Interview with Commissioner Tom Leary

The following interview with Commissioner Tom Leary – the longest serving current FTC Commissioner – was conducted on September 26. It covers a broad range of issues reflecting Commissioner's Leary extensive experience at the Commission, having served with three different Chairmen, and five different Commissioners. On health care and antitrust, Commissioner Leary offers his views on the importance of guidelines and hearings, FTC enforcement in pharmaceutical markets and physician practices, the goals of the Hatch-Waxman Act, the FTC's hospital merger retrospective, disgorgement, and health care markets generally.

Chronicle: Having served as a Commissioner for a full term, what observations do you have on how the Commission has changed during that period?

Leary: I don't think the substance of our analysis has changed much. It certainly changed a great deal less than people anticipated in 2001, with the change in the administration and Tim [Muris] onboard.

The priorities have changed a bit over time. I think some of these changes were driven by outside events. For example, when Bob [Pitofsky] was here the merger wave sucked up resources from other areas of the Commission. As you probably know, we had to really strip people away from non-merger enforcement in order to deal with that avalanche, and I think that inhibited Bob's ability to do some of the more innovative things that he might have wanted to do. On the other hand, he did start to revitalize the Commission's role in "competition R&D." Bob started that in 1995 when he had these big hearings on global competition and, of course, you saw a lot more of it going on in Tim's tenure, and continuing.

When Tim came on board, he had a more affirmative agenda on the consumer protection side, particularly, than we've seen around here in quite a while. Of course "do not call" was the big thing, but there were a whole bunch of other things done on the consumer protection side. In part, it was because he wanted to do them, and in part, it was because consumer protection became the focus of attention up on the Hill -- reflecting concerns about privacy and spam. On balance we probably get more inquiries from the Hill on consumer protection issues today than we do on competition issues.

The big competition issue up on the Hill that drives a lot of our activity right now -- and the only one that we hear anything about, as you can imagine -- is gasoline pricing. We are inundated with letters all the time about gasoline prices, particularly in the last month or so after the hurricane. So, those are the changes. I think an awful lot of people expected big changes in the Commission, and I just don't think that we saw them.

Chronicle: Can you comment on any changes between Chairman Majoras and her predecessors?

Leary: Well, there's one small difference. Debbie Majoras followed two people who've been longtime scholars in the field of competition and consumer protection law -- in Bob's case, dating back from before Debbie was born and in Tim's case, dating back about 30 years. They had to deal with these issues over a long period of time. They're both academics.

Debbie comes out of the world of private practice and the Department of Justice which is more specific-case oriented. I've heard her say that "I am a bottom up person rather than a top down person." So I think that her first initiative, and the one thing that she wants to do affirmatively before she really turns to anything else, is deal with the merger review process. That must be in its final stages right now. So, there's some difference, based on their experience. Their focus is a little bit different but I don't think her substantive response to any particular case or controversy would be any different than either Bob's or Tim's.

Chronicle: Turning to health care markets, have there been significant changes in those markets and the FTC's efforts regarding health care during your tenure here?

Leary: I think the one thing I've noticed here is a greater focus on health care issues in the last several years, and I think there are a couple of reasons for it. There was a period of time when health care costs seemed to be at a plateau or at least increasing at a rather low level. They have spiked much more sharply in the more recent years.

There are various causes for the cost increases that we could go into, but I think this has stimulated more focus here at the Commission on health care. If you were to look at our allocation of resources to health care issues, both on the competition side and on the consumer protection side, I think you see a fairly dramatic increase.

Chronicle: The FTC/DOJ Health Care Guidelines were last updated nearly ten years ago. What are your thoughts on how useful these Guidelines have been to private parties?

Leary: The Guidelines are very helpful to practitioners who are willing to pay attention to them and deal with them. I think they're very fulsome. It may be, quite frankly, that collectively they're too big a mouthful for outside-the-beltway practitioners. And I am not saying that in a patronizing way.

I get the impression there are an awful lot of lawyers giving antitrust advice on the Health Care Guidelines who are not really antitrust lawyers, and I think that it might be desirable to consider amplifying on those Guidelines through speeches and things of that kind to make them more focused for the edification of outsiders. As you know we've got a case under consideration right now [*North Texas Specialty Physicians*] involving possible application of the Guidelines. When that opinion comes out, it may provide some guidance for people – regardless of the outcome.

Chronicle: What about updating the Guidelines, would that be a good idea?

Leary: I think we're learning that the process of revising and updating guidelines is fairly excruciating and should not be undertaken very frequently. The amount of effort involved in dealing not just with the various constituencies of the Federal Trade Commission, but also with the Department of Justice, is horrendous. I think you could say the same thing about merger guidelines generally, or about collaborative venture guidelines, or about intellectual property guidelines. I just don't see any great enthusiasm for revising guidelines in the near future.

Chronicle: In a 2002 speech you discussed in detail a Commission staff advisory opinion in *Med South*. What did that advisory opinion add to our understanding of how the Health Care Guidelines operate, particularly relating to clinical integration?

Leary: What I was trying to do in that speech is similar to what we're talking about here. I was trying to take an advisory opinion, which is necessarily a somewhat starchy document, and turn it into language that outside practitioners might understand a little bit better. I also wanted to indicate how many unanswered questions there were. I think the speech was also intended to provoke people into thinking about clinical integration and trying to encourage clinical integration. I might say, up to now at least, we've been disappointed by the reaction.

The *Med South* opinion letter was intended to be an invitation to doctors to genuinely try to integrate their practice, and incidental to integrating their practice there might be certain things they can do in the joint contracting area that would be prohibited otherwise. Unfortunately, I think a great many of these medical groups or associations still have the cart before the horse. Their prime focus is on using negotiations and contracts for the purpose of enhancing their bargaining power. And the one thing that seems to distinguish the good from the bad is that if you are putting together something for the primary purpose of enhancing your bargaining power you're going to buy trouble.

Maybe, it's too early to judge and maybe that comment isn't accurate about what's going on in the medical community, but my impression is that we're not seeing too many examples of genuine clinical integration. We did have one more example, where they tried to negotiate collectively first, and then integrate, rather than the other way around. They had to go back and start over.

Chronicle: Chairman Muris initiated a well-publicized retrospective look at hospital mergers and promised that the Commission would distribute its findings. The Commission has challenged one hospital merger in *Evanston* that was the subject this retrospective, but there has been no report released summarizing the staff's findings relating to the broader retrospective. Anything you can share concerning the results of this retrospective?

Leary: Well I obviously can't talk about the case that's in litigation, but I think I can predict it's highly unlikely that we will issue any kind of a report on the retrospective while

we've got a case in litigation. There are also a couple of other things that I know I've said publicly and I think can be safely said here.

We learned in the course of doing this that a retrospective is very hard to do. It seems so logical that we ought to try to go back and see whether past enforcement efforts have been effective, or whether the denial of our efforts to enforce have led to harmful results. You may remember that a few months ago, Hew Pate -- in the letter he sent to the Antitrust Modernization Commission just as he was walking out the door at DOJ -- suggested that retrospective analysis of the effectiveness of antitrust across the board might be something that would be worth doing.

I think the lesson that we learned is that it is very hard to do a retrospective. There are two reasons. Number one, it's very hard to get the data. It's one thing to be able to get data from companies that are contemplating a merger or that are in the process of just putting one together because its right up front and there tends to be a lot of internal communication about that particular subject. Once it's done, people aren't thinking anymore about the merger as such and what the merger will do.

Number two, any effects that you may be able to identify tend to get blurred with all kinds of outside effects. When I was in the auto business, I used to use an analogy. Suppose there is a new government standard, say for a different kind of stop light or a different kind of a bumper. Your first year, within the limits and the vagaries of cost accounting, you can have a ballpark idea of how much that standard costs. But as the years go by and it becomes just integrated in the way you do things, you can't pull it out any more and you have no idea. I think that's the trouble with trying to determine the impact of either a consummated or a failed transaction.

Then, if you are to go beyond that and try, somehow or other, to assess the potential efficiencies that might have been lost from mergers that never of even saw the light of day, that were killed in lawyers' offices because of the fear of antitrust consequences, I think it's hopeless. You may not even be able to find out what they were because companies don't like to talk about them, and the advantages and disadvantages of the road not taken are hard to figure out. I think the bottom line lesson we can learn from that retrospective is that we've got to be very, very modest about our ability to identify effects on a broad basis. Individual cases might be different, but broad conclusions are pretty hard.

Chronicle: Within the past few years the Commission has brought about two dozen enforcement cases alleging that physicians have engaged in price-fixing. Why do you think such conduct continues to occur?

Leary: I think the fundamental reason it occurs is that doctors have this desire to get some countervailing power. I think that doctors feel they've been pushed around by payors. They believe that the payors have interfered unduly with their ability to practice medicine and deliver the kind of quality care that they want to deliver. Now, whether that's good or bad involves issues that are certainly beyond our competence. I don't think we're in a

position to determine whether some of the protocols that are laid down by the payors are or are not detrimental to patient care. But I do think that a beleaguered mindset, prompts doctors to combine their forces to counter this.

And, of course, there are legal ways to do it. We point out to them that there are legal ways to do this. But, the antitrust laws don't have any broad exemption for collective attempts to resist countervailing power. Doctors attempted to get legislative relief. We don't happen to think that's necessarily good policy, but they're entitled to try to get it if they want to.

Chronicle: Do you think there's any role for enhanced penalties here, such as civil or criminal penalties, in order to deter physician price-fixing?

Leary: I think there might be a role for enhanced penalties for these against some of those consultants. There are some people who get these doctors together and promise that they can represent them collectively in negotiations with payors. It may be that we could be a little bit harsher on them than we've been. I'm really hesitant to get in the business of hitting these doctors too terribly hard because my impression is that a lot of them have been led down the garden path and they've gotten a lot of really bad advice.

Chronicle: Regarding the Hatch-Waxman Act, what are your thoughts on whether the Act has achieved its original objectives in creating incentives for both innovation and the development and introduction of generic products?

Leary: Up to now, I think that the Hatch-Waxman Act and the FTC's initiatives concerning Hatch-Waxman have done both, and I think that they've been very useful. I can't really talk about the ongoing *Schering* matter or what the impact of any final decision on that matter will be. The Commission has said things publicly, and I don't think I want to add to it.

Chronicle: The Commission continues to be active in reviewing pharmaceutical mergers. Has enforcement in these matters changed during your tenure at the Commission?

Leary: It doesn't seem to have changed. I still think the focus of our inquiry is on overlaps in various different therapeutic categories. There is, I think, some overarching concern if these very, very big mergers that we're seeing continue indefinitely. We need to be continually concerned about possible long-term effects on innovation if these big mergers continue because I don't know the extent to which research directed at one particular therapeutic category may or may not have spillover effects into other areas.

I think we're assuming that you can kind of deal with the pharmaceutical business as if it consists of myriad separate markets. When you're looking at R&D, I am less sure. As you know, there have been certain blockbuster discoveries in the pharmaceutical area that were almost accidental – people were looking for something in category A and it turns out it had some unanticipated impact in category B. I think that's something we need to always be aware of, and we do look at it. We have a very knowledgeable staff who have dealt with

these things over a period of years and know a great deal about them. It's a question I always ask.

Chronicle: There has been some criticism of the Commission using different product market definitions in merger cases, and between merger and conduct cases. Sometimes the Commission defines a generic only market, sometimes it's generic and brand, and sometimes it's a branded market. Do you have any thoughts on this?

Leary: People tend to forget that market definition is a tool, not an end in itself. We actually addressed this specific issue in the *Schering* opinion. For example, the question of whether or not the brands and the generics are or are not really in a separate submarket depends a lot on the product. Are they the only close substitutes, or are there myriad other substitutes? And that depends on case-by-case analysis.

In some cases -- and I guess *Schering* was one of them -- we found there was a very close interaction, predicted by both the branded and the generic. I think we're pragmatic about whether you can generalize from that to other kinds of drugs.

Chronicle: In recent years the Commission has sought disgorgement in three matters, all of which involved pharmaceuticals in some matter. Is this just a coincidence?

Leary: I don't think it's a coincidence, but also I don't think it's because we're targeting pharmaceuticals. I think it's because the criteria for disgorgement that we've agreed to, and that are in the Commission policy statement on disgorgement, seem to fit in drug cases. Our policy focuses on the nature of the offense and the likelihood of private remedies. It just so happens in pharmaceuticals that we've seen some fairly egregious restraints -- probably driven by the fact that, at least in some areas, the profit opportunities are immense. These pharmaceuticals companies drill a lot of dry holes and they depend for their profitability on a few real blockbuster drugs. They try to protect them. I think the financial temptations are very strong. And, of course, the harm is diffused over hundred of thousands of consumers out there, so the likelihood of meaningful consumer redress is rather slim. Disgorgement is particularly attractive in those situations.

Chronicle: You've offered statements in two of the Commission's disgorgement matters reflecting your view that restraint is needed in the Commission's use of its disgorgement authority. Can you comment on your views generally regarding disgorgement and where you stand today?

Leary: Well, I signed onto the recent policy statement. I was initially very dubious about the whole program for reasons that I explained in my dissenting opinion in *Mylan*. But I was outnumbered and I couldn't persuade anyone else here to go along with it, and once the battle is lost, there's no point in flogging a dead horse. So I participated very actively in the crafting of the policy statement and I'm satisfied that if the Commission adheres to those general principles down the road, we won't damage our mission. That's the primary thing. One of the potential problems I mentioned in *Mylan*, is that collecting money is such

a seductive activity that we may tend to focus on it too much. Then we're just another prosecutor and, in some ways, we've lost our reason for being. I don't want to see that happen.

Chronicle: You commented in a speech given about two years ago that the FTC/DOJ Health Care Hearings enriched the Commission's understanding of health care issues. Can you describe how the Hearings and the Report following the Hearings accomplished this, and whether additional hearings down the road will be useful as health care markets change?

Leary: I think it's a mistake to assume that we go into a hearing with no knowledge of the subject and that we are learning health care 101. We go into the hearing with a great deal of embedded knowledge on the subject but we are not sure whether there are things that we may not be taking into consideration, or we're not sure whether our views on this are in the mainstream of views that are out there. It provides reassurance that we're taking account of the right things if people from the outside -- a broadly representative group of people from the outside -- come in and have an opportunity freely to comment.

Let me give you just one example. Health care is too recent so I can't really comment. When Bob Pitofsky had his hearings on international competitiveness in 1995, they didn't just focus on international matters but considered just about any complaint that the business community might have about the direction of the FTC. I was advising The Business Roundtable very actively at that time, and I said to them this is your opportunity if you've got any serious concerns about the direction the FTC is taking. It's an open invitation to come in and give some views. And as you probably know, very little critical comment from members of the business community came in.

That provided the leadership of the FTC in 1995 with some reassurance that they were not going down a road that an awful lot of people would be concerned about. When you have a hearing and people are just reaffirming some of the ideas you have already had, it gives you some assurance that you're going down the right road.

Chronicle: Last question, any additional thoughts or comments you'd like to share regarding the Commission's role in health care?

Leary: One thing that I've noted, and I've talked about a little recently, is that health issues provide a very good example of the interface between competition and consumer protection matters. Some of these health issues are the best examples that I can think of. We're inviting collective private initiatives to reduce "red flag" false claims for weight-loss products. I was also very pleased to see that the soft drink manufacturers have come up with some kind of compact among themselves to restrict the distribution of the sweet soft drinks in the primary school setting. I was gratified to see that because I have encouraged them directly to do it. They were concerned that there would be some antitrust reaction to it, and of course, an antitrust lawyer might well give some cautious advice on that subject. But, I think there is a scope for targeted efforts.

I wrote a little piece in the latest Antitrust Law Journal, that's an introduction to the subject. I think health issues are a wonderful example of ways in which self regulatory efforts can go beyond what people may have thought in the past. Another area, by the way, is the whole field of information security, but that's not the subject of this discussion.