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Legal Sidebar

FTC Revives Enforcement of the Robinson-Patman Act

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On December 12, 2024, the Federal Trade Commission (FTC) sued Southern Glazer's Wine and Spirits (Southern), the largest U.S. distributor of wine and spirits, alleging that the company violated the Robinson-Patman Act (RPA) by charging independent retailers higher prices than large chain stores. The complaint marks the first government RPA case in more than 20 years. In bringing the lawsuit, the FTC revives enforcement of a statute that has generated controversy within the antitrust bar. Some critics—including the congressionally created Antitrust Modernization Commission—have recommended repeal of the RPA, arguing that the law discourages price discounts and harms consumers. Others have advocated narrower reforms intended to harmonize the RPA with the pro-consumer goals of the other antitrust laws. Supporters of robust RPA enforcement defend the law as an important (though neglected) tool for promoting fair competition and protecting small businesses. The statute's proponents also contend that there is little empirical support for the proposition that increased RPA enforcement would adversely affect consumers.

This Legal Sidebar provides an overview of the RPA and the FTC's lawsuit. It begins with background on the RPA's history and its interpretation by the courts. Next, the Sidebar discusses the FTC's complaint and accompanying statements from the FTC's Commissioners, which reflect varied perspectives on the RPA. The Sidebar concludes with considerations for Congress.

Legal Background

Statutory History

Congressional interest in price discrimination predates the RPA. The original Clayton Act, passed in 1914, contained the first general prohibition of differential pricing. The prohibition was a response to allegations that Standard Oil—one of the country's largest industrial trusts—had relied upon discriminatory pricing to achieve and maintain monopoly power. Those concerns involved two types of discrimination. First, Standard Oil allegedly cut prices below its costs in regions where it faced competition, while charging higher prices in markets where it did not. Once Standard Oil eliminated competitors using this strategy, critics claimed, it hiked prices to monopoly levels. This conduct—which may affect competition between a discriminating seller and its rivals—would later be called "primary line" discrimination. Second, Standard Oil was accused of pressuring railroads to grant it rebates that were not offered to other firms. This type of differential pricing—which may affect competition between a favored buyer and its rivals—constitutes "secondary line" discrimination.

In 1911, the Supreme Court affirmed a decision dissolving Standard Oil for violations of the Sherman Act. The Court's opinion did not, however, definitively resolve the legality of certain conduct the government had alleged, including price discrimination. Congress responded with the Clayton Act, which proscribed specific anticompetitive practices. Section 2 of the statute prohibited differential pricing in the sale of commodities "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce." The provision included safe harbors. Quantity discounts, for example, were permitted. The law also contained an exception for discrimination that made "only due allowance" for differences in selling or transportation costs, along with a carveout for discriminatory sales "made in good faith to meet competition."

The government did not enforce the original Section 2 vigorously. Concerns about price discrimination resurfaced, however, with the growth of chain stores in the late 1920s and early 1930s. Large chains like the Great Atlantic & Pacific Tea Company were accused of using their bargaining power to secure discriminatory discounts from suppliers, disadvantaging independent retailers and wholesalers. The legality of those discounts under the Clayton Act was uncertain; a 1934 FTC report indicated that the statute's safe harbors for quantity discounts and cost-justified discrimination created "difficulties of enforcement" vis-á-vis the chain stores.

Congress addressed these concerns in 1936 by enacting the RPA, which included several changes to Section 2 of the Clayton Act. Section 2's core prohibition became Section 2(a), which added a clause to the competitive effects language of the original Clayton Act. Section 2(a) bars price discrimination

> where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination, or with customers of either of them*.

In addition, the RPA removed Section 2's categorical exception for quantity discounts. Along with that removal, the RPA modified the cost-justification defense to encompass discriminatory sales that make "only due allowance" for differences in manufacturing, selling, or delivery costs resulting from the "differing methods or quantities" in which commodities are sold or delivered.

The statute also added several new prohibitions. Some of the supplementary prohibitions target methods of evading Section 2(a). Section 2(c), for example, is directed at sham brokerage payments. It prohibits a party to a sale from granting or receiving certain commissions or brokerage fees except for services rendered in connection with the sale. Sections 2(d) and (e) bar sellers from granting advertising or promotional allowances or services unless they are available to all competing purchasers on proportionally equal terms. Unlike Section 2(a), these prohibitions do not require proof of competitive harm. The RPA also added Section 2(f)—which bans knowing inducement of illegal discrimination by buyers—and several criminal prohibitions involving discriminatory pricing.

Doctrinal Evolution

In the decades after the RPA's enactment, the FTC enforced the statute aggressively. Between 1937 and 1971, the FTC brought 1,395 RPA complaints. Almost 70% of those actions alleged violations of Sections 2(c), (d), or (e), which do not require proof of competitive harm. The agency also advanced expansive interpretations of Section 2(a). In its 1948 *Morton Salt* decision, the Supreme Court agreed with the FTC that plaintiffs can establish a *prima facie* case of competitive injury in secondary line RPA cases by showing that a favored competitor received substantial price discounts over a significant period of time. This principle—called the "*Morton Salt* inference"—thus permits a finding of competitive injury without evidence of diverted sales or market-wide effects like higher prices, reduced output, or other consumer harms. During this period of active enforcement, the FTC also construed the RPA's cost-justification and meeting-competition defenses narrowly.

The law governing primary line claims under Section 2(a) was similarly restrictive. Like *Morton Salt*, the Supreme Court's 1967 decision in *Utah Pie Co. v. Continental Baking Co.* endorsed the theory that competitive harm could be inferred from harm to a competitor. The case involved three firms that charged lower prices for frozen pies in Salt Lake City than they charged elsewhere, leading to a decline in the plaintiff's market share from 66% to 45%. The Court concluded that the jury could have rationally found competitive injury even though market output expanded considerably over the relevant period, the plaintiff's financial position improved, and the plaintiff retained its position as the market leader. Evidence of "predatory intent" and a "drastically declining price structure," the Court held, was sufficient to find that the defendants' discriminatory pricing harmed competition.

The 1970s witnessed the beginning of changes in competition law and policy. In 1979, the Supreme Court declared that the Sherman Act was a "consumer welfare prescription." The Court borrowed the phrase from Robert Bork, who argued that antitrust doctrine had grown overly interventionist and theoretically incoherent, embracing social goals that often conflicted with economic efficiency and the interests of consumers. Over the following decades, the courts pared back many of the more restrictive elements of antitrust law. They did so based on the view that antitrust should protect "competition" by promoting economic welfare (understood as either total surplus or consumer surplus)—not by protecting individual competitors or particular market structures.

The welfarist turn in antitrust affected views of the RPA. The FTC's enforcement of the statute peaked in the early 1960s. By the 1970s, the tide had turned against enforcement. In 1977, the Department of Justice (DOJ) released a report that was highly critical of the FTC's administration of the statute. The report found that RPA enforcement had resulted in higher prices, created inefficiencies in distribution, and encouraged price coordination among competitors. The DOJ thus recommended that Congress give "serious consideration" to repealing the statute. Government enforcement remained tepid in the ensuing decades. The FTC filed a total of five RPA complaints during the Reagan Administration, zero during the George H. W. Bush Administration, and one during the Clinton Administration, which marked the agency's last RPA complaint before the December 2024 lawsuit against Southern.

While government enforcement of the RPA receded, judicial interpretation of the statute continued to evolve in private litigation. The Supreme Court significantly restricted the scope of primary line liability in its 1993 *Brooke Group* decision, holding that primary line claims can succeed only if a defendant's prices fell below its costs and the defendant had a reasonable prospect of recouping the resulting losses (e.g., by eliminating competitors or enforcing discipline within an oligopoly). Without recoupment, the Court reasoned, consumers benefit from low prices. The Court deemed it irrelevant that low prices may harm rivals, remarking that the antitrust laws "were passed for the protection of *competition*, not *competitors*," and that the RPA should be construed "consistently with broader policies of the antitrust laws." Since *Brooke Group*, pro-plaintiff decisions in primary line cases have been exceedingly rare.

The law governing secondary line RPA claims has undergone more modest changes. Courts have broadened some defenses and imposed certain limitations on secondary line liability. The Supreme Court's most recent RPA decision, *Volvo Trucks of North America, Inc. v. Reeder-Simco GMC, Inc.*, also includes language attempting to minimize the gap between the RPA and other antitrust laws. There, the Court held that sellers are not liable for secondary line discrimination if the favored and disfavored buyers do not compete to supply the same end users. In the final section of the majority opinion, Justice Ginsburg wrote

> Interbrand competition, our opinions affirm, is the primary concern of antitrust law. The [RPA] signals no large departure from that main concern. Even if the Act's text could be construed in the

> manner urged by [the plaintiff] and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*. In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. By declining to extend [the RPA's] governance to such cases, we continue to construe the Act consistently with broader policies of the antitrust laws.

Despite this language, the welfarist principles that govern most other types of antitrust claims have not been imported fully into the secondary line RPA case law. While the Court relied on those principles to resist extension of the RPA to the fact pattern in *Volvo*, it preserved core elements of secondary line RPA doctrine. Elsewhere in *Volvo*, the Court explained that the "hallmark" of competitive injury in secondary line cases remains "the diversion of sales or profits from a disfavored purchaser to a favored purchaser"—an inquiry that focuses on harm to individual competitors, as opposed to reduced output or higher consumer prices. The Court also reaffirmed the *Morton Salt* inference. Thus, plaintiffs alleging secondary line discrimination can establish a *prima facie* case of competitive harm with direct proof of lost sales to a favored purchaser or evidence of substantial discriminatory discounts to a competitor over a significant period of time. Proof of buyer power or harm to market-wide competition is not required.

It is less clear whether evidence of healthy market-wide competition can be used to rebut a *prima facie* case of secondary line harm. The D.C. Circuit has held that it can, but other courts reached the opposite conclusion in pre-*Volvo* decisions. Many courts have also interpreted competitive harm in secondary line cases to mean harm to disfavored purchasers rather than market-wide competition. That proposition—which *Volvo* seems to affirm despite some language pulling the other direction—suggests that cognizable rebuttal evidence must show an absence of harm to disfavored buyers. The Supreme Court has not resolved the issue definitively, though it has held that defendants can rebut the *Morton Salt* inference with evidence "breaking the causal connection between a price differential and lost sales or profits."

The FTC's Lawsuit

The FTC's lawsuit against Southern is a secondary line case under Section 2(a). The complaint alleges that Southern has sold wine and spirits to independent retailers at prices that are "drastically higher" than the prices it charges large chain stores. While the complaint is heavily redacted, the FTC asserts that Southern favors large retailers using a variety of mechanisms, including quantity discounts and scan rebates (price reductions offered to a retailer's customers, for which a supplier reimburses the retailer dollar-for-dollar). The relevant price differentials, the FTC contends, are neither cost-justified nor bona fide attempts to meet competition. The FTC claims that disfavored retailers have lost sales and customers to chain stores as a result of Southern's conduct. The agency seeks an injunction barring Southern from engaging in the alleged discrimination.

The FTC voted 3-2 to bring the complaint, which drew dissents from Commissioners Melissa Holyoak and Andrew Ferguson. The dissents, along with a statement from Commissioner Alvaro Bedoya that was joined by Chair Lina Khan and Commissioner Rebecca Kelly Slaughter, may offer a preview of some of the key issues in the litigation and the future of RPA enforcement more generally.

In her dissent, Commissioner Holyoak criticized the majority for relying upon a protectionist interpretation of the RPA. Charting the statute's history and broader developments in antitrust law, she contended that the concept of competitive injury should be interpreted consistently across all provisions of the Clayton Act. Because the courts have adopted a welfarist gloss on "competition" in interpreting the Clayton Act's provisions regarding mergers, tying, and primary line price discrimination, Commissioner Holyoak argued, the FTC should do likewise in analyzing secondary line discrimination. In Commissioner Holyoak's view, secondary line discrimination violates the RPA only when there is evidence that it may reduce output, raise prices, or cause other market-wide harms—for example, where discounts to a powerful buyer raise input prices for other purchasers and thereby enhance the favored firm's market power (a phenomenon called the "waterbed effect"). She argued that allegations of these types of harm are absent from the FTC's complaint against Southern.

Commissioner Holyoak also contended that the FTC's lawsuit is unlikely to succeed for several reasons beyond a failure to allege competitive harm. First, she claimed that the alleged discrimination did not occur "in [interstate] commerce," as required by the RPA. Applying this language, the Supreme Court has recognized a general rule that the RPA applies only where "at least one of the two [discriminatory] transactions . . . crosses a state line." Holyoak argued that the complaint's allegations do not meet this requirement because Southern's sales to retailers generally do not cross state lines—a result of the regulatory structure of the alcohol industry.

Second, Commissioner Holyoak maintained that the complaint is deficient because it fails to allege specific pairings of favored and disfavored retailers who compete with one another. Commissioner Holyoak also noted that the lawsuit does not assert that favored retailers knew they were receiving discriminatory discounts from Southern, which she contended is a requirement for a secondary line claim.

Third, Commissioner Holyoak suggested that the RPA's cost-justification defense may present difficulties for the FTC's case. She argued that the FTC's majority erred by concluding that volume discounts that Southern receives from its suppliers are not cognizable "costs . . . of sale" for purposes of that defense. Holyoak also said that Southern produced evidence that the operating expenses associated with selling and delivering to large chain stores are lower than those associated with supplying smaller independent retailers.

Fourth, Commissioner Holyoak contended that the RPA's meeting-competition defense insulates Southern from liability. Here, she argued that the company's pricing practices are good-faith efforts to meet upstream competition from other buyers and downstream competition from other distributors.

Commissioner Ferguson dissented on narrower grounds than Commissioner Holyoak. After discussing the "thorny problem" of how to evaluate competitive injury in secondary line RPA cases, Ferguson reserved judgment on that question. He then criticized the government's "longstanding refusal to enforce the [RPA] because of disagreement with its underlying policy." That refusal, Ferguson argued, is inconsistent with constitutional principles and not justified by the academic literature on price discrimination, which he reads as inconclusive regarding the RPA's effects.

While Commissioner Ferguson is thus critical of wholesale repudiation of RPA enforcement, he dissented from the FTC's decision to sue Southern for two reasons. First, he contended that the Commission is unlikely to prevail even under the "traditional, protectionist understanding of the [RPA]." Specifically, Commissioner Ferguson concluded that Southern is likely to prove that its discriminatory discounts were cost-justified, while the FTC is unlikely to show substantial diversion of sales to favored purchasers or that the alleged discriminatory sales occurred in interstate commerce. Second, Commissioner Ferguson argued that the FTC's lawsuit is a poor use of resources even if the agency is likely to succeed. He maintained that the Commission should focus RPA enforcement on cases involving buyer power, which was Congress's "chief concern" in enacting the statute. Concentrating on powerful buyers, Ferguson claimed, would also mitigate worries about the effects of RPA enforcement on consumers.

Commissioner Bedoya's statement, joined by Chair Khan and Commissioner Slaughter, responded to several of the criticisms offered by Commissioners Holyoak and Ferguson. Bedoya began by offering a general defense of the RPA, arguing that Congress intended the statute to protect small businesses, which offer a range of benefits to local communities. He also rejected the claim that the statute raises consumer prices as lacking empirical support.

Commissioner Bedoya then addressed the legal arguments raised by Commissioners Holyoak and Ferguson. Responding to the argument regarding the RPA's jurisdictional scope, Bedoya highlighted a line of lower court cases holding that intrastate sales meet the RPA's interstate commerce requirement if they were made within the "practical, economic continuity" of an interstate transaction. Courts have held that this test was satisfied where a distributor transferred goods across state lines in response to the actual or anticipated needs of a particular customer. Bedoya contended that the FTC is likely to establish jurisdiction based on this case law.

Next, Commissioner Bedoya rejected Commissioner Holyoak's criticism that the complaint is deficient for failing to allege specific pairings of favored and disfavored retailers, along with the contention that secondary line claims must allege knowledge of discriminatory discounts by a favored buyer. Commissioner Bedoya argued that the complaint alleges discrimination covering thousands of retail pairings and that the FTC need not identify individualized pairings at the pleading stage of litigation. He also maintained that no cases have held that retailer knowledge is an element of a secondary line RPA claim.

Proceeding to the issue of competitive harm, Commissioner Bedoya argued that the Supreme Court and federal circuit courts have consistently held that harm to disfavored purchasers is sufficient to establish secondary line competitive injury under the RPA.

Finally, Commissioner Bedoya turned to the RPA's cost-justification and meeting-competition defenses. The former is unlikely to help Southern, Bedoya said, because the volume discounts Southern receives from suppliers are based on its overall sales and do not depend on sales to any particular buyer. As a result, Bedoya argued, those discounts do not lower Southern's "costs . . . of sale" to large chain stores relative to smaller independent retailers. Bedoya likewise denied that the meeting-competition defense will defeat the FTC's lawsuit. He contended that upstream competition is irrelevant to that defense and that Commissioner Holyoak's dissent fails to offer evidence that all of Southern's discriminatory sales were good-faith attempts to meet downstream competition.

Issues for Congress

Disputes regarding the RPA implicate an ongoing debate over the purpose of antitrust law and narrower empirical questions about the statute's economic effects.

The RPA's staunchest critics have charged that the statute inhibits price competition and is fundamentally inconsistent with an antitrust regime focused on consumer welfare. Some have also argued that the RPA is bad policy even when judged on protectionist terms, reasoning that sellers may respond to enhanced enforcement by refusing to deal with small purchasers. As discussed, these concerns have led to calls for the statute's repeal. Other commentators have proposed more limited reforms—for example, a requirement that plaintiffs in secondary line cases prove that the discriminating seller or the favored buyer has market power.

Many supporters of reinvigorated RPA enforcement challenge the claim that economic welfare should be the singular goal of antitrust law. In their view, the RPA can serve a valuable role by ensuring a level playing field for small businesses, which offer economic opportunity and other social benefits. Defenders of the statute have also disputed allegations that the RPA harms consumer welfare, arguing that secondary line plaintiffs typically demand that sellers offer them the same discounts extended to favored purchasers—not that sellers cease those discounts altogether.

The future of RPA enforcement remains to be determined. In December 2024, President-elect Trump announced his intention to appoint Mark Meador as FTC Commissioner and elevate Commissioner Ferguson to the position of Chair. Meador has expressed support for RPA enforcement, while Commissioner Ferguson's dissent in the Southern case repudiates previous policies of non-enforcement.

Other RPA cases may also be in the pipeline; the FTC is reportedly investigating Coca-Cola and PepsiCo for possible violations of the statute. A revived RPA thus remains a possibility regardless of the outcome of the Southern litigation.

Congress can address these developments in a variety of ways. Legislation clarifying or modifying the RPA's prohibition of secondary line discrimination—in either a regulatory or deregulatory direction—is one possibility. Repealing the RPA is also an option. Alternatively, Congress may decline to alter the RPA, leaving the FTC and the courts to resolve several of the issues discussed above.

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