

# Robinson-Patman Act: Revival or Approaching Return to Dormancy?

December 17, 2024

On December 12, the Federal Trade Commission (FTC)—after a 3-2 vote—filed a complaint against Southern Glazer’s Wine and Spirits, LLC (Southern), the largest U.S. distributor of wine and spirits. The FTC alleges that Southern violated the Robinson Patman Act’s rarely enforced ban on “price discrimination” by selling wine and spirits to small, independent businesses at prices “drastically” higher than what Southern sells to large chains (e.g., Total Wine & More, Bevmo, Costco, and Kroger), and by not disclosing those discounts to the smaller businesses. As alleged, “[i]n reasonably contemporaneous transactions, Southern charged significantly higher prices for identical bottles of wine and spirits to disfavored independent retailers than to favored large chain retailers that are in proximity to and in active competition with the disfavored retailers for the resale of wine and spirits to the same pool of end consumers.” The FTC further alleges that (a) Southern’s lower prices for large national chains are “not derived from differences in Southern’s cost of distributing products to larger retailers”, (b) do not “reflect legitimate attempts to meet prices offered to chain retailers by competing distributors”, and (c) smaller companies are not able to access the discounts offered to larger companies (i.e. Robinson Patman Act defenses do not apply). While much of the complaint is redacted, including some of the conduct in which Southern engaged, the FTC does identify as problematic large, high-volume quantity discounts, cumulative quantity discounts, and scan rebates (price reduction given to a customer at the register for which the retailer is reimbursed by Southern), as well as accepting payments or “discount support” from suppliers for enacting the discounts and rebates. As for the cumulative quantity discounts, the FTC alleges: “Large chain retailers were able to qualify for these cumulative volume thresholds by combining purchases across many stores or by utilizing warehouses [while] in contrast, small independent retailers often operate only a single store or handful of locations and generally have limited storage space.”

The FTC self-identifies its motives: “(i) to ensure that small, independent retailers served by Southern have access to the same discounts, rebates, and pricing as the large chains that they compete directly against, except to the extent justified by actual cost differences, changed conditions, or a good faith effort to meet a competitor’s equally low price, and (ii) to obtain an injunction prohibiting further price discrimination by

---

Southern against these small, independent businesses. When Southern's unlawful conduct is remedied, large corporate chains will face increased competition, which will safeguard continued choice for American consumers."

Two of the FTC Commissioners issued dissents, which when combined span more than 110 pages. Commissioner Ferguson, who is slated to be the next FTC Chair, noted: "[f]or decades, a bipartisan, anti-enforcement consensus has prevailed among federal antitrust enforcers, the bar, and the academy" based on a general understanding that "the [Robinson Patman] Act rests on bad economics and that enforcement would injure consumers by denying them the benefits of vigorous price competition." He opined that the Commission is unlikely to prevail and gave a road map of Southern's opposition to the complaint. Notably, Commissioner Ferguson questions the competitive harm resulting from Southern's conduct, stating that the agency failed "to allege that the price discrimination injured any consumer by leading to higher prices, lower output, diminished product quality, less product choice, a reduction in services, or a decline in product innovation" and instead "alleges that the discrimination permitted the large chain retailers to offer lower prices to consumers than the independent retailers could offer." The primary defense that Commissioner Ferguson sees as likely to succeed is cost justification – arguing that by delivering in greater volume there must be cost saving. The second potentially-successful defense is that there is little evidence that diversion of sales between large and small retailers is more than de minimis. A key point in Commissioner Ferguson's dissent is that he believes the case is not a good use of FTC resources. As the future FTC Chair, Commissioner Ferguson will have the power to determine just how the agency expends its limited resources.

Commissioner Holyoak offered a similar dissent, which she summarized as follows:

"today's Complaint ... condemns conduct that is plainly innocuous or even procompetitive. Specifically, the Complaint condemns Southern [] for selling its product at lower prices to some retailers relative to others. Such a theory of antitrust harm is based on a patently untrue assertion that mere price differences offered to downstream buyers diminish competition in the retail sale of wine and spirits. Indeed, it manifestly defies logic to suggest that the mere presence of discounting is dispositive proof that there has been harm to competition."

The US Chamber of Commerce had this to say: "This case is the latest antitrust folly, marked by a partisan attack on rebates that is ultimately inflationary. Today's lawsuit encapsulates the worst features of this administration's failed approach to antitrust enforcement: it disregards basic economics, decades of legal precedent, and consumer interests. The alcohol industry is highly regulated, with rebates in the sector overseen at both the federal and state levels, though not by the FTC. Further, the timing of this

---

lawsuit is clearly a political last gasp effort to revitalize nonsensical Robinson-Patman theories of harm that have long been discarded."

Key takeaways from the above include:

- The Democratic Commissioners, especially Commissioner Bedoya, who has long been interested in reviving enforcement of the Robinson Patman Act, have addressed in several public speeches the need to enforce the Robinson Patman Act, and this case is their departing shot over the bow to that effect.
- The fact that Commissioner Ferguson stated that pursuing the complaint was not a good use of FTC resources, and that Commissioner Holyoak also dissented, may signal that (a) that the FTC could withdraw its complaint or quickly settle when the Commissioner composition reverts to a Republican majority, and (b) further FTC cases under the Robinson Patman Act by the incoming administration are unlikely.
- Politics and federal agency action aside, private cases may follow the Southern complaint and those lawsuits may impact whether any Robinson Patman Act revival continues.

\* \* \*

Please do not hesitate to contact us with any questions.



**Tim Cornell**  
Partner, Washington, D.C.  
+1 202 383 8062  
tjcornell@debevoise.com



**Ted Hassi**  
Partner, Washington, D.C.  
+1 202 383 8135  
thassi@debevoise.com



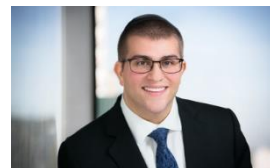
**Michael Schaper**  
Partner, New York  
+1 212 909 6737  
mschaper@debevoise.com



**Erica S. Weisgerber**  
Partner, New York  
+1 212 909 6998  
eweisgerber@debevoise.com



**Leah Martin**  
Counsel, Washington, D.C.  
+1 202 383 8203  
lmartin@debevoise.com



**Adam C. Saunders**  
Associate, New York  
+1 212 909 6761  
asaunders@debevoise.com

*This publication is for general information purposes only. It is not intended to provide, nor is it to be used as, a substitute for legal advice. In some jurisdictions it may be considered attorney advertising.*