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THE CAPITOL FORUM

An Interview with FTC Commissioner Julie Brill

April 28, 2015 - On April 16th, The Capitol Forum interviewed FTC Commissioner Julie Brill during the ABA's 2015 Antitrust Spring Meeting. The full transcript, which is modified slightly for clarity, as well as an "Interview Highlights" section is below, or ***click here*** *to access the article in our library. A video of the interview will also be posted to our website.*

Interview Highlights

On FTC merger process and potential for disagreements between the competition and economics bureaus:

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What that means is that there will be disagreements from time-to-time. I think it's a good thing to have disagreements, as long as everyone's respectful. When commissioners hear the debates among staff, it's productive because it means that the conversation at the agency is robust and dynamic.

What we do is make our best judgment based on the information we have. There will be times when one entity or another, whether it's staff of BE or BC, or management of one or the other, makes arguments that we disagree with. While this situation doesn't happen all that much, when it does, the commissioners must reach our own conclusion. We all have our deep expertise in different areas. Among the five commissioners, we usually come to the right decision.

On generic drugs:

COMMISSIONER JULIE BRILL: It's a really complicated market. I meet with staff about this issue. Staff constantly is examining what's happening in the marketplace with respect to generic drug

pricing and whether or not there are competition issues. I think that's all I can say now, but it is a very important issue to enforcers.

On PBMs, Express Scripts/Medco:

COMMISSIONER JULIE BRILL: … I'm still disappointed that the agency did not take action against that merger. Let's review what happened in 2012. There was a market that was dominated to a large degree by three PBMs, Pharmaceutical Benefit Managers.

PBMs are pro competitive in many ways. PBMs negotiate against pharmaceutical companies to drive down prices in order to bring price discounts to plans—whether those plans are run by insurance companies or by employers themselves. In this way, PBMs play a very important role in terms of helping to drive down pharmaceutical costs.

In the Express Scripts/Medco matter, two of the large three PBMs were merging. As a result, the merger, in my view, raised significant concerns about increased post-merger market power. There are high barriers to entry to become a viable PBM. The market already had ten or so small players that had not been able to get meaningfully larger. And the parties did not offer any meaningful efficiency justifications for the merger. So the competitive landscape for PBMs at the time consisted of a highly-concentrated market with few competitors, high barriers to entry, and no efficiency justifications.

I am worried that the merger could have spurred opportunities for increased coordination. That was the focus of my dissent from the Commission's decision to take no action against this merger. I'm also worried that PBMs won't have the incentives that they need to pass along the discounts that they obtain to their customers.

For instance, there's been a lot of discussion about the high cost of certain types of biologics and other pharmaceutical products. I understand that these PBMs are trying to get prices down. I think that's great; I want them to do that. What I am concerned about is whether the PBMs are passing along those savings to the market.

Bottom line, I still am worried about the PBM market. I think it's a marketplace that we should watch.

Full Transcript of Interview

TEDDY DOWNEY: We're honored to have FTC Commissioner Julie Brill with us today. While she really needs no introduction, I'd like to highlight some of Commissioner Brill's areas of focus and previous positions.

At the FTC, Commissioner Brill has been a leader on consumer privacy, healthcare and consumer financial services issues. In terms of prior experience, Commissioner Brill has distinguished herself as an expert on antitrust and consumer protection issues in two previous government positions, most recently as Senior Deputy Attorney General and Chief of Consumer Protection and Antitrust for the North Carolina Department of Justice. And before that, Commissioner Brill served as an Assistant Attorney General for Consumer Protection and Antitrust for the State of Vermont.

And with that, thank you so much for joining us today.

COMMISSIONER JULIE BRILL: Thanks for having me.

TEDDY DOWNEY: I'd like to start with a couple of big picture questions first. From a historical perspective, whose ideas have influenced you the most on antitrust and competition policy issues?

COMMISSIONER JULIE BRILL: If we want to go really far back, I'd say that Louis Brandeis was a big influence on me. Obviously, he was operating in a very different time. Competition and even privacy were very different when he was thinking about those issues as he did, not only as a Supreme Court Justice, but also as one of the FTC's architects. He has been a big influence on me, but from an historical perspective.
As for more modern folks on the consumer protection side, one of my heroes is Roy Cooper who is the Attorney General of North Carolina. I had the pleasure of working with him for a year.

He's someone who saw the problems in subprime lending from a very early point, back in 2003 and 2004. He tried to raise these issues with federal authorities, whether the Office of the Comptroller of the Currency or others here in Washington. Nobody would listen to him, but he kept at it. He was one of the visionaries who really saw what the subprime lending problem was going to bring, not only to North Carolina, but around the country. And he was right.

I should also say Roy is also an incredibly humble person. For someone who's an important politician in a very large state, he has so little ego. There's so much that many people could learn from someone like Roy, who is on the ground, looking at facts, and is figuring out what those facts mean for consumers or competition. He tries to think about big picture and long-term issues. I think those are great lessons.

Another role model of mine is actually Janet Steiger in terms of her style of leadership. As a female leader of the FTC, Janet was known for being incredibly warm and inclusive. She loved working with other agencies. She was great with the states, one of the very first Chairmen to really reach out to the states. I got to know her through my work in Vermont.

She was a tough cookie on issues, but she was also a delight to be with. From Janet, I learned that you can be firm in your views and still be a nice person and inclusive. That was a great lesson.

TEDDY DOWNEY: Getting back to Brandeis, you mentioned from an historical perspective. But he talked a lot about the politics of antitrust and that these are political laws. And there was a lot of talk today at the ABA about how these are economic issues and economists are sort of the dominant thinkers on the topic.

Recently, Elizabeth Warren has made some comments to the effect that political interests regarding Citigroup and their ability to get laws passed and bigness as a political issue. Is that too in the past? Is that Brandeis in the past? Or is that something that you also identify with?

COMMISSIONER JULIE BRILL: The progressive era was really different in the sense that many of those leaders were very focused on busting trusts and really worried about "bigness" as being bad in and of itself. I am a modern competition thinker and I understand that dominance or being a monopolist isn't itself bad. What is often at issue is what the company is doing with that market power.

You mentioned a discussion of how economists are dominant and may drive antitrust theory. When you get into a courtroom and are in front of a judge, the judges do care about economics. But they also care about the parties' justifications for their actions. While it's certainly not the end of the discussion, judges care a lot about market shares. Courts also carefully consider many other types of qualitative evidence.

The dominance of economists is, in part, a beltway conversation. What's really important to people in my position, and what we need to keep in mind as commissioners, is what we have to do to prove a case—what's going to be important to the district court judge, what's going to be important to the circuit court, and ultimately what's going to be important to the Supreme Court.

TEDDY DOWNEY: And with my second question, I wanted to get into a little bit about the specifics of the internal process at the FTC. In considering whether to challenge mergers, the commissioners receive the views of both the Competition Bureau and the Bureau of Economics, getting back to that tension. What's the relationship between the two bureaus on merger views? And how do the commissioners reconcile when the two bureaus don't agree?

COMMISSIONER JULIE BRILL: We can have the two bureaus disagree. We can have staff within one bureau disagree with its management. We can have staff within one bureau agree with management in the other, and vice versa. We get recommendations from staff in both bureaus, and we get recommendations from management in both bureaus. Any permutation and combination of opinions can come out of those groupings.

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TEDDY DOWNEY: And shifting gears to a specific topic, what are some of the most important healthcare issues that the FTC is grappling with currently?

COMMISSIONER JULIE BRILL: We've been dealing with pay for delay, or reverse payment, matters for a very long time. A couple of years ago, we got a great decision out of the Supreme Court, which vindicated a position that we had been taking for many, many years. Ultimately, the Supreme Court's Actavis decision, vindicated a rule of reason analysis—and rejected an approach that limited the analysis to the four corners of the patent only. Now, under the Court's directive, we are examining how to look at reverse payments and how to analyze whether they are anti competitive.

For example, we are continuing to litigate the Cephalon case, which is currently underway in the Eastern District of Pennsylvania. In January, just a few months ago, the court denied the defendant's motion for summary judgment. Just yesterday, April 15, the court determined that we would be able to seek disgorgement in that matter. Disgorgement is obviously a powerful remedy and one that we use judiciously. The trial is set for June. This will be an important case to

watch. We've also filed amicus briefs in other pay for delay actions. We will continue to be engaged to ensure that the lower courts appropriately interpret, from our perspective, what the Supreme Court said and what is needed to ensure that anti competitive pay for delay deals are stopped.

Another area of focus is healthcare provider mergers—that is hospital, physician, or outpatient provider mergers. We have paid attention to, and will continue to pay attention to, healthcare provider mergers. We had two very nice victories in this area. The 6th Circuit upheld the Commission's decision in ProMedica, a hospital merger in the Toledo, Ohio, area. More recently, the 9th Circuit upheld a federal district court's decision that a hospital system's purchase of a physician group in Nampa, Idaho, violated the antitrust laws.

The healthcare community believes that it needs to focus on integrated care. The administration and Congress have instructed the healthcare community to think about integrated care and ACOs. Those goals are very important and we support that.

When it becomes a competition problem is when a merger or acquisition takes place that isn't designed, and won't achieve, greater integrated care or greater efficiencies. Instead, it will lead to more market power that will result in higher prices because of the provider's increased leverage at the bargaining table with payors.

Pharmaceutical mergers will continue to happen and we'll continue to look at those matters closely. Also, we received two strong Supreme Court decisions on the issue of state action immunity—that is, when healthcare providers or other healthcare-related entities claim immunity from the antitrust laws under the state action doctrine. In this area, we achieved a great victory in Phoebe—although, we ultimately had to abandon that case—and also in the North Carolina Dental matter.

I don't want to leave out the consumer protection side of healthcare. We have brought a number of cases involving apps, advertisers, and other companies that were claiming health benefits to their products, but without substantiation. For example, in the Pom Wonderful matter, the D.C. Circuit Court affirmed, on most points, a decision authored by the Commission.

We're also bringing cases against apps that are claiming that they will help consumers detect or cure diseases, such as melanoma or acne. Unless these companies have substantiation that the apps can provide the claimed benefits, they will likely be confronted by an FTC investigation.

TEDDY DOWNEY: It's been in the press a little bit – generic drug prices have gone up recently.

COMMISSIONER JULIE BRILL: Right.

TEDDY DOWNEY: Are you guys interested or is there a concern about the recent rise in the price of generic drugs? And is that viewed as any follow-on effective consolidation in any way?

COMMISSIONER JULIE BRILL: It's a really complicated market. I meet with staff about this issue. Staff constantly is examining what's happening in the marketplace with respect to generic drug pricing and whether or not there are competition issues. I think that's all I can say now, but it is a very important issue to enforcers.

TEDDY DOWNEY: You dissented from the Express Scripts/Medco merger in 2012.

COMMISSIONER JULIE BRILL: Right.

TEDDY DOWNEY: Obviously, there are incentives in the PBM market and their ability to influence the price of drugs. Have your views on that merger changed at all?

COMMISSIONER JULIE BRILL: No, I'm still disappointed that the agency did not take action against that merger. Let's review what happened in 2012. There was a market that was dominated to a large degree by three PBMs, Pharmaceutical Benefit Managers.

PBMs are pro competitive in many ways. PBMs negotiate against pharmaceutical companies to drive down prices in order to bring price discounts to plans—whether those plans are run by insurance companies or by employers themselves. In this way, PBMs play a very important role in terms of helping to drive down pharmaceutical costs.

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TEDDY DOWNEY: The developments there are very interesting I think also.

COMMISSIONER JULIE BRILL: Absolutely.

TEDDY DOWNEY: In terms of the incentives for the PBMs and how their focus on rebates and things like that.

COMMISSIONER JULIE BRILL: Absolutely. One has to wonder whether the plans and the employers, in particular, understand the PBM rebate system -- for instance, how the companies allocate administrative fees and rebates. Such issues have been a concern for a long time at the state level. And, of course, now we've got a highly concentrated market.

TEDDY DOWNEY: One of the other interesting court cases that the 9th Circuit upheld the district court opinion enjoining the merger in the St. Luke's/Saltzer case, rejecting St. Luke's efficiency defense. What's left of the efficiencies defense in this healthcare sector and more broadly in both the courts and at the FTC?

COMMISSIONER JULIE BRILL: The ABA Antitrust Annual meeting is taking this week. There's been a lot of discussion at this meeting about whether the 9th Circuit's decision implied that no

efficiencies defense is permitted. If you carefully read the decision, you'll see that's not with the 9th Circuit said.

The federal antitrust agencies -- that is, the FTC and the DOJ -- wrote the Horizontal Merger Guidelines, which say we should take efficiencies seriously. But merging parties can't just wave a wand and claim "efficiencies" as a defense. Parties have to demonstrate that those efficiencies are real, and, importantly, that they are merger specific.

In St. Luke's/Saltzer, the district court and the circuit court went through each one of St. Luke's efficiency arguments, including electronic medical records, the need for integrated care, and the notion that ACA directs the formation of these groups. The courts evaluated these arguments and found that they were not merger specific. That is, St. Luke's could have practically obtained any such benefits outside of this merger.

One other thing I want to point out, especially in the context of healthcare provider acquisitions. It's not just lawyers, economists, and financial analysts making a recommendation. Of course, we have all those professionals and they do closely look at these mergers.

But we also bring in clinical experts to evaluate whether a transaction is needed in order to obtain clinical quality benefits. In matters where the FTC proceeds to challenge a merger, these professionals have offered us the expert opinion that particular clinical quality benefits at issue can be accomplished outside of a merger. Integration and high-quality care is offered outside the context of a merger in many, many organizations.

TEDDY DOWNEY: One quick question about efficiencies. If the courts don't care about it that much or at all and that's not in the law, does that mean at some point it's going to be considered as not belonging in the Horizontal Merger Guidelines?

COMMISSIONER JULIE BRILL: I don't think so. If you look at the H&R Block case, if you look at CCC/Mitchell, a number of courts have said it's going to take extraordinary efficiencies to overcome a merger that's going to lead to very high concentration.

In other words, courts are going to balance the anti-competitive effect of a merger and the arguable pro-competitive effect. If the merger is very anti-competitive, with high barriers to entry, and increases in concentration, you're going to need a high level of efficiencies.

I think that's where the courts are going to remain for a while.

The agencies will continue to use the Horizontal Merger Guidelines. I think we will continue to conduct our investigations by doing a very in-depth analysis of the efficiencies arguments.

TEDDY DOWNEY: And the last question. The Phoebe Putney/Palmyra case underwent several twists and turns before finally being withdrawn from administrative litigation and resulting in a settlement earlier this month. What are the lessons learned from Phoebe?

JULIE BRILL: We alleged that Phoebe Putney's acquisition of Palmyra was a merger to monopoly in the Albany, Georgia area. This merger occurred in an area of Georgia that's one of the poorest areas in the country, and that experiences among the highest healthcare costs in the nation.

FTC staff were proceeding to block the merger. The acquisition, however, had been structured in such a way that Phoebe argued it was a "state action," and so immune from antitrust scrutiny. While the FTC lost at the district court level and at the 11th Circuit on the issue of state action, the

FTC ultimately prevailed at the Supreme Court. Specifically, the Court said that the state of Georgia had not clearly articulated and affirmatively expressed a policy to allow hospital authorities to make acquisitions that substantially lessen competition.

Because the FTC was unsuccessful in convincing the lower courts from keeping the parties from "scrambling the eggs," as we say in our business, they were starting to merge. In that process, Palmyra's certificate of need was eliminated. There was an initial debate on whether or not a new certificate of need would be required if the FTC's Administrative Law Judge, after conducting a trial on the merits, ultimately found antitrust liability. If so, it would be extremely difficult to order the divestiture of Palmyra hospital. The Georgia healthcare authority staff made an initial determination that, yes, there could be a divestiture and the certificate of need laws would not prohibit it.

Then, as that issue rose up to a higher level, first to a hearing officer and then to the commissioner, they determined that a certificate of need would, in fact, be required if Palmyra was going to be divested. To us, this decision meant it would be very difficult for any purchaser to obtain a certificate of need because that area was deemed "over bedded." As a result, we concluded it was highly unlikely that any divestiture could occur should there have been a legal violation.

With Phoebe, the FTC won a very important case in the Supreme Court on state action immunity.

The lesson that comes out of it—and hopefully we'll be able to effectively tell to any other court that's considering whether or not to stop parties from merging further once we're in court—is that it's quite difficult, especially in a hospital context, once the assets are merged to undo the merger if liability is found.

The lesson is about the importance of the preliminary injunction, if a credible argument is being made, to ensure that there will be a remedy at the end of the day.

TEDDY DOWNEY: Well, I'm sorry it didn't work out for the people of Georgia.

COMMISSIONER JULIE BRILL: I'm sorry for them too.

TEDDY DOWNEY: But thank you so, so much for joining us. It's been a pleasure.

COMMISSIONER JULIE BRILL: It was a pleasure too. Thank you so much.

TEDDY DOWNEY: Thank you.

(END OF TRANSCRIPT)

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