

The Deal Pipeline

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

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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 Office of the Attorney General of Vermont in 1988 after serving as a law clerk and spending two years as an associate in the New York office of Paul, Weiss, Rifkind, Wharton & Garrison LLP. In Vermont she held the title of assistant attorney general for consumer protection and antitrust, a job she held from 1988 to 2009. Immediately before joining the FTC, she also spent 14 months as the senior deputy attorney general and chief of consumer protection and antitrust for the North Carolina Department of Justice.

Her years in states' attorneys general offices allowed her to work in a wide range of cases, from consumer protection to privacy to antitrust. As the leader of the National Association of Attorneys General's working group on privacy issues for many years, she worked on the investigation of massive security breaches at consumer data broker ChoicePoint Inc. The investigation led to \$15 million in penalties against the company and a settlement requiring it to implement new procedures that prevent the sale of data to identity thieves and other criminals.

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 about her views on antitrust enforcement and her tenure so far at the FTC.

The Deal magazine: *You've been outspoken on a number of merger matters, most recently your colleagues' unconditional approval of the Express Scripts purchase of rival pharmacy benefits manager Medco. What are your concerns?*

Julie Brill: The PBM industry was one of many pharmaceutical matters I focused on at the state level. So I've gained a familiarity with the industry over the years. PBMs serve a very useful function in our healthcare system by driving prices down through aggregating buyers -- employers and health plans -- and engaging in volume purchasing on their behalf. Ordinarily we look at PBMs and say, "Wow, you're driving down prices and you're doing a great job. You're helping consumers."

But here the companies said up front there were no efficiencies created with respect to this merger. That is, they said they didn't need to get any bigger to do their job -- they already had all the leverage they needed to obtain the biggest discounts from pharmaceutical manufacturers. So in many ways, we needed to look at this more soberly, without the usual halo we put around the PBM industry.

There were also signs that the two remaining largest PBMs could engage in coordination on bidding. My third concern was that entry has been difficult in this industry. Before the merger, three firms dominated the landscape, with a bunch of much smaller players at the tail. And this has been the case in this industry for a long time.

The one recent new development was that United Health has indicated that it plans to enter the PBM market. My colleagues were comfortable that United and these other long-standing bit players could provide sufficient counterweight to the merged ESI-Medco, but I saw that as more of a hope than reality, particularly since other health plans have tried to enter this market in the recent past and have either failed or outsourced major parts of their business to the Big Three.

The Deal: *So you mean that the issue isn't whether the combined company would have market power on its own, but rather that it could gain a greater opportunity to drive up prices through interaction with remaining competitors?*

Julie Brill: While there was some evidence that the parties competed against each other, the parties submitted other studies showing they were not each other's closest competitor. So overall, the evidence on unilateral effects was mixed. But this evidence didn't answer all the questions that need to be answered in this case. It didn't say anything about coordinated effects. No one offered persuasive evidence to assuage me that increased coordination was not a likely outcome of this merger.

The Deal: *You and Chairman Jon Leibowitz tried to get a settlement with conditions governing their behavior post-merger. Given your colleagues' acceptance of the companies' economic analysis, was it realistic to hope they would impose conditions?*

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 think the changes have determined the outcome of our merger reviews.

The Deal: *In Washington there is a view that states are junior partners to the FTC and DOJ when it comes to merger reviews. Do you agree? Does it have to be that way?*

Julie Brill: You cannot describe the states monolithically. They run the gamut from states with large, sophisticated antitrust programs to states that have one or fewer staff members focusing on competition issues. Some states with sophisticated antitrust programs also have economists on staff, so it's difficult to simply say states are junior partners. One thing that is difficult for states as a group is keeping up with fast-paced timing requirements for merger reviews under the Hart-Scott-Rodino Act. States have a number of other things they're doing, and sometimes it's simply hard to keep up with FTC or DOJ investigations.

On the other side of that question, states provide incredibly helpful information with respect to local marketplace conditions. States can also conduct secondary interviews and take depositions that folks in Washington might not have time to do. Even states with one or fewer [aides to AGs] will become very active if a merger greatly affects the state. In Vermont, when grocer Penn Traffic Co. bought Grand Union Co., we really dug in because it was affecting Vermont more than any other area in the country. We had a lot of both stores in Vermont, and we were one of the only states where the two overlapped.

The Deal: *What other cases stand out from your years as a state regulator?*

Julie Brill: One is a major credit-reporting case. We started getting phone calls from people who were being denied credit by banks. They were being turned down for refinancing at a time when interest rates were beginning to fall in the early '90s, after being really high in the 1980s. They were being told their credit reports were bad because they had not paid their taxes. In fact all these people had paid their taxes. The credit-reporting agencies had hired subcontractors who misread Vermont tax records.

Vermont puts a lien on everybody when a tax is assessed; that didn't mean the consumer hadn't paid, only that a tax was due. But the subcontractors were paid a commission on each bad record found, and they found a lot of bad records based on this verbiage, "lien." So a lot of people were being listed as tax deadbeats when in fact they had paid their taxes. There were other issues, too, like mixing up names so one person's record would be included in another's.

At the same time the FTC and many states were looking at nationwide credit-reporting problems, and we became the poster child in Vermont. Once we resolved all these through settlements with the industry, I was asked to come to Washington to testify about the credit-report issues and how the law should be reformed. Vermont's story was one of the factors that led to enactment of 1996 amendments to the Fair Credit Reporting Act.

On the competition side, I focused on monopolization cases involving Vermont's 800-pound gorillas: solid waste and paving. I also worked on dairy mergers that had a strong regional impact, and national airline and grocery store mergers. The most satisfying case involved Casella

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.