Interview with Richard A. Feinstein, Director, F– rea oi o ! etition

Editor's Note: *In this interview with* The Antitrust Source, *Richard Feinstein discusses his background, recent FTC enforcement decisions, coordination with other agencies, and proposed antitrust legislation, with a special focus on "pay for delay" pharmaceutical settlements.*

Mr. Feinstein was appointed Director of the Federal Trade Commission's Bureau of Competition in May 2009. Prior to this, he was a partner at Boies, Schiller & Flexner LLP'c8rucrvs88[dmr"ulumr"ulcmryDmrxvwlimr"ulnmrxvwltmryDmr"ulemrxvwlpmr"ulhmryDmr"ulrmryDmr"ulamr"u

would be because of the experience I've had in the health care sector. Certainly I've had antitrust experience with respect to many other industries as well. But to the extent that health care was a subspecialty of mine and a high priority of his, it may have made it a good fit.

I have noted on a number of occasions publicly that the very first meeting that I attended in 1998 (when I arrived at the Commission for the first time), was a meeting that led to the first of the "pay for delay" cases that the Commission brought. It was a very preliminary meeting regarding what became the *Cardizem* case, where the respondents were Hoechst and Andrx. And if somebody had said to me on that day in October of 1998, that eleven years later I would be back at the FTC where (1) I would be Bureau Director and (2) the FTC would still be worrying about pay for delay cases, I would have been very skeptical on both counts.

So it just shows you how serendipitous things can be and in some ways how one can have a sense of déjà vu in these jobs. But I'm delighted to be here. It's a very interesting time to be at the Commission, needless to say, not only with respect to the issues that we're confronting but also with respect to the quality of the Commission. In addition to a very dedicated and talented staff, I have also worked with several of the current Commissioners before—in private practice, at the Commission, or both. And I'm very grateful to have the opportunity to be here.

ANTITRUST SOURCE: Is there anything in particular that drove your interest in health care and its intersection with antitrust?

FEINSTEIN: Again I think that's somewhat serendipitous. When I first left the Antitrust Division back in 1985 I joined a firm where a former colleague of mine from the Division was working and was primarily doing health care work. I had not done any health care work at the Division, interestingly. But the firm I joined was looking to beef up its antitrust and white-collar horsepower, and at a time when antitrust activity was somewhat dormant or quiet in many sectors, health care was a conspicuous exception in the '80s.

That was, I think, driven in part by the very dramatic transformation in the way in which the government approached reimbursement for health care services, when it moved from essentially cost-plus reimbursement to prospective-payment reimbursement. That caused health care providers and particularly hospitals to have to worry more than they ever had before about their costs and about excess capacity and about making sure that they had a steady flow of patients. And that led in turn to all kinds of changes in the marketplace and to a lot of hospital mergers. It also led to vertical relationships between hospitals and physicians and physician groups, and to vertical relationships between hospitals and ancillary services providers, such as durable medical equipment firms and that sort of thing.

It was a time when things were changing very rapidly in health care and that led to a fair amount of antitrust activity, both in terms of government enforcement—relatively speaking—and also private litigation and counseling.

I found myself at a firm that was doing a lot of that work and I had an opportunity to experience that. The firm was then called Casson, Calligaro & Mutryn. It later became the Washington office of the Proskauer firm, but by the time that happened I had actually departed and was at the firm that is now McKenna Long & Aldridge. Back then it was called McKenna & Cuneo.

I spent twelve years at the McKenna firm—from 1985 S'iejn"iojn"i.jJJ)n"i.isjn('.jn"i—jn"ifljJJ)'iejn"i"jn"iojn"i–
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tical industry had been reassigned to the Health Care Division within the Bureau of Competition. And so I found myself presiding over a group of lawyers who were dealing not only with physicians and hospitals, but also with non-merger issues in the pharmaceutical sector. One of the matters that we brought while I was there was the *Mylan* case, in which the Commission sought and obtained disgorgement, and it was also during that time that we initiated the pay for delay activity. I actually had the opportunity, while I was the Assistant Director, to be the lead attorney on the *Mylan*

approach which, if successful, will almost certainly be faster, is a legislative solution that would at a minimum address the issue prospectively. Ultimately, the judicial and legislative approaches are not mutually exclusive. In my view, regardless of the outcome of the judicial initiative, a legislative solution is highly desirable, particularly to address the ongoing harm (in the form of higher costs) that consumers are experiencing as a result of these arrangements.

ANTITRUST SOURCE: In addition to the areas of health care and pay for delay pharmaceutical settlements, are there other areas that are priorities for you during your time at the FTC? Are there other goals that you would like to achieve at the FTC?

FEINSTEIN: Well, certainly there are other areas that are receiving a lot of attention with respect to our resources. We have a number of matters in what I'll call sort of the high-tech sector for lack of a better term. The most prominent of those of course would be the *Intel* matter that was voted out in December. We've had some activity in the standard-setting area. I think that continues to be an important area. We are of course active in the energy sector. All of our shops are busy. With respect to mergers, of course, our activity is inherently reactive. By that I mean that we confront mergers as they happen rather than having an agenda to address a particular form of conduct, for example.

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But there are also a fair number of investigations underway—and obviously there is some litigation in the works—addressing exclusionary conduct that may violate Section 2.

In terms of process as opposed to substance, it's also one of my goals to try to make sure that the Bureau operates efficiently and keeps things moving. That's an ongoing goal, and I'm not the first Bureau Director to want to achieve that, I'm sure. But, that is something that we are spending time on as well.

The incentives for the respondents in our matters are very different depending upon the nature of the matter. If they're trying to get a deal through, and it's subject to the Hart Scott Rodino procedures, they are well motivated to move things along and give us all the information we need. That's not necessarily as much the case in our conduct investigations or with respect to consummated mergers.

And, in addition to trying to keep things moving internally, we've also devoted some resources to trying to make sure that the parties understand that we're relying on them to help us keep things moving—by cooperating with our discovery requests, for example.

ANTITRUST SOURCE: You mentioned that there might be a renewed interest in investigating unilateral conduct under Section 2. Should we expect more enforcement in this area?

FEINSTEIN: We already have one example of that in the *Intel* matter, which raises both Section 2 and Section 5 allegations. I can certainly represent to you that there are investigations underway in the conduct area that involve exclusionary practices as to which Section 2 could easily be invoked, perhaps Section 5 as well.

So the answer to your question would be I think that's likely. Obviously, all I can do is recommend actions for the Commission. I can't cause them to be voted out. It's also worth noting that we have two new commissioners, and they will form their own views on these questions. But there are certainly matters in the pipeline that implicate Section 2 as well as Section 1 and Section 7.

ANTITRUST SOURCE: Following up on the *Intel* complaint and its Section 5 allegations, Chairman

Leibowitz and Commissioner Rosch have made no secret that they would like to see a greater role for Section 5. Can practitioners expect to see the FTC put out guidance on Section 5 liability?

FEINSTEIN: If it were up to me, yes. There was a workshop held on Section 5 back in the fall of 2008. My impression is that there was an expectation and I think even some representations at that time that the FTC would issue a report on Section 5. I would like to see that happen. Obviously it hasn't happened yet. And whether it does happen will be decided by the full Commission including the new Commissioners.

But I believe personally that it would be useful for the FTC to provide some additional guidance about the considerations that it takes into account when enforcing Section 5 or that it will take into account when enforcing Section 5.

Whether you call them limiting principles or considerations (I Bie(icj

Another thing that the Bureau is contemplating—in addition to going to federal court to enforce our discovery requests—is to ask the Commission to issue a Show Cause Order under its rules, as to why practitioners who engage in this conduct before the Commission shouldn't be sanctioned or reprimanded. That procedure, to my knowledge, has not been used recently. And that is another tool that the Bureau may seek to have the Commission invoke going forward. The Bureau can't do that on its own; we can only make recommendations. But I would like to think that this won't be an ongoing problem if people understand that we expect them to fulfill their obligations.

I have been on both sides of FTC subpoenas and I certainly understand that there is room for reasonable accommodation and reasonable disagreement. And those aren't the instances where, in my judgment, we will be going to federal court. I would like to think that this problem will not be a persistent one, but time will tell.

ANTITRUST SOURCE: Regarding the FTC's challenges to a number of consummated mergers: How do these mergers actually come to the FTC's attention? And how does the FTC go about deciding which ones it should challenge?

FEINSTEIN: They come to our attention in a variety of ways. Sometimes we receive complaints from customers or others. Sometimes we read about them. There's no single path that brings them to our attention. And typically they are mergers that were not HSR reportable.

The ultimate decision whether to challenge a consummated merger is up to the Commission, of course. So all I can do is tell you how I would decide about which ones we ought to be devoting our resources to investigating. The rules of thumb for me are impact in some sense, either in terms of direct impact on consumers or, if there isn't a substantial direct impact on consumers, you may still have a matter that tees up a legal issue that we think it will be useful to advance.

FEINSTEIN: I think they can be very useful. Obviously they're subject to resource constraints and we probably can't do as many retrospectives as we might like to do. And there is certainly a role for the academic community to play in retrospectives.

But in an area with which I've had a lot of experience personally (the health care sector), hospital mergers are a very good example of how retrospectives can be very useful in both informing and animating antitrust enforcement.

Back in the late '90s both the DOJ and the FTC were having a very hard time winning hospital merger cases in the courts. And to his great credit Chairman Muris commissioned some retrospectives on several hospital mergers, including of course the Evanston merger, which led to an enforcement action which I think has enabled the FTC to more confidently explain to judges why its predictions about likely competitive effects should be taken seriously.

And I think that's a good thing. So that's a sort of a textbook example of how retrospectives can be useful. But there are certainly other examples as well.

ANTITRUST SOURCE: The *Whole Foods* and the *CCC* decisions have been interpreted by some practitioner as lowering the bar for the FTC to obtain a preliminary injunction in merger cases. Is that how you see it?

FEINSTEIN: I don't know that I really see it as a dramatic lowering of the bar.

To some extent that perception is as much related to the reality that when the Justice Department goes into federal court to block a merger, almost inevitably the preliminary injunction proceeding is collapsed into a permanent injunction proceeding where the standard is a little different. If the Antitrust Division were to seek a preliminary injunction followed by a separate proceeding on a permanent injunction, I'm not sure that there would be the same perception, which is not to say that the standards are identical.

But ultimately if the FTC obtains a PI and then goes into Part 3 litigation, I'm not sure that the end result is terribly different depending upon which agency is challenging the merger. And I realize that there are people who may disagree with that. But I think that has been, to some degree, overblown.

ANTITRUST SOURCE: Many of us in private practice wondered which agency would review the Comcast/NBC merger. How has the clearance process been working since you became Bureau Director?

FEINSTEIN: The Antitrust Division will be reviewing that merger. I think generally the clearance process works quite well. I've said this publicly before as well. I think if one were starting from scratch to come up with an antitrust enforcement mechanism, I'm not sure that we would come up with one that looks the way it looks in the United States right now, with the overlapping jurisdiction. Or I'm not sure I would at least. But that's what we have. The clearance process has evolved as a result of that, and in my experience it works pretty well.

FEINSTEIN: Certainly there's been a lot of convergence over the years. Of course some differences remain as well. But there's a great deal of cooperation that I've observed, particularly—but not entirely—in the merger area.

Several of the major deals that we've investigated just in the time that I've been Bureau Director—I'm thinking in particular of several of the major pharmaceutical deals that led to consent orders—were also being investigated in Europe and in Canada and elsewhere. We work quite cooperatively with our international colleagues. While there's not complete convergence with respect to conduct issues, there's been movement in that direction as well.

Certainly there's a lot of cooperation, none of which directly involves the FTC, involving international cartels investigated and prosecuted by the Justice Department. And we've worked closely with a aniejsvingcnge e.

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