UNEVEN POUR: FTC'S ROBINSON-PATMAN ENFORCEMENT SEES MIXED RESULTS AS PEPSI CASE GOES FLAT AND SOUTHERN GLAZER'S ORDERS ANOTHER ROUND

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Since the publication of “Rum and Coke: The FTC Targets Soft Drinks and Alcohol in the Revival of Robinson-Patman Act Enforcement–What's Next?”, new developments have continued to shape the enforcement landscape of the Robinson-Patman Act (the Act).[1]

In effect, the Federal Trade Commission (FTC) is sending mixed messages about how aggressively it intends to enforce the Act. Since our last update, the agency has brought two notable cases—one against Southern Glazer's Wine and Spirits, LLC (Southern) and another against PepsiCo, Inc. (PepsiCo)—but handled them very differently. While FTC Chairman Andrew Ferguson initially opposed filing both cases, the agency has decided to proceed with the Southern lawsuit while voluntarily dismissing the PepsiCo action. These developments suggest a more selective and uncertain approach to the Act's enforcement under the current leadership.

FTC INITIATES ENFORCEMENT ACTION AGAINST SOUTHERN

On 12 December 2024, following an investigation, the FTC filed suit against Southern in the US District Court for the Central District of California (the Court), alleging violations of both (1) the Act, 15 U.S.C. § 13(a), and (2) Section 5 of the FTC Act, 15 U.S.C. § 45.[2] In its complaint, the FTC alleges that Southern unlawfully favored large national retailers by offering them significantly lower prices and promotional benefits on wine and spirits than those made available to smaller, independent, “mom and pop” retailers.[3] According to the complaint, these advantages included volume-based and cumulative discounts, as well as scan rebates.[4] The FTC asserts that these practices were not justified by cost differences and had the effect of harming competition and disadvantaging small businesses.[5]

COURT DENIES SOUTHERN'S MOTION TO DISMISS

In a recent development, the Court denied Southern's motion to dismiss the FTC's complaint.[6] The Court held that the FTC had sufficiently stated a claim under the Act by adequately alleging each element of a secondary-line price discrimination claim. Specifically, the Court reasoned that the FTC plausibly alleged that: (1) the sales occurred in interstate commerce, (2) the products sold to different buyers were of like grade and quality, (3) Southern charged different prices to favored and disfavored purchasers, and (4) the price discrimination had a likely harmful effect on competition.[7] Under the first element, Southern argued that state laws requiring alcohol to

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"come to rest" in in-state warehouses before retail sale breaks the flow of interstate commerce, but the Court rejected this argument, holding that temporary storage does *not* eliminate the interstate character of the sales.[8] Under the second element, while Southern argued that the FTC failed to plausibly allege the products were of "like grade and quality" because the complaint lacked details beyond price, the Court disagreed, finding that the FTC adequately alleged the same products were sold to different buyers under materially similar terms except for price.[9] Under the third element, the Court reasoned that the FTC sufficiently alleged price discrimination by claiming Southern charged significantly higher prices to disfavored purchasers than to favored chains, supporting the claim with aggregated data from thousands of transactions.[10] Last, under the fourth element, the Court reasoned that the FTC adequately alleged competitive harm by pleading that favored retailers received substantial, long-term price discounts enabling them to undercut disfavored retailers, and these retailers operated in close geographic proximity, bought similar products at the same time, and competed at the same functional level.[11]

FTC DISMISSES PEPSICO CASE

In contrast to the above, the FTC recently dismissed its lawsuit against PepsiCo, which alleged that PepsiCo provided preferential pricing to Walmart in violation of the Act.[12] The case, filed on 23 January 2025, was voluntarily dismissed by the FTC on 22 May 2025.[13] FTC Chairman Ferguson criticized the lawsuit as a "politically motivated travesty," stating his opinion that it lacked sufficient evidence and was an inappropriate use of agency resources.[14]

IMPLICATIONS FOR BUSINESSES

Although these developments send a mixed message, they indicate that the FTC remains at least partially focused on enforcing the Act—particularly in cases where there is compelling evidence of price discrimination that harms competition. Moreover, even if the FTC ultimately retreats from active enforcement, the Act provides for a private right of action. Therefore, businesses across all industries should take this opportunity to review their pricing and promotional practices to ensure compliance with the Act.

For further information or assistance in evaluating your company's compliance with the Act, please contact the firm's Policy and Regulatory practice lawyers.

FOOTNOTES

[1] *See* Christopher S. Finnerty & Michael R. Murphy, *Rum and Coke: The FTC Targets Soft Drinks and Alcohol in the Revival of Robinson-Patman Act Enforcement—What's Next?*, K&L GATES HUB (June 16, 2023), https://www.klgates.com/Rum-and-Coke-The-FTC-Targets-Soft-Drinks-and-Alcohol-in-the-Revival-of-Robinson-Patman-Act-Enforcement-Whats-Next-6-16-2023.

[2] *See* Fed. Trade Comm'n v. S. Glazer's Wine & Spirits, LLC, No. 8:24-cv-02684-FWS-ADS (C.D. Cal. Dec. 12, 2024).

[3] *Id*. at 1–3, 9–10.

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[4] *Id*. at 10–20.

[5] *Id*. at 20–21.

[6] Order Denying Motion to Dismiss, Fed. Trade Comm'n v. S. Glazer's Wine & Spirits, LLC, No. 8:24-cv-02684-FWS-ADS (C.D. Cal. Apr. 17, 2025).

[7] *Id*. at 5–12.

[8] *Id*. at 5–8.

[9] *Id*. at 8–9.

[10] *Id*. at 9–10.

[11] *Id*. at 10–12.

[12] *See* Fed. Trade Comm'n v. PepsiCo, Inc., No. 1:25-cv-00664-JMF (S.D.N.Y. Jan. 17, 2025).

[13] *See* Notice of Voluntary Dismissal, Fed. Trade Comm'n v. PepsiCo, Inc., No. 1:25-cv-00664-JMF (S.D.N.Y. May 22, 2025).

[14] Andrew N. Ferguson, Dissenting Statement of Commissioner Andrew N. Ferguson, In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation, FTC Matter No. 2210158 (Jan. 17, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/dissenting-statement-commissioner-ferguson-regarding-non-alcoholic-beverages-price-discrimination-investigation.pdf.

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