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7-Eleven Deal Catches FTC Divided And Off Guard

By **Bryan Koenig**

Law360 (June 7, 2021, 6:17 PM EDT) -- When 7-Eleven Inc. wrapped its $21 billion purchase of the Speedway chain last month before the Federal Trade Commission finished its merger investigation, the bitterly and bizarrely divided commission could muster nothing more than a "strongly worded statement" from two members criticizing the companies and a rebuttal from the remaining members criticizing their colleagues' inaction.

FTC Democrats and Republicans split 2-2, with both sides equally critical of the merger but seemingly divided over what action to take. The uproar underscored what can happen when an agency designed around a five-member panel with a three-person majority suddenly finds itself with an even number of members because of attrition or recusal.

Antitrust professionals say it also highlights what can happen if FTC commissioners are caught unprepared or are unwilling to contest a deal when merger review deadlines run out. In this case, that meant the expiration of four separate extensions the merging parties granted to merger investigators. The FTC had sought an additional extension, according to 7-Eleven, but the company refused, instead preferring to take its chances and close the deal on the day the last extension expired, May 14.

The fact that the FTC professed to be caught off guard by the closing reminded Joel Mitnick, a partner at Cadwalader Wickersham & Taft LLP and a former FTC trial attorney, of the movie "Casablanca" when Captain Renault expresses his shock to find gambling occurring at Rick's Cafe only to promptly be handed his own winnings.

"I'm shocked, shocked to learn that the parties would close this transaction when all the conditions have been satisfied and the timing agreement has run out," Mitnick said.

The shock was more real on Capitol Hill. Sen. Mike Lee, R-Utah, the top Republican on a Senate antitrust panel, accused the FTC of "a growing trend of mismanagement" in a biting letter that asserted the partisan stalemate on the Speedway deal "raises issues of basic competence."

"It's not a good look for the FTC," said Lisa Kimmel, a senior counsel in Crowell & Moring LLP's antitrust group and an FTC alum. "Especially at a time where they want to be more aggressive and explore dormant authorities."

The commissioners themselves seem wary of a repeat stalemate. In criticizing their Democratic colleagues for simply issuing "a strongly worded statement" that did nothing to stop the deal — which both sides described as likely anti-competitive because of hundreds of potential gas station and convenience store overlaps — the Republican commissioners voiced a hope that the failure to either challenge the transaction or cut a divestiture deal is a one-off, "not the beginning of a trend."

So what happened? The FTC has been mum since the deal's May 14 closing and the commissioners declined comment for this story.

Even Divides

What is clear is that neither Democrats nor Republicans can muster a majority on divisive issues in the wake of former Chairman Joseph Simons' departure with the change in administration, a common practice for FTC chiefs when the White House flips occupants.

"It's always a precarious time between administrations," said Constantine Cannon LLP partner Henry C. Su, an FTC alum.

The FTC's two Democrats, acting Chairwoman Rebecca Kelly Slaughter and Commissioner Rohit Chopra, will likely soon have a majority to override their Republican colleagues Noah Joshua Phillips and Christine S. Wilson when the Senate votes on the nomination of Lina Khan, a Columbia Law School professor and major Big Tech critic. But that majority could be fleeting if the Senate also confirms Chopra to lead the Consumer Financial Protection Bureau.

"That then would create a new vacancy on the FTC that would need to be filled," said Daniel E. Hemli, a Bracewell LLP partner.

The likelihood of Chopra's confirmation is an open question, however, after the Senate Banking Committee deadlocked on his nomination in March.

A lingering open Democratic seat, however, does not make future split votes, which prevent the commission from moving forward or even changing course on an existing action, an inevitability, antitrust professionals said. They cited many other votes, including on actions taken right after the 7-Eleven split, in which all four commissioners were united in moving forward, including the 4-0 vote May 20 to challenge a merger between Pennsylvania cement producers.

"It's not as if everything has been completely turned upside down," Hemli said.

What makes 7-Eleven dispute so particularly perplexing for onlookers is the fact that all four commissioners are critical of the merger, yet they remain unclear about exactly where their differences lie.

"When there's disagreement, you usually know what that disagreement is. It's usually sharply, clearly defined," Su said.

Additionally, partisan rancor has rarely been a defining feature of an agency that often prides itself on bipartisan votes on enforcement against consumer protection violations, anti-competitive conduct and mergers with too much competitive overlap.

"It's rare to see deadlocks," said Su.

But schisms do occur. And disputes, even when there's a clear majority and minority, have been particularly prominent in recent years as Democrats, now in control at the agency, help propel a wave of criticism of antitrust enforcement by arguing that U.S. enforcers in the past have been too permissive of potentially anti-competitive mergers and too forgiving of illegal conduct.

"Hindsight is always perfect as they say. But I think the writing has been on the wall for some time," Hemli said.

Antitrust professionals say that Slaughter and Chopra's past criticisms, including of new vertical merger guidelines, some merger cases and enforcers' overall approach, could signal future stalemates as long as the FTC is down a commissioner. Mitnick says that the Democrats' general call for a major change in U.S. antitrust policy and law signals a much deeper partisan divide than in the past.

"It's more than simply an ideological split between slightly liberal and slightly conservative antitrust attorneys," Mitnick said.

Timing Is Everything

This time around, by 7-Eleven's telling, the purchase of the Speedway portfolio from Marathon Petroleum, which includes about 3,800 stores in 36 states, was actually blessed by FTC staffers who recommended the commission approve a deal reached **at the end of April**. That recommendation called for the divestiture of 293 stores to resolve concerns of overlap in the market for retail gasoline. 7-Eleven said in a statement last month that it was operating under the terms of that deal.

Three days before the May 14 expiration of the last timing extension, according to 7-Eleven, Slaughter and Chopra had asked for more time. But the companies decided the last-minute delay would have been too disruptive. It also argued that the commissioners had plenty of time to review the deal and said the only concern that the Democrats ever articulated was too much time for the companies to carry out the agreed-to divestiture.

"Ironically, 7-Eleven did not ask for that amount of time. It was proposed by FTC staff to assist the proposed buyers, and 7-Eleven has offered several times to change to the originally-anticipated shorter time frame," the company said.

The commissioners themselves did not address the divestiture deal in their statements, with the Republicans instead criticizing their peers for failing to "resolve the issues and order divestitures (or sue to block the transaction)."

The fact that at least a staff-level deal was in place could complicate any challenge the FTC ultimately decides to file, attorneys say, noting that such a lawsuit would likely have to "litigate the fix" and show that the companies' proposed remedy isn't enough to safeguard competition.

"The defendants would have a pretty good chance to convince the judge to look at the merger as 'solved' by the staff and asking whether that merger, as remedied, would substantially lessen competition," said Stephen Calkins, a former FTC general counsel who is now a professor at Wayne State University Law School.

Past Splits

This is not the first time the FTC has found itself hobbled by split votes, an issue not encountered by parties whose mergers happen to wind up in front of the U.S. Department of Justice Antitrust Division where there's only a single top decision-maker.

The most prominent example of a commission split is the enforcement case against Qualcomm, which was ultimately upended by the Ninth Circuit, that the commission approved in the last days of the Obama administration. The vote was 2-1 but soon after, the commission found itself with just two commissioners, who were on opposite sides of the initial vote. That put the case "on autopilot," Kimmel of Crowell & Moring said. Because the FTC needs a majority to change course, cut a deal or launch a new challenge, "It continued on because of that split," Kimmel said.

The split over the Qualcomm case, a case apparently supported by the two Democrats but opposed by the FTC's sibling antitrust enforcers at the Department of Justice, continued over the lifespan of the suit and the entirety of the Trump administration. That's because Simons was recused from the case, leaving an apparent 2-2 divide.

Wilson fomented rumors of that split by publishing an op-ed taking direct aim at the enforcement action being pursued by her own agency's staffers, creating speculation that the commission's Republicans would have dropped or settled the dispute if they had the votes.

"That was something that was sort of frozen in place as a result of that partisan split," Kimmel said.

--Additional reporting by Andrew Kragie, Benjamin Horney and Matt Perlman. Editing by Jill Coffey.