Interview with Richard A. Feinstein, Director, FTC Bureau of Competition

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, where he focused on antitrust litigation and counseling. From 1998 to 2001, Mr. Feinstein was Assistant Director in the Bureau of Competition's Health Care Services and Products Division, concentrating on antitrust enforcement, including anticompetitive practices and mergers involving health care providers and payers, and anticompetitive conduct in the pharmaceutical industry. Mr. Feinstein also worked previously at McKenna & Cuneo, LLP, and he was a trial attorney and supervisor in the Antitrust Division of the U.S. Department of Justice. Mr. Feinstein is a graduate of Yale University and Boston College Law School.

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—Atleen Kaur

Richard A. Feinstein, Director, FTC Bureau of Competition

ANTITRUST SOURCE: You've been at the FTC previously and you've spent some time in private practice. Could you elaborate on how that experience has informed your current vision as the Director of the FTC's Bureau of Competition?

RICHARD FEINSTEIN: I've been practicing antitrust law in Washington for more than thirty-two years, which is frankly kind of shocking to me. But I got here in 1977 fresh out of law school and started my career in the Antitrust Division where I worked for seven-and-a-half years in a variety of positions. At the time I left the Division in 1985, I was serving as an Assistant Section Chief. I was then in private practice from 1985 to 1998.

At that point I had an opportunity to come to the FTC to serve as the Assistant Director of the Bureau of Competition in charge of the Health Care shop. I'll pause and backtrack just for a second. During the decade or so from the mid-'80s to the late '90s I had devoted a great deal of my practice to activity at the intersection of antitrust and health care, which I guess may be the reason I was asked to run the Health Care shop after Bob Leibenluft stepped down as Assistant Director. I did that from 1998 to 2001. At the end of June 2001 I left the Commission, and took a couple of months off actually. I then re-entered private practice with Boies, Schiller & Flexner here in Washington, where I practiced until May of last year, when I returned to the FTC as Bureau Director.

Over the course of my career, I have had the opportunity to do both antitrust litigation and counseling. I've had a fair amount of litigation experience, including a couple of jury trials—one of which was criminal. I also did some criminal work when I was in the Division back in the early '80s.

So I've had a fairly broad antitrust experience. And I've found the opportunities to serve in both the Division and the Commission to be particularly exciting and rewarding.

You'd probably have to ask him to confirm this, but I suspect that one of the reasons that the current Chairman of the FTC, Jon Leibowitz, thought I might be qualified to be the Bureau Director

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.

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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 1986 until 1998—where I was ultimately in charge of their antitrust practice and their health care practice.

I had not had much exposure at that point to the pharmaceutical industry. But when I arrived at the FTC in 1998, responsibility for enforcement arising from conduct issues in the pharmaceu-

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* case in federal court, which was both very challenging and very gratifying.

I certainly didn't go to law school knowing that I was going to be an antitrust lawyer when I got out. I had a summer job in the Antitrust Division in 1976 which influenced that. And I certainly didn't become an antitrust lawyer knowing that I would spend a fair amount of my career in the health care sector. But I've also, as I said, had a variety of experiences in other industries over the years.

ANTITRUST SOURCE: Once again you are at the FTC at a time when there is much debate about the health care system in the country. Is the FTC playing any role in the health care debate on the Hill? In addition to merger enforcement, what ways can the FTC contribute to ameliorating the health care crisis?

FEINSTEIN: I assume that what you're referring to is the health reform debate. The FTC has been very involved in one portion of that, which is the effort to see the passage of legislation that would address the pay for delay problem that has been confounding the FTC for several years.

More broadly, I would say that (and obviously I don't speak for the Commission here; I'm speaking for myself) the goals of health reform are fundamentally consistent with the goals of the antitrust laws and the goals of competition with respect to the delivery of health care products and services. To oversimplify a bit, I would summarize the goals of health reform, broadly speaking, as being related to promoting quality, promoting access, and promoting efficiency in terms of the delivery of health care goods and services. To my mind, all of those goals are fundamentally consistent with the goals of the antitrust laws. I haven't been at all involved in the details of the health reform debate on the Hill. But I view our role as making sure that the value of competition in serving the goals of health reform isn't overlooked.

And after the passage of the legislation, I would hope and expect that there will be an ongoing role for competition policy and antitrust enforcement in relation to health reform.

The Chairman has, of course, been very active in pursuing a legislative solution to the pay for delay issue. And we are still hopeful that legislation to address that problem may emerge from the current Congress.

ANTITRUST SOURCE: Just to follow up on the legislative solution—is there a consensus at the FTC that a legislative solution is actually required, given the recent court decisions on pay for delay settlements?

FEINSTEIN: I'm only going to speak for myself on that. We have several matters pending in federal court. We also have a number of investigations underway, but in recent years our view on that issue has not prevailed at the appellate level, either in actions that we brought or in actions brought by private parties teeing up the same issue. We are continuing to fight the good fight in the courts, and we recently received good news when the District Court in Philadelphia denied the motion to dismiss our *Cephalon* case.

While we have made no secret of our desire to get this issue to the Supreme Court, another

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.

[T]here 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.

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.

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. . . . there will likely be additional enforcement recommendations coming from the Bureau with Section 5 as part of them.

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 actually prefer the term "considerations"), my personal hope is that there will be some additional guidance.

I also expect that in any event there will likely be additional enforcement recommendations coming from the Bureau with Section 5 as part of them. And, assuming that the Commission votes those out, then there will be guidance in the form of cases as well.

ANTITRUST SOURCE: Before we leave the topic of Section 5 we'd like to briefly discuss interlocking directorates, which had been a topic that had gone out of the mainstream for a while but then came back with the Google/Apple discussion.

Do you think that the FTC might consider using Section 5 to enforce the policy considerations underlying Section 8 of the Clayton Act?

FEINSTEIN: Again, I can only speak for myself on that. I could imagine a circumstance where that might be possible. I wouldn't go so far as to say it's likely. But the fact that we did have the well-publicized Section 8 inquiry involving Google and Apple has already had a prophylactic effect.

A number of folks (I'm thinking of members of the Antitrust Bar) have come up to me on various occasions and said that our investigation and the resolution of it has been very useful for them in counseling their clients about paying attention to Section 8.

I don't mean to suggest that it's my view that a large proportion of our resources are likely to be devoted to Section 8 enforcement. But I think from time to time it is useful for the Bar and corporations that may have overlapping directors to be reminded that there are rules, and they're actually quite straightforward, at least under Section 8.

ANTITRUST SOURCE: You have said recently that sometimes parties delay investigations by not complying fully with agency subpoenas. Does the FTC have plans to address this issue? And, what methods is it considering?

FEINSTEIN: We're addressing it already in the form of going to federal court to enforce our subpoenas where that becomes necessary. We've done that two or three times already since I've been here. I would like to think that it wouldn't be necessary very often.

And I want to be clear: it's not my view that we are unwilling to negotiate the scope of our subpoenas. That's not the point at all. But where parties are unnecessarily delaying the process or in some instances engaging in the redaction of documents on grounds other than privilege—and we've seen that a few times recently—I think we have to try to nip that in the bud. And it is particularly ironic when we confront some of these delaying tactics in the context of investigations that are focused on pay for delay issues, for example.

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.

There are certainly many consummated mergers that we don't worry about for a variety of reasons. But, for example, every so often we come across one that appears to be a merger to a monopoly or something pretty close to a monopoly. And in those instances it's fairly hard to look the other way unless it's really trivial.

ANTITRUST SOURCE: When the FTC is evaluating efficiencies of a proposed merger how does the FTC draw the line between a reasonable prediction and speculation?

FEINSTEIN: That's a great question. There's a sense in which all of merger enforcement—at least with respect to a prospective merger—involves making predictions.

With respect to analyzing efficiencies as well as other potential effects, I don't know that there is a bright line between what is speculative and what is verifiable. I mean there's a continuum and we need—as much as possible—to satisfy ourselves that likely efficiencies are not speculative and are supportable.

One way of doing that is by considering the extent to which they are addressed in contemporaneous documents at the time that the deal is being considered by the parties as opposed to being developed after the fact. That doesn't mean that they may not be real if the efficiencies analysis is developed later. But if they're really driving the deal, there is likely to be some evidence of that in contemporaneous documents. That's one thing that I at least would look for.

ANTITRUST SOURCE: What are your views on retrospective study of the effects of previously approved mergers?

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.

[I]f 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.

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.

I think again that's an area where the notion that it's a problem of major proportions or that consideration of deals is frequently delayed by clearance disputes doesn't comport with my experience.

ANTITRUST SOURCE: Do you think there's a need for convergence in competition laws internationally? And can you comment a bit on the FTC's efforts to cooperate with or secure cooperation from other international agencies?

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 our colleagues in Europe on some conduct matters as well. I don't think it's any secret, for example, that we have discussed the Intel matter with them from time to time.

While there isn't precisely the same analytical approach or statutory scheme in every jurisdiction, I think on a lot of the big issues there is a fundamental consistency.

ANTITRUST SOURCE: Thank you for your time. It has been a pleasure talking with you. ●