

Q&A with the FTC's Julie Brill By Bill McConnell

September 4, 2012

Since she joined the Federal Trade Commission in 2010, Julie Brill has emerged as an outspoken critic of some of the agency's rulings. She is also a strong voice for consumer protection and privacy issues. She has managed to do that so far in a pointed and frank way, and without antagonizing her colleagues.

For example, Brill has questioned the FTC's willingness to approve two major mergers, Grifols SA's 2011 purchase of blood products rival Talecris Biotherapeutics Holdings Corp. and Express Scripts Inc.'s acquisition of rival pharmacy benefits manager Medco Health Solutions Inc. in April of this year. Both were high-profile, controversial mergers of direct competitors, and unlike the other commissioners, she was pointed in her skepticism about the companies' arguments defending the deals. Brill opposed the Medco deal and concurred with the Talecris takeover, but in both cases offered detailed reasons to doubt approval was the right result.

Before joining the FTC, Brill, 53, had spent more than 20 years as a state antitrust and consumer protection regulator. A graduate of the New York University School of Law, Brill joined the

The multijurisdiction investigation helped fuel interest in data-breach notification laws, which are now on the books in 45 states. The Deal magazine's Bill McConnell spoke with Brill recently

Julie Brill: Despite the sophisticated science that we bring to the analysis, we are still engaged in making a prediction. In a case like this, where some facts are quite troubling and other facts are mixed, I believe a remedy to improve the situation would have been a better outcome than doing nothing.

The Deal: *In the Express Scripts deal, the change in the Herfindahl-Hirschman Index was quite large. Are you concerned HHI is not playing as big a role in the outcome of merger reviews?*

Julie Brill: I don't want to say HHI is playing less of a role, but there's also an emphasis on sophisticated competitive effects analysis. Certainly, the parties presented a sophisticated competitive effects analysis, which looked at whether the parties are each other's closest competitor. I don't think we have the same level of tools for the coordinated effects side as we do on the unilateral effects side. Those kinds of tools are important. But when we look at merger cases, we need to look at the totality of evidence to determine the appropriate course of action.

The Deal: *In Grifols' takeover of Talecris, the FTC imposed a divestiture and a set of conditions that must be monitored for compliance. How confident are you that antitrust regulators can ensure compliance with behavioral remedies?*

Julie Brill: There are good reasons to be very cautious before imposing remedies that are short of a clean divestiture. But in appropriate cases, we should look at behavioral remedies too. In this deal I was concerned that perhaps we should have given greater considerations to challenging this merger. I was particularly concerned about whether [hospitals and federal programs for at-risk patients] would be able to obtain services. The remedy in this case was ordered to ensure the purchasers of the divested assets would be able to effectively compete. So far we haven't had difficulties with the remedies we imposed.

The Deal: *How do you set up monitoring to make sure remedies accomplish their goals?*

Julie Brill: That depends on the remedy you are considering. If you are requiring alteration of contracts [with customers or suppliers], that might not need much ongoing oversight. Or the remedial action required could be more involved and need more oversight. How much oversight a remedy requires is very fact-based. Some of the things we can do to assist with oversight include hiring a person to help us monitor compliance and reports from the merged firm that outline its compliance.

The Deal: *How well are the 2010 changes to the merger guidelines working?*

Julie Brill: People are getting used to them. There was once a question in the private bar about how much the agencies would incorporate them into each merger analysis. However, because the revisions were designed at least in part to describe how the agencies were already looking at mergers, it wasn't that difficult for the FTC to implement them. There probably has been more of a learning curve at the state level.

There was also concern within the private bar at the beginning about impact on competitive effects analysis -- how the diversion ratios and upwards pricing pressure analyses would play

out. My sense is a lot of that calmed down. The private bar is getting used to them, and I don't

Waste Systems, Vermont's big vertically integrated solid-waste company. We were concerned that Casella was locking up small and medium commercial contracts through evergreen clauses that were difficult for customers to cancel. So we were concerned that Casella, already a monopolist in the state, was engaged in illegal conduct by inappropriately locking up the commercial market. Casella is still operating under the consent decree I negotiated.

The Deal: *You've repeatedly called on Internet and other companies to implement ever-better privacy safeguards for consumers' personal information. Why has privacy been such a priority for you?*

Julie Brill: One of the fundamental issues around privacy is that it's not obvious to consumers what's happening to their information. Problems can be technology-driven, and changes can be fast-moving. Consumers aren't in the business of trying to find out what's happening to their information. They're online-shopping or on social networks. They don't necessarily want to investigate or have the means to find out what's happening to their information.

It's a very important issue for the folks at the FTC and the state AG offices to get involved in. I think we have a very valuable role in educating consumers and finding out what's going on with some of those practices.

It's going to be more important, especially as consumers make the move to mobile devices.