



# **DEPARTMENT OF JUSTICE**

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## **Antitrust Update: Supreme Court Decisions, Global Developments, and Recent Enforcement**

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Good morning and thank you for inviting me to speak. Today, I will use my time to address three topics. First, recent antitrust decisions by the Supreme Court. Second, some reflections on international antitrust developments. Third, some general observations on antitrust enforcement at the DOJ during the last few years.<sup>1</sup>

## **I. Recent trends in Supreme Court Antitrust Cases**

The U.S. Supreme Court has taken a renewed interest in antitrust cases. From 1991 to 2003, the Court addressed fewer than one antitrust case per term on average. In the last three terms, the Court has addressed ten antitrust cases.<sup>2</sup> This renewed interest is a positive development, and I will remark on three specific aspects of it.

First, the Court's recent antitrust jurisprudence is marked by an extraordinary decree of consensus. Of the ten cases, there were 77 votes for the majority decision and a total of only nine dissenting votes. Indeed, eliminate the

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<sup>1</sup>I thank Hill Wellford for his help in preparing these remarks.

<sup>2</sup>*Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (the 5-4 decision); *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007) (7-1); *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (7-2); *Weyerhaeuser Co. v. Ross-Simmons Lumber Co.*, 127 S. Ct. 1069 (2007) (9-0); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006) (8-0); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (8-0); *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (7-2); *F. Hoffman-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155 (2004) (8-0); *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004) (9-0); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (9-0).

one 5-4 decision – which I will discuss at greater length today – and the numbers are 72 to 5. Six of the cases were decided in unanimous decisions.

Second, I submit that the principal reason for the abundance of supermajority decisions is an analytical consensus that has emerged. The Court has accepted the focus on economic efficiency and the use of economic analysis. Many of the recent decisions reflect no more than an application of these principles to outdated antitrust doctrines. As Judge Douglas Ginsburg concluded in a recent article, the “Court, far from indulging in a pro-defendant or anti-antitrust bias, is [instead] methodically re-working antitrust doctrine to bring it into alignment with modern economic understanding.”<sup>3</sup>

Here are two examples:

In *Illinois Tool Works Inc. v. Independent Ink, Inc.*,<sup>4</sup> the Court addressed the question of whether the possession of a patent should be presumed to confer market power on the patent holder in a tying case. Two 1940s Supreme Court decisions, *Morton Salt*<sup>5</sup> and *International Salt*,<sup>6</sup> had been widely interpreted to

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<sup>3</sup>Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court, 1967 to 2007*, COMPETITION POL’Y INT’L, Autumn 2007, at 3, 4.

<sup>4</sup>547 U.S. 28 (2006).

<sup>5</sup>*Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942).

<sup>6</sup>*Int’l Salt Co. v. United States*, 332 U.S. 392 (1947).

adopt such a presumption, and the Court explicitly adopted the presumption in *United States v. Loew's, Inc.* in 1962.<sup>7</sup> The U.S. Department of Justice had advocated in *International Salt* that the Court should place tying arrangements involving patented products in the category of *per se* violations of the Sherman Act, but it had not gone so far as to state that a patent, merely because it provides the exclusive rights to a product or process, also establishes the separate question of antitrust market power.<sup>8</sup> When, subsequently, the agencies (and economic scholars) confronted the latter question, they recognized that possessing a patent does not, in fact, always or even usually create market power. A patent conveys the exclusive right to make a particular product or use a particular process, but there may be other, sometimes better, ways in which to serve the same need. Think of the example of a patent on metal paper clips. Thus, the DOJ and FTC rejected such a presumption in their own analysis and announced this fact in 1995 in publishing the *Antitrust Guidelines for the Licensing of Intellectual Property*.

In *Illinois Tool Works*, the plaintiff had asserted a tying claim against a maker of toner cartridges that also owned patent rights relating to those cartridges.

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<sup>7</sup>371 U.S. 38 (1962).

<sup>8</sup>See Brief for the United States in *Intern. Salt Co. v. U.S.* (Sup. Ct. No. 47-46) (filed Oct. 14, 1947), 1947 WL 44272. Indeed, the term “market power” does not appear in the government’s brief.

The plaintiff was in the business of refurbishing the toner cartridges and complained about tying restrictions imposed by the defendant manufacturer that made it difficult or impossible for the plaintiff to compete. The presumption I just referenced was of crucial importance because, under existing Supreme Court precedent, the challenged tie-in was per se unlawful if the defendant possessed market power. And if market power were presumed from the existence of the patent, you can see how straightforward a claim the plaintiff would have. The Solicitor General authorized an *amicus* filing advocating that the Court reject a presumption of market power in light of advances in our learning over the past 50 years. The Court, noting the agencies' change of views on patent tying and longstanding views on patents and market power, accepted the economic scholarship and eliminated the presumption in an 8-0 decision. The decision removes any confusion on this point that might be caused by *Morton Salt*, *International Salt*, and an often-cited dictum (relying on these cases) in *Jefferson Parish*.<sup>9</sup>

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>10</sup> the question presented was whether vertical minimum resale price maintenance (RPM)

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<sup>9</sup>Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984).

<sup>10</sup>127 S. Ct. 2705 (2007).

agreements should be deemed per se illegal under section 1 of the Sherman Act, or whether they should instead be evaluated under the rule of reason. The Supreme Court had deemed such agreements per se illegal in the 1911 case *Dr. Miles Medical Co. v. John D. Park & Sons Co.*<sup>11</sup> In *Leegin*, the United States filed a brief as *amicus*,<sup>12</sup> noting that economic scholarship and the Court's more recent decisions had thoroughly undermined the bases for the *Dr. Miles* opinion. The United States observed that per se condemnation is appropriate only for conduct that is almost invariably anticompetitive, but that vertical RPM often has procompetitive justifications; among other things, vertical RPM can promote the interbrand competition that is the *sine qua non* of the antitrust laws. The Court did reverse, but this time the vote was a close one: 5 to 4, with the dissent consisting of Justices Breyer (the author), Stevens, Souter, and Ginsburg. The dissenters focused less on the substantive antitrust issue and more on *stare decisis*, and included a 2000-word discussion of the value of precedent and the six factors traditionally used by the Court when considering whether to depart from it.<sup>13</sup>

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<sup>11</sup>220 U.S. 373 (1911).

<sup>12</sup>Brief for the United States as Amicus Curiae Supporting Petitioner, *Leegin*, 127 S. Ct. 2705 (No. 06-480), available at <http://www.usdoj.gov/atr/cases/f221000/221027.pdf>.

<sup>13</sup>*Leegin*, 127 S. Ct. 2734–37.

The Court has discussed *stare decisis* in antitrust cases in some depth before.

A decade before *Leegin*, it decided in *State Oil Co. v. Khan* that *maximum* resale price maintenance was no longer to be treated as per se illegal – overruling *Albrecht v. Herald Co.*,<sup>14</sup> a 1968 decision – and it had this to say:

*[S]tare decisis* is not an inexorable command. In the area of antitrust law, there is a competing interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.<sup>15</sup>

The unanimous court in *State Oil Co. v. Khan* included all the dissenters in *Leegin*.

Their apparently heightened concern with *stare decisis* in 2007 may involve more than merely antitrust issues. More generally, however, these types of split decisions on antitrust matters have been rare in recent years. The Court has seen four dissenting votes in an antitrust case only one other time since 1999, and only two other times since 1991.<sup>16</sup>

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<sup>14</sup>390 U.S. 145 (1968).

<sup>15</sup>522 U.S. 3, 20–21 (1997) (internal quotation marks omitted) (citation omitted).

<sup>16</sup>*Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991).

My third observation is that the Court has begun to give greater weight to practical considerations. While there are several decisions reflecting this trend, a key example is the *Brooke Group*<sup>17</sup> decision, which set forth a safe harbor for above-cost pricing against predatory pricing claims. The Court acknowledged that its rule for predatory pricing likely did not cover some potentially successful above-cost predatory schemes, but held that permitting plaintiffs to pursue above-cost predation claims would present an unacceptable risk of chilling procompetitive price cutting. In 2007, in *Weyerhaeuser*,<sup>18</sup> the Court essentially extended the logic of the 1993 *Brooke Group* decision into a related area: below-cost predatory buying.

The Court took another significant step in this direction in *Bell Atlantic Corp. v. Twombly*.<sup>19</sup> The question presented in *Twombly* was whether mere parallel conduct, together with a conclusory allegation of conspiracy, was sufficient under Rules 8 and 12(b)(6) to state a claim under section 1 of the Sherman Act. The Second Circuit answered that question in the affirmative, relying on the “no set of facts” pleading standard of the 1957 case *Conley v.*

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<sup>17</sup>*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

<sup>18</sup>*Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

<sup>19</sup>127 S. Ct. 1955 (2007).



*Gibson*.<sup>20</sup> The United States filed a brief as *amicus* urging reversal as a matter of antitrust pleading. The Court did reverse, but it went further, taking direct aim at *Conley* and holding that the “‘no set of facts’ . . . . passage so often quoted . . . after puzzling the profession for 50 years . . . has earned its retirement.”<sup>21</sup> The Court set forth a new pleading standard that requires a plaintiff in an antitrust conspiracy case to allege facts “plausibly suggesting (not merely consistent with) agreement,” and requiring that allegations “must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.”<sup>22</sup> The language in *Conley* is frequently cited and the Court had never previously questioned it, so this decision was a significant evolution. Justice Souter wrote the opinion for the 7-member majority. Justice Stevens wrote a dissent, joined by Justice Ginsburg.

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<sup>20</sup>355 U.S. 41 (1957).

<sup>21</sup>*Twombly*, 127 S. Ct. at 1969.

<sup>22</sup>*Id.* at 1966.

## **II. The Relationship Between U.S. Antitrust and Foreign Competition Law**

### **A. U.S. and Foreign Law, Economics, and Enforcement Practice**

I turn now to some observations on the relationship between antitrust enforcement in the U.S. and abroad. This issue is distinct from the question that is sometimes raised about the extent to which U.S. courts should draw from foreign precedent in interpreting U.S. law. Rather, this issue arises out of the fact that we live in a global economy and that antitrust enforcement action in one jurisdiction can impact economic activity in another jurisdiction. Nevertheless, there is an element of each jurisdiction learning from the experiences of others. Until recently, this learning was largely in one direction – outward from the U.S. Indeed, the U.S. has been extraordinarily successful in exporting the concept that countries should adopt antitrust enforcement regimes. Whereas 20 years ago only a handful of countries made any serious attempt to enforce antitrust laws, there are now over 100 antitrust enforcement regimes around the world, including China, which will begin enforcing its new Antimonopoly Law in August of this year.

To the extent that this spread of antitrust law reflects a growing acceptance of free markets as the most effective way to organize an economy and acceptance of antitrust as a means to help deregulate markets, the trend is, in my view, a good one. There are, however, significant challenges presented by multiple antitrust

enforcement regimes. In antitrust, as in other areas of law, companies having to comply with multiple regimes can face burdensome requirements. These concerns are increased if procedures and substantive antitrust analysis diverge across countries, which can lead to inconsistent or even incompatible results.

There are many positive accomplishments to point out in this regard. As a matter of substantive law, we are approaching a worldwide consensus that antitrust enforcement should focus on protecting the competitive process and consumer welfare, not on protecting individual competitors or on other social goals, and that the analysis should be based on sound economic principles. The European Commission, for example, now has a chief economist and roughly two dozen staff economists, and I observe that many antitrust agencies abroad are led by economists, not attorneys. What we have today is not an American lecture on antitrust economics but a global dialogue. As foreign jurisdictions contribute to the state of the art in economics, we should expect to see those contributions also make their way, indirectly, into U.S. antitrust practice and case law.

We have developed a further and important consensus that aggressive enforcement against price-fixing and other cartels – naked agreements among competitors not to compete – should be a top priority. We have exported our highly successful leniency program, which has proven to be an extraordinarily

effective tool in detecting and prosecuting cartels. We also are enhancing our international cooperation in cartel enforcement. Enforcers now periodically execute contemporaneous searches around the world. And in December, for the first time, three defendants in a cartel involving marine hose agreed to plead guilty to antitrust conspiracy charges in the United States, then to be escorted in custody back to Britain to face charges of violating the UK's Enterprise Act of 2002, and to receive credit in the U.S. for any prison sentence imposed in the UK.

On merger enforcement, the adoption by multilateral organizations such as the OECD and the International Competition Network of best practices for merger notification regimes has helped convince many governments and agencies to reduce procedural burdens. With the EC, for example, we now coordinate many aspects of merger timing and discovery practices to minimize duplication and other burdens to parties doing business in the U.S. and Europe.

There remain significant differences between U.S. antitrust law and some aspects of other jurisdictions' competition regimes. The EC, for example, is tasked with promoting a single European market, and therefore prohibits certain territorial contract restrictions that would not violate U.S. antitrust laws if they involved restrictions between U.S. states. More generally, it remains to be seen whether we can forge a consensus on the antitrust rules for judging the activity of individual

firms – governed in U.S. law by section 2 of the Sherman Act. Such challenges and differences are important to note but they should not be exaggerated. In general, U.S. and foreign enforcers have made great progress in promoting principled convergence.

## **B. Foreign Competition Considerations in the U.S. Supreme Court**

I return now to the subject of U.S. Supreme Court cases to illustrate how the Court has taken into consideration foreign competition laws. In short, the Court does not appear to be looking to homogenize U.S. and foreign law, at least not if we can take any guide from *Intel Corp. v. Advanced Micro Devices, Inc.*<sup>23</sup> and *F. Hoffman-La Roche Ltd. v. Empagran S. A.*,<sup>24</sup> two decisions from 2004. The question presented in *Intel* was whether participants in a foreign competition law proceeding – in this case, AMD’s “abuse of dominance” complaint against Intel before the EC – could seek discovery in U.S. courts under a federal enabling statute.<sup>25</sup> The EC participated as *amicus curiae* and asked the Supreme Court to bar such discovery, on the grounds that private discovery could interfere with the

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<sup>23</sup>542 U.S. 241 (2004).

<sup>24</sup>542 U.S. 155 (2004).

<sup>25</sup>28 U.S.C. § 1782(a) (2000) (authorizing a district court, upon the request of a “foreign or international tribunal or upon the application of any interested person,” to order production of testimony, documents or other things “for use in a proceeding” in the tribunal).

EC's management of its investigation.<sup>26</sup> The United States as *amicus*, however, urged,<sup>27</sup> and the Court held,<sup>28</sup> that U.S. law commits the matter to the discretion of the district court. The district court, on remand, eventually denied the discovery request.<sup>29</sup>

*Empagran* involved claims under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which states that the Sherman Act shall not provide a claim based on conduct involving foreign commerce (other than imports) unless that conduct has a direct, substantial, and reasonably foreseeable effect on U.S. commerce, and that effect gives rise to the claim.<sup>30</sup> The plaintiffs were foreign corporations that purchased vitamins abroad for delivery abroad, and alleged that they were harmed by a price-fixing and market-allocating cartel, aspects of which DOJ prosecuted criminally in the United States. The D.C. Circuit ruled that the FTAIA allows foreign plaintiffs injured by anticompetitive conduct to sue in the

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<sup>26</sup>Brief of the Commission of the European Communities as Amicus Curiae in Support of Petitioner, *Intel Corp.*, 542 U.S. 241 (No. 02-572).

<sup>27</sup>See Brief for the United States as Amicus Curiae Supporting Affirmance at 13, *Intel Corp.*, 542 U.S. 241 (No. 02-572), available at <http://www.usdoj.gov/osg/briefs/2003/3mer/1ami/2002-0572.mer.ami.pdf>.

<sup>28</sup>See *Intel Corp.*, 542 U.S. at 266.

<sup>29</sup>See *Advanced Micro Devices, Inc. v. Intel Corp.*, No. C 01-7033, 2004 WL 2282320, at \*2 (N.D. Cal. Oct. 4, 2004).

<sup>30</sup>15 U.S.C. § 6a.

U.S. if the conduct's harmful effect on U.S. commerce would give rise to a claim by anyone, even if not the foreign plaintiff actually before the court. The United States, joined by Germany, Belgium, Canada, Japan, the United Kingdom, Ireland, and the Netherlands, participated as *amici* and urged the Supreme Court to reverse,<sup>31</sup> which the Court did. The Court held that, where “price-fixing conduct significantly and adversely affects” customers both outside and within United States, “but the adverse foreign effect is independent of any adverse domestic effect,” the FTAIA does not permit a Sherman Act claim for the foreign purchasers’ injury.<sup>32</sup>

*Intel* and *Empagran* are interesting, among other reasons, for the ways in which the Court viewed foreign law. In *Intel*, the Court did not adopt a “global antitrust” view of the world and interpret the U.S. laws and discovery practices in a way that converged with EC practices; instead, it read the U.S. laws within their

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<sup>31</sup>Brief for the United States as Amicus Curiae Supporting Petitioner, *F. Hoffman-La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155 (2004) (No. 03-724), available at <http://www.usdoj.gov/osg/briefs/2003/3mer/1ami/2003-0724.mer.ami.pdf>; Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners, *Empagran*, 542 U.S. 155 (2004) (No. 03-724); Brief for the Government of Canada as Amicus Curiae Supporting Reversal, *Empagran*, 542 U.S. 155 (2004) (No. 03-724); Brief of the Government of Japan as Amicus Curiae in Support of Petitioners, *Empagran*, 542 U.S. 155 (2004) (No. 03-724); Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, *Empagran*, 542 U.S. 155 (2004) (No. 03-724).

<sup>32</sup>*Empagran*, 542 U.S. at 164; *see id.* at 164–167.

four corners, and it left the district court free to consider impacts on the EC's investigation because such discretion is built directly into the discovery enabling statute.<sup>33</sup> In *Empagran*, the Court did the opposite of creating a one-world antitrust regime: by enforcing the FTAIA, it prevented American antitrust law from reaching the entirely foreign consequences of antitrust violations, and left intact the possibility that each nation can treat antitrust violations very differently (or perhaps not find violations at all). To be sure, the Court in each case merely applied particular facts to particular statutes, rather than attempting to define antitrust policy on a global scale, but that is just as it should be. And it did so by votes of 7-1 in *Intel* and 8-0 in *Empagran*.<sup>34</sup>

### **III. Recent Antitrust Enforcement by DOJ**

Finally, let me say a few words on the health of antitrust enforcement in the United States. Much of the scholarly and legal development in recent decades has focused on ways in which our older antitrust enforcement was overly aggressive. Scholars have opined and agencies and courts have accepted that mergers of grocery stores with no more than 15 percent of the market are unlikely to harm competition. Presumptions of market power were misplaced when based merely

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<sup>33</sup>*Intel*, 542 U.S. at 265–66 (citing 28 U.S.C. § 1782(a) (“may”)).

<sup>34</sup>Justice O’Connor did not participate in either opinion.



on the existence of patents. Vertical restrictions, such as territorial limitations or resale price maintenance, can benefit competition and consumers. Vague rules for single firm conduct can chill beneficial, procompetitive activity. More generally, the limitations of institutions such as courts, and the administrative costs of implementing rules, need to be taken into account in developing antitrust standards.

Some misinterpret these developments in two distinct ways. First, they view antitrust law as moving in a pro-defendant direction. That is missing the whole point of scholars, such as Judge Bork, who championed these changes. Antitrust law has become more pro-consumer in forging rules that focus better on protecting the competitive process and fostering economic efficiency. And as an aside, consider that in most of the ten antitrust cases the Supreme Court has decided since 2004, all the litigants – winners and losers – were business entities. It is difficult to defend the notion of cases as anti-consumer where consumers were not involved.

Second, some perceive that antitrust enforcement has somehow waned. This perception is wrong. While I would like to think that we are more judicious in deciding when there is a violation of the antitrust laws, the DOJ remains committed to aggressively enforcing the antitrust laws where appropriate.

As a prime example, the Division's criminal cartel enforcement has never been stronger. Here's how our criminal statistics stack up for the past five fiscal years:

<b>DOJ Antitrust Division Cases</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>
Number of Criminal Cases	41	42	32	34	40
Fines Obtained (\$ in millions)	107	350	338	473	630
Total Jail Days	9,341	7,334	13,157	5,383	31,391

In FY 2007, the \$630 million in fines obtained by the Division were the second highest in history, and the number of jail days imposed was more than double the previous record. Part of the explanation for these numbers is that Congress and the U.S. Sentencing Commission have increased criminal penalties for antitrust violations, but the staff of the Antitrust Division deserves full credit: staff not only vigorously enforced the laws as written, but also made the case for the increased penalties, and assisted the Sentencing Commission with their adoption. The message is clear: criminal cartels are finding the antitrust environment in the United States to be tougher than ever before, and it is getting even tougher.

On the merger enforcement front, during the last two fiscal years, there were 28 transactions that the Division challenged in court or that the parties modified or abandoned in response to antitrust concerns from the Division. This two-year total

is the highest since the end of the merger wave in 2001. And we have filed another eight complaints already in fiscal year 2008. In virtually all of those cases, the parties elected not to contest the Division's analysis in court, and we were able to obtain effective relief without the costs and risks of a trial. In one case, however, we are in contested litigation involving a merger of two newspapers in Charleston, West Virginia.

More generally, the Division is investigating and/or litigating a range of civil non-merger matters, such as several matters involving real estate brokerage services. My point is that we try to be transparent about our enforcement criteria and to encourage compliance with the law. We also try to reduce unnecessary investigative burdens and to apply the law to the facts consistently when making enforcement decisions. It would be incorrect, however, to construe these efforts as signaling a lack of resolve. Where we find a violation, we will pursue a remedy.

Thank you for inviting me today, and I look forward to your questions.