Updates
December 17, 2024
FTC’s Last Attempt To Revitalize the RPA?

On December 12, 2024, the Federal Trade Commission (FTC) sued Southern Glazer’s Wine and Spirits (Southern)—the largest wholesale distributor of wine and spirits in the country—in the U.S. District Court for the Central District of California under the Robinson-Patman Act (RPA), potentially breathing new enforcement life into the often unenforced law.

The RPA, 15 U.S.C. § 13, is a New Deal-era statute prohibiting sellers of commodity products from charging different prices to competing purchasers of those commodities. A violation occurs when a business sells the same goods at roughly the same time at two different prices to two different competing customers, with the price difference creating a competitive injury. Discriminating in promotional allowances—such as marketing support—can also constitute a violation. Buyers can also be liable along with the seller if the buyer knowingly induces and receives discriminatory pricing or promotional allowances.

The FTC points out in its complaint that the agency has “brought over 1,400 actions to enforce the Robinson-Patman Act,” but that number obscures the elephant in the room: the striking lack of recent public enforcement caselaw. For decades, RPA theories had primarily been the domain of private plaintiffs. In 1977, the U.S. Department of Justice (DOJ) issued a report stating it would cease to enforce the act, and the FTC had not brought an RPA case since 2000. The Supreme Court of the United States has not opined at length on the RPA for almost two decades, recently denying a petition for a writ of *certiorari* that would have allowed it to do so. The RPA has also been subject to withering criticism as inimical to consumer welfare.[1]

To be sure, the December 12, 2024, filing did not come from nowhere. There have been rumblings of an FTC-orchestrated RPA revival for some time. In July 2021, President Joe Biden promulgated an executive order that called for the FTC chair to scrutinize the food industry through the lens of the RPA. In June 2022, the FTC announced in a policy statement that it intended to deploy the RPA to combat allegedly improper rebates and fees from drug manufacturers to pharmacy benefit managers. In April 2024, FTC Commissioner Alvaro Bedoya noted he wished to take the RPA “car out of the garage.” In June 2024, it was reported that a suit against

Southern was likely coming down the pike.

Finally, during the twilight of the Biden administration, the FTC has made good on its intimations and brought its first RPA enforcement action in more than two decades.

While the public complaint is heavily redacted, the thrust of its allegations is clear. The FTC alleges that, from at least 2018 through the present, Southern has sold identical bottles of wine and spirits to "mom and pop" small businesses at prices that are "drastically higher" than what it charges large national and regional chains, with "many discounts and deals" simply unavailable to the disfavored smaller retailers. The suit is brought under Section 2(a) of the RPA and Section 5 of the FTC Act, seeking an injunction to halt the alleged discrimination.

The FTC is careful to allege that "[i]n each instance of price discrimination [], the disfavored independent retailer(s) competed with the favored large chain retailer(s) in the same geographic area(s) for sales of identical bottles of wine and spirits to the same pool of end consumers," evidently paying deference to elements that have been recently flagged as important in RPA caselaw from the U.S. Court of Appeals for the Ninth Circuit.[2]

The "mechanisms" by which Southern allegedly engages in its discrimination are said to include "large, high-volume quantity discounts, cumulative quantity discounts…scan rebates, [and] 'discount support' funding from suppliers[.]" The FTC apparently provides multiple "specific product examples" of Southern's "substantial and sustained" discrimination—but these vignettes and their specific prices and other terms of dealing are heavily redacted.

The FTC, anticipating typical RPA defenses, alleges that "this price discrimination in favor of large national chains is not justified by differences in Southern's cost of distributing products to the different retailers, nor does it reflect bona fide attempts to meet prices offered to chain retailers by competing distributors." Further, the discriminatory pricing allegedly "does not reflect a response to changing conditions" in the marketplace.

The FTC claims that its allegations reflect "paradigmatic violations" of the RPA that Congress had well in mind when it put forth the act in 1936—specifically, the favoring of large corporate chains over smaller rivals. Indeed, the FTC emphasizes Southern's large market shares at multiple points in its complaint.

Rare Dissents May Signal FTC Litigation Woes

Two commissioners—including Commissioner Andrew Ferguson, who President-elect Donald Trump indicated would be the next FTC chair—dissented to the FTC's action against Southern. Traditionally, commissioners voting against a complaint will not issue written dissents, as doing so creates a record FTC staff will have to combat in litigation. The two Republican commissioners, Ferguson and Melissa Holyoak, have broken with this tradition.

As the incoming FTC chair, Commissioner Ferguson's dissent warrants particular attention, as it may provide insight on federal RPA enforcement over the next four years. Commissioner Ferguson questions the majority's complaint and contends that Southern can legitimately use cost justification as a defense for its discriminatory pricing practices, particularly since its agreement with suppliers allows for significant discounts on large orders from retailers. Commissioner Ferguson also questions the complaint's assertion that efficiency considerations are necessary for a cost justification defense, arguing that courts have not historically required this.

Commissioner Ferguson addressed the FTC's complicated relationship with the RPA, noting that while the FTC should not be in the business of picking and choosing which laws to enforce, the RPA seemingly attacks discounts that lower prices for consumers. He states that so long as the law is "sensibly enforced," "breathless warnings of the catastrophe that will follow...seem decidedly overstated."

Commissioner Ferguson's dissent leaves open the potential for future RPA enforcement in the second Trump administration, and he notes that enforcement should focus on powerful buyers who can impose favorable terms at the expense of consumers and competitors. However, his acknowledgement of the many benefits consumers receive from volume discounts, combined with his seeming prediction that the FTC's case against Southern is doomed at the motion to dismiss stage, raise significant doubts as to whether his FTC will find any potential RPA violations worthy of investigation—much less a complaint.

What's Next?

This case and its inevitable motion to dismiss briefing will be watched closely by Perkins Coie and companies alike. Indeed, if the second Trump administration ends up pursuing the RPA or other antitrust theories, it will likely do so through the lens of its trademark populism (*e.g.*, targeting big tech or companies perceived as progressive). As noted above, Commissioner Ferguson does support enforcing the RPA but primarily in circumstances of buyer market power. If this is the case, private parties or state enforcers may also be encouraged to pursue similar actions. As such, companies should ensure their RPA and other antitrust compliance programs are up to date as the new administration's priorities and desires come into focus. For further guidance, see our series of takeaways and best practices to avoid RPA headaches here and here.

Endnotes

[1] Herbert Hovenkamp, The Robinson-Patman Act and Competition: Unfinished Business, 68 Antitrust L.J. 125, 130 (2000) ("Very few statutes have survived such long-lived and unrelenting criticism as has been directed against the Robinson-Patman Act. It is practically accepted that the legislative history of the Robinson-Patman Act is anticompetitive and excessively concerned with the protection of small business at the expense of more efficient rivals.").

[2] *U.S. Wholesale Outlet & Distrib., Inc. v. Innovation Ventures, LLC*, 89 F.4th 1126 (9th Cir. 2023), *L.A. Int'l Corp. v. Prestige Brands Holdings, Inc.*, 2024 WL 2272384 (C.D. Cal. May 20, 2024).

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