

Interview with Commissioner Tom Leary

The following interview with Commissioner Tom Leary – the longest serving current FTC Commissioner – was conducted on September 26. It covers a broad range of issues reflecting Commissioner’s Leary extensive experience at the Commission, having served with three different Chairmen, and five different Commissioners. On health care and antitrust, Commissioner Leary offers his views on the importance of guidelines and hearings, FTC enforcement in pharmaceutical markets and physician practices, the goals of the Hatch-Waxman Act, the FTC’s hospital merger retrospective, disgorgement, and health care markets generally.

Chronicle: Having served as a Commissioner for a full term, what observations do you have on how the Commission has changed during that period?

Leary: I don’t think the substance of our analysis has changed much. It certainly changed a great deal less than people anticipated in 2001, with the change in the administration and Tim [Muris] onboard.

The priorities have changed a bit over time. I think some of these changes were driven by outside events. For example, when Bob [Pitofsky] was here the merger wave sucked up resources from other areas of the Commission. As you probably know, we had to really strip people away from non-merger enforcement in order to deal with that avalanche, and I think that inhibited Bob’s ability to do some of the more innovative things that he might have wanted to do. On the other hand, he did start to revitalize the Commission’s role in “competition R&D.” Bob started that in 1995 when he had these big hearings on global competition and, of course, you saw a lot more of it going on in Tim’s tenure, and continuing.

When Tim came on board, he had a more affirmative agenda on the consumer protection side, particularly, than we’ve seen around here in quite a while. Of course “do not call”

Leary: Well, there's one small difference. Debbie Majoras followed two people who've been longtime scholars in the field of competition and consumer protection law -- in Bob's case, dating back from before Debbie was born and in Tim's case, dating back about 30 years. They had to deal with these issues over a long period of time. They're both academics.

Debbie comes out of the world of private practice and the Department of Justice which is more specific-case oriented. I've heard her say that "I am a bottom up person rather than a top down person." So I think that her first initiative, and the one thing that she wants to do affirmatively before she really turns to anything else, is deal with the merger review process. That must be in its final stages right now. So, there's some difference, based on their experience. Their focus is a little bit different but I don't think her substantive response to any particular case or controversy would be any different than either Bob's or Tim's.

Chronicle: Turning to health care markets, have there been significant changes in those markets and the FTC's efforts regarding health care during your tenure here?

Leary: I think the one thing I've noticed here is a greater focus on health care issues in the last several years, and I think there are a couple of reasons for it. There was a period of time when health care costs seemed to be at a plateau or at least increasing at a rather low level. They have spiked much more sharply in the more recent years.

There are various causes for the cost increases that we could go into, but I think this has stimulated more focus here at the Commission on health care. If you were to look at our allocation of resources to health care issues, both on the competition side and on the consumer protection side, I think you see a fairly dramatic increase.

Chronicle: The FTC/DOJ Health Care Guidelines were last updated nearly ten years ago. What are your thoughts on how useful these Guidelines have been to private parties?

Leary: The Guidelines are very helpful to practitioners who are willing to pay attention to them and deal with them. I think they're very fulsome. It may be, quite frankly, that collectively they're too big a mouthful for outside-the-beltway practitioners. And I am not saying that in a patronizing way.

I get the impression there are an awful lot of lawyers giving antitrust advice on the Health Care Guidelines who are not really antitrust lawyers, and I think that it might be desirable to consider amplifying on those Guidelines through speeches and things of that kind to make them more focused for the edification of outsiders. As you know we've got a case under consideration right now [*North Texas Specialty Physicians*] involving possible application of the Guidelines. When that opinion comes out, it may provide some guidance for people – regardless of the outcome.

Chronicle: What about updating the Guidelines, would that be a good idea?

Leary: I think we're learning that the process of revising and updating guidelines is fairly excruciating and should not be undertaken very frequently. The amount of effort involved in dealing not just with the various constituencies of the Federal Trade Commission, but also with the Department of Justice, is horrendous. I think you could say the same thing about merger guidelines generally, or about collaborative venture guidelines, or about intellectual property guidelines. I just don't see any great enthusiasm for revising guidelines in the near future.

Chronicle: In a 2002 speech you discussed in detail a Commission staff advisory opinion in *Med South*. What did that advisory opinion add to our understanding of how the Health Care Guidelines operate, particularly relating to clinical integration?

Leary: What I was trying to do in that speech is similar to what we're talking about here. I was trying to take an advisory opinion, which is necessarily a somewhat starchy document, and turn it into language that outside practitioners might understand a little bit better. I also wanted to indicate how many unanswered questions there were. I think the speech was also intended to provoke people into thinking about clinical integration and trying to encourage clinical integration. I might say, up to now at least, we've been disappointed by the reaction.

The *Med South* opinion letter was intended to be an invitation to doctors to genuinely try to integrate their practice, and incidental to integrating their practice there might be certain things they can do in the joint contracting area that would be prohibited otherwise. Unfortunately, I think a great many of these medical groups or associations still have the cart before the horse. Their prime focus is on using negotiations and contracts for the purpose of enhancing their bargaining power. And the one thing that seems to distinguish the good from the bad is that if you are putting together something for the primary purpose of enhancing your bargaining power you're going to buy trouble.

Maybe, it's too early to judge and maybe that comment isn't accurate about what's going on in the medical community, but my impression is that we're not seeing too many examples of genuine clinical integration. We did have one more example, where they tried to negotiate collectively first, and then integrate, rather than the other way around. They had to go back and start over.

Chronicle: Chairman Muris initiated a well-publicized retrospective look at hospital mergers and promised that the Commission would distribute its findings. The Commission has challenged one hospital merger in *Evanston* that was the subject this retrospective, but there has been no report released summarizing the staff's findings relating to the broader retrospective. Anything you can share concerning the results of this retrospective?

Leary: Well I obviously can't talk about the case that's in litigation, but I think I can predict it's highly unlikely that we will issue any kind of a report on the retrospective while

we've got a case in litigation. There are also a couple of other things that I know I've said publicly and I think can be safely said here.

We learned in the course of doing this that a retrospective is very hard to do. It seems so logical that we ought to try to go back and see whether past enforcement efforts have been effective, or whether the denial of our efforts to enforce have led to harmful results. You may remember that a few months ago, Hew Pate -- in the letter he sent to the Antitrust Modernization Commission just as he was walking out the door at DOJ -- suggested that retrospective analysis of the effectiveness of antitrust across the board might be something that would be worth doing.

I think the lesson that we learned is that it is very hard to do a retrospective. There are two reasons. Number one, it's very hard to get the data. It's one thing to be able to get data from companies that are contemplating a merger or that are in the process of just putting one together because its right up front and there tends to be a lot of internal communication about that particular subject. Once it's done, people aren't thinking anymore about the merger as such and what the merger will do.

Number two, any effects that you may be able to identify tend to get blurred with all kinds of outside effects. When I was in the auto business, I used to use an analogy. Suppose there is a new government standard, say for a different kind of stop light or a different kind of a bumper. Your first year, within the limits and the vagaries of cost accounting, you can have a ballpark idea of how much that standard costs. But as the years go by and it becomes just integrated in the way you do things, you can't pull it out any more and you have no idea. I think that's the trouble with trying to determine the impact of either a consummated or a failed transaction.

Then, if you are to go beyond that and try, somehow or other, to assess the potential efficiencies that might have been lost from mergers that never of even saw the light of day, that were killed in lawyers' offices because of the fear of antitrust consequences, I think it's hopeless. You may not even be able to find out what they were because companies don't like to talk about them, and the advantages and disadvantages of the road not taken are hard to figure out. I think the bottom line lesson we can learn from that retrospective is that we've got to be very, very modest about our ability to identify effects on a broad basis. Individual cases might be different, but broad conclusions are pretty hard.

Chronicle: Within the past few years the Commission has brought about two dozen enforcement cases alleging that physicians have engaged in price-fixing. Why do you think such conduct continues to occur?

Leary: I think the fundamental reason it occurs is that doctors have this desire to get some countervailing power. I think that doctors feel they've been pushed around by payors. They believe that the payors have interfered unduly with their ability to practice medicine and deliver the kind of quality care that they want to deliver. Now, whether that's good or bad involves issues that are certainly beyond our competence. I don't think we're in a

these things over a period of years and know a great deal about them. It's a question I always ask.

Chronicle: There has been some criticism of the Commission using different product

