation would not be in the public interest because it would require the Commission staff to present largely the same record evidence that the district court found insufficient to warrant an injunction. Furthermore, in the months following the acquisition, the staff has not found new evidence indicating harm to competition.

"The FTC in 2005: Standing up for Consumers and Competition." The report discusses the agency's accomplishments over the past year and makes clear that the agency will continue to focus its efforts on merger review.

The report notes that during the 2004 fiscal year HSR filings increased by more than 40% over 2003 and projects that filings will continue to increase in 2005. The report also emphasizes the FTC's commitment to making the agency's merger analysis process both clearer to the business community and more predictable. Indeed, both the FTC and the DOJ have recently made efforts to clarify their merger enforcement activities. Those efforts have included issuing appeal procedures for second requests, publishing a report that provides data on consumer complaints, publishing guidelines for negotiating merger remedies, and holding workshops on merger enforcement. The antitrust agencies also published a report that identified concentration levels in markets where the FTC or DOJ has challenged transactions. Later this year the agencies will publish a commentary on the merger guidelines to show how the agencies apply them.

Chairman Majoras has established a task force to recommend additional improvements to the merger review process. The task force will examine HSR information disclosure requirements, the analysis the FTC uses in making comments it issues when it accepts consent agreements, and the second request compliance process and its impact on both the FTC and the merging parties. The FTC is also considering releasing an annotated model second request to explain the rationale underlying certain information requests.

The FTC's Annual Report is available on the FTC's web site at <http://www.ftc.gov/opa/2005/05annualrpt.htm>.

In a recent interview, Chairman Majoras said that she wants the merger review task force to make a "soup to nuts" evaluation of the merger review process, and that she hopes the panel will have some recommendations by the end of the year. The antitrust agencies and the private bar have discussed potential second request reforms for years. A second request, which the antitrust agencies can

## ARTICLES & SPEAKING ENGAGEMENTS

Washington, D.C. partner Stephen Paul Mahinka spoke at the 6th Annual Philadelphia-Japan Health Sciences Dialogue in Philadelphia on June 18. Steve presented a speech entitled "Starting or Expanding a Pharma/Biotech Business in the U.S.: New Legal and Regulatory Issues."

On April 20–21, Washington, D.C. partner Donald C. Klawiter spoke at the IBA's International Competition Enforcement Conference in Tokyo. Don participated in a panel discussion entitled "Anti-Cartel Enforcement: Global Issues." At the same time, Don's article, entitled "Competition Law Compliance in Japan: The Time Is Now," was published in the *Asia Pacific Antitrust and Trade Review 2005 (Global Competition Review 2005)*. On April 27–28, Don presented a paper entitled "Defending the Global Cartel Investigation: The Preparation and First Steps" at the Advanced EC Competition Law Conference in London and participated in a panel discussion entitled "International Cartel Enforcement and Leniency." On April 12, 2005, Don testified before the U.S. Sentencing Commission regarding amendments to the Antitrust Sentencing Guidelines. On June 6–7, Don participated in the Fourth Annual Conference of the International Competition Network in Bonn as a nongovernmental advisor to the United States delegation. Don also spoke on a panel entitled "Defending the International Cartel Investigation" at the Insight - International Competition Law Conference in Montreal on June 16–17.

Washington, D.C. partner Willard K. Tom attended the Canadian Law Conference Competition Law Compliance Program in Toronto. Will participated in a panel discussion entitled "Recent U.S. and International Developments: What They Mean for Your Organization." The discussion was held on May 31, 2005.

Washington, D.C. partners Stephen Paul Mahinka and Scott A. Stempel appeared at the American Conference Institute In-House Counsel Forum on Pharmaceutical Antitrust. Steve participated in a panel discussion entitled "Pharmaceutical Industry Mergers: Anticipating Antitrust Issues and Surviving the Investigation." Scott participated in a panel discussion entitled "Defining the 'Market' and Its Effect on the Antitrust Analysis of Pharmaceutical Company Conduct and Transactions." The discussion was held on May 24, 2005.

Washington, D.C. partner Jonathan M. Rich testified before the Subcommittee on Courts, the Internet and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives, regarding the American Society of Composers, Authors and Publishers on May 11, 2005.

*issue after the initial HSR waiting period, contains a lengthy set of interrogatories and document requests, and triggers a second 30-day waiting period that commences when both parties "substantially comply" with the request. A second request can delay a proposed deal for months and cost the merging parties millions of dollars to complete. However, the agencies do not want to narrow second requests in a manner that would permit parties to withhold relevant information. Chairman Majoras hopes the task force will present recommendations that (if adopted) will relieve the merging parties' burdens but still ensure that the reviewing agency obtains the information necessary for a thorough review.*

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## SUPREME COURT TO CONSIDER PRESUMPTION OF MARKET POWER IN CASES INVOLVING INTELLECTUAL PROPERTY RIGHTS

The Supreme Court recently agreed to review the Federal Circuit's decision in *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, which held that market power may be presumed in tying cases where the tying product is patented. Although it acknowledged the consensus among the antitrust bar, the antitrust enforcement agencies and academics that intellectual property rights do not automatically confer market power, the Federal Circuit concluded that it was bound by two Supreme Court opinions—issued in 1947 and 1962, respectively—that established a presumption of market power in tying cases involving intellectual property rights. Has the Supreme Court granted *certiorari* in order to overturn those decisions? Stay tuned to find out.

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