

FEDERAL TRADE COMMISSION REVIVES ANTI-PRICE-DISCRIMINATION STATUTE WITH FIRST ENFORCEMENT ACTION IN 24 YEARS

On December 12, 2024, the Federal Trade Commission filed a lawsuit in federal court against Southern Glazer's Wine and Spirits, LLC, alleging that Southern engaged in illegal price discrimination in violation of Section 2(a) of the Robinson-Patman Act and Section 5 of the FTC Act.¹ The lawsuit is the government's first enforcement action under the RPA in decades. The FTC's complaint alleges that Southern harmed small, independent retailers of wine and spirits by charging them higher prices and depriving them of the same discounts and rebates it provided to larger national and regional chains. The Commission's vote to file the complaint was along party lines, with both Republican Commissioners filing lengthy dissents on the grounds that the suit was unlikely to succeed and would be a suboptimal use of the FTC's resources even if successful. Regardless of whether the FTC's suit is an anomaly or foretells future RPA enforcement by the FTC, it is likely to draw increased attention to the RPA and could drive an increase in the use of private RPA actions in response to perceived illegal price discrimination.

KEY TAKEAWAYS

First, the FTC alleges that Southern violated the RPA primarily by providing certain discounts and rebates only to its larger retailers. The FTC alleges that in some instances, Southern failed to inform small, independent retailers about discounts and

¹ Complaint, *Fed. Trade Comm'n v. Southern Glazer's Wine and Spirits, LLC*, Case No. 8:24-cv-02684 (C.D. Cal Dec. 12, 2024), ECF No. 1.

rebates that were available, and that in other instances Southern's discounts and rebates were "not functionally available" to these retailers. The complaint also expressly alleges that two other defenses under the RPA are not available to Southern, stating that Southern's differential pricing was neither cost-justified nor motivated by a good-faith attempt to meet competition from a rival distributor.

Second, the FTC's complaint is novel among recent agency actions—but not among RPA enforcement actions historically—in its explicit focus on harm to individual competitors, rather than to competition overall. The complaint does not allege that Southern's practices caused consumers to pay higher prices or receive lower output or lower-quality products, effects that are at the center of the consumer welfare standard and are the most common harms for the agency to seek to remedy through enforcement actions. Instead, the complaint alleges that Southern's pricing practices have "victimized independent and family-owned neighborhood grocery stores, local convenience stores, and other independent retailers across the country," and that those businesses are a "critical component of the American economy and provide valuable alternatives to megastore chains." The complaint implies, however, that smaller retailers' customers are harmed by the alleged discrimination against smaller retailers and posits that the FTC's requested relief will cause "large corporate chains [to] face increased competition, which will safeguard continued choice for American consumers."

Third, notwithstanding the change in presidential administration, it is apparent that there will be a majority on the Commission to support renewed enforcement of the RPA. In addition, although there is disagreement about the extent to which the agency should prioritize its enforcement, all five Commissioners agree that the Commission has a duty to enforce the statute.

BACKGROUND

The FTC's lawsuit, filed in the United States District Court for the Central District of California, charges Southern with violating Section 2(a) of the Robinson-Patman Act, which generally prohibits sellers of goods from "discriminat[ing] in price between different purchasers of commodities of like grade and quality" where such discrimination would lessen competition or "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination."

The FTC alleges that Southern is the largest coast-to-coast distributor of wine and spirits in the U.S. and sells one-third of all wine and spirits purchased in the U.S. The FTC alleges that, beginning as early as 2018, Southern "charged significantly higher prices for identical bottles of wine and spirits" to certain independent retailers than to the large chain retailers with whom those independent retailers compete.

As alleged by the FTC, Southern's "mechanisms of price discrimination" included "high-volume quantity discounts," which only a few large retailers have the volume to attain, and "cumulative quantity discounts," which favor large retailers who are able to combine purchases across many stores or utilize warehouses. Southern also allegedly favored large retailers in awarding "scan rebates," whereby Southern would reimburse retailers dollar-for-dollar for price reductions offered by retailers for certain products. For each of these categories, the FTC alleges that Southern discriminated against "disfavored" retailers (1) by not informing them about these rebates or declining to make them available, or (2) because they were "not functionally available" to small, independent retailers, given that such retailers "cannot buy the volume necessary to achieve the highest discounts due to their smaller storage space, lack of funds needed to purchase such quantities, and lower turnover of products."

The FTC contends that Southern's price discrimination has injured competition between favored and disfavored retailers of wine and spirits, causing disfavored independent retailers to lose "sales and customers" to their competitors, to be "unable to be price-competitive" with their competitors, to sell "lower volumes of wine and spirits than they would have sold in the absence of price discrimination," and to make "lower profits on the products they did sell." The complaint asks that the court prohibit Southern from "selling its products to any purchaser at a net price higher than that charged to any competing purchaser, where the discrimination may cause competitive harm as contemplated by the statutory language" of the RPA.

POTENTIAL DEFENSES TO DIFFERENTIAL PRICING

The RPA does not prevent all differential pricing and contains several statutory defenses permitting sales of the same product to different customers at different prices without violating the RPA. The debates among the Commissioners in their statements accompanying the FTC's complaint illustrate that the meaning and application of these provisions are likely to be litigated in Southern's case and that the scope of the RPA itself remains a point of contention for any future enforcement actions.

For example, Section 2(a) permits price differentials that "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting

from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.” The Commissioners disagreed about whether these cost differences should include “supplier-supported discounts,” rebates that a seller receives from their own supplier for large quantities sold to individual retailers. The Commissioners also disagreed about whether the cost-justification defense would protect a seller whose differential pricing was largely, but not entirely, cost-justified.

As another example, Section 2(a) applies to discrimination that occurs “in the course of” interstate commerce. Because the FTC’s complaint does not allege that Southern discriminated across state lines (i.e., by selling to a favored purchaser in one state and a disfavored purchaser in another state), the Commissioners disagreed whether Southern’s process of distribution would be sufficient to bring its conduct within the RPA’s purview.

The Commissioners disputed several other points, including whether a violation under Section 2(a) applies where favored retailers do not know they are receiving a discriminatory price; whether harm to a competitor, rather than to competition, is sufficient to make out a violation of the RPA; and what a seller must show to support the defense available under Section 2(a) that their lower price “was made in good faith to meet an equally low price of a competitor.”

VIEWS ON THE ROBINSON-PATMAN ACT

The FTC’s lawsuit against Southern is the FTC’s first enforcement action under the RPA since 2000 and its first litigated action federal court since 1988. It remains to be seen whether the FTC will bring additional actions to enforce the RPA in the near future or whether enforcement will again be deprioritized in favor of the agency’s other regulatory mandates. Evidence for the latter could be drawn from the Republican Commissioners’ statements: Commissioner Ferguson described the FTC’s action as “a poor use of the agency’s resources,” while Commissioner Holyoak stated that she did “not believe this enforcement action is in the public interest—even if I believed the law had been violated.”

Statements from all Commissioners and an incoming Commissioner, however, indicate a consensus that the RPA has been underenforced. In a statement accompanying the complaint, Chair Lina Khan—who is expected to depart the Commission in the first part of 2025—criticized her predecessors for failing to enforce the RPA,² while a separate statement from Commissioner Alvaro Bedoya, joined by Chair Khan and Commissioner Rebecca Kelly Slaughter, spoke strongly in favor of the policy of the RPA and concluded by saying that “[i]t is time to enforce it.”³ Commissioner Bedoya has also strongly advocated for renewed RPA enforcement since the beginning of his FTC tenure.⁴ Commissioner Ferguson, whom President-Elect Trump has selected to be the FTC’s next Chair, also spoke in support of enforcement of the RPA, stating, “Treating the Robinson-Patman Act as a nullity for decades offended the separation of powers. That offense is vitiated

² Press Release, Fed. Trade Comm’n, *FTC Sues Southern Glazer’s for Illegal Price Discrimination* (Dec. 12, 2024), available at <https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-sues-southern-glazers-illegal-price-discrimination>.

³ Fed. Trade Comm’n, *Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter In the Matter of Southern Glazer’s Wine and Spirits, LLC* (Dec. 12, 2024), available at https://www.ftc.gov/system/files/ftc_gov/pdf/statement-bedoya-joined-by-khan-slaughter-southern-glazers.pdf.

⁴ Fed. Trade Comm’n, *“Returning to Fairness”: Prepared Remarks of Commissioner Alvaro M. Bedoya, Delivered at the Midwest Forum on Fair Markets* (Sept. 22, 2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf (“Certain laws that were clearly passed under what you could call a fairness mandate - laws like Robinson-Patman - directly spell out specific legal prohibitions. Congress’s intent in those laws is clear. We should enforce them. ... I support Chair Khan’s goal to reactivate enforcement under our unfairness authority”).

today.”⁵ Even Commissioner Holyoak disclaimed the notion that “enforcement of the Robinson-Patman Act is never warranted,” since “as law enforcers, the Commission must faithfully execute the law.”⁶ And Mark Meador, whom President-Elect Trump plans to appoint to the Commission, published an article in July 2024 for the Federalist Society entitled “Not Enforcing the Robinson-Patman Act is Lawless and Likely Harms Consumers.”⁷

CONCLUSION

The FTC’s action and Commissioner support for enforcing the RPA bring renewed attention to price-discrimination issues. In addition, the possibility that the FTC’s action will embolden private plaintiffs and states to bring their own cases under the RPA and state price discrimination laws make the price-discrimination area an important space to watch going forward. Finally, the FTC’s lawsuit highlights the importance for companies to continue to ensure that their pricing, distribution, and procurement policies comply with the RPA.

⁵ Fed. Trade Comm’n, *Dissenting Statement of Commissioner Andrew N. Ferguson In the Matter of Southern Glazer’s Wine and Spirits, LLC* (Dec. 12, 2024), available at https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-southern-glazers-statement.pdf.

⁶ Fed. Trade Comm’n, *Dissenting Statement of Commissioner Melissa Holyoak In the Matter of Southern Glazer’s Wine & Spirits, LLC* (Dec. 12, 2024), available at https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-statement_southern-glazers.pdf.

⁷ Mark Ross Meador, “Not Enforcing the Robinson-Patman Act is Lawless and Likely Harms Consumers,” The Federalist Society (July 9, 2024), available at <https://fedsoc.org/commentary/fedsoc-blog/not-enforcing-the-robinson-patman-act-is-lawless-and-likely-harms-consumers>.

CONTACTS

Joseph Ostoyich
Partner

T +1 202 912 5333
E joseph.ostoyich
@cliffordchance.com

Brian Concklin
Partner

T +1 202 912 5060
E brian.concklin
@cliffordchance.com

William Lavery
Partner

T +1 202 912 5018
E william.lavery
@cliffordchance.com

Peter Mucchetti
Partner

T +1 202 912 5053
E peter.mucchetti
@cliffordchance.com

Leigh Oliver
Partner

T +1 202 912 5933
E leigh.oliver
@cliffordchance.com

Sharis Pozen
Regional Managing
Partner Americas

T +1 202 912 5226
E sharis.pozen
@cliffordchance.com

Danielle Morello
Counsel

T +1 202 912 5088
E danielle.morello
@cliffordchance.com

Lauren Rackow
Counsel

T +1 212 878 3194
E lauren.rackow
@cliffordchance.com

Michael Van Arsdall
Counsel

T +1 202 912 5072
E michael.vanarsdall
@cliffordchance.com

Dodi Allocca
Associate

T +1 202 912 5180
E dodi.allocca
@cliffordchance.com

Timothy Lyons
Associate

T +1 202 912 5910
E timothy.lyons
@cliffordchance.com

Julius Pak
Associate

T +1 202 912 5128
E julius.pak
@cliffordchance.com

Jordan Passmore
Associate

T +1 202 912 5416
E jordan.passmore
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 2001 K Street NW,
Washington, DC 20006-1001, USA

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