

## US FTC could end Southern Glazer's case despite win in motion-to-dismiss round

24 Apr 2025 | 22:34 GMT | [Comment](#)

By [Alex Wilts](#)

By rejecting Southern Glazer's Wine and Spirits' motion to dismiss the US Federal Trade Commission's price-discrimination lawsuit against the company, a California federal judge gave new life to the Robinson-Patman Act, a statute that many thought was likely to remain dormant. But US District Judge Fred Slaughter's order last week also raises the question of whether FTC Chairman Andrew Ferguson — who strongly opposed bringing the action in the first place — will want to continue with a case he said would face difficulties in court, even though it has now overcome a significant hurdle in litigation.

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But US District Judge Fred Slaughter's order last week also raises the question of whether FTC Chairman Andrew Ferguson — who strongly opposed bringing the action against Southern Glazer's — will want to continue with a case he said would face difficulties in court, despite its now having overcome a significant hurdle in litigation.

In his order, Slaughter rebuffed Southern Glazer's argument that the case should be dismissed because the alleged illegal conduct didn't involve interstate commerce — “a technical, but critical, requirement that has resulted in many RPA actions to die at the pleading stage,” said Rosa Morales, an antitrust attorney at Crowell & Moring.

Morales said the rejection of this argument is “especially notable” because when the FTC filed the case in December (see [here](#)), about a month before the end of the Biden administration, the two Republican FTC commissioners — Ferguson and Melissa Holyoak — “raised that specific concern in lengthy dissenting statements.”

In his dissent, Ferguson wrote that he expected the commission to “mostly fail to satisfy the stringent statutory requirement that the discriminatory sales take place ‘in [interstate] commerce’” (see [here](#)). In addition, he called the case “an imprudent use of the Commission's enforcement resources even if it were likely to prevail.”

But Slaughter in his order said he found that the commission's complaint, “which alleges Southern purchased specific products to fulfill the anticipated demands of favored purchasers in several states, sufficiently alleges that Southern's goods remained in commerce under a demand-planning theory” (see [here](#)).

The debate over whether the FTC's complaint has met the “in-commerce” requirement appears to be far from over, however.

“The lion's share of the alcohol sales at issue in this case were not ‘in commerce’ for purposes of the Robinson-Patman Act, as discovery will show,” Southern Glazer's said in a report submitted this week to the judge, in which the company cited both Ferguson's and Holyoak's dissents to support its arguments (see [here](#)).

At the pleading stage, Slaughter didn't need to decide whether the FTC had established a RPA violation on the merits — only that the commission “had alleged enough facts to keep the case alive and proceed to discovery where it may uncover evidence” to later prove a RPA claim, Morales said.

Southern Glazer's said in the report filed yesterday that a “majority of the FTC's current commissioners — who were privy to the agency's extensive investigative discovery — independently concluded that [the company] is likely to succeed on a cost-justification defense at end of this litigation.”

Assertions like this from Southern Glazer's are provoking curiosity about why Ferguson would want to continue with the case when his own statements could lead to a court loss for the agency he is leading.

Rebecca Nelson, an antitrust attorney at BLCP, said that “the FTC has got a victory here” with Slaughter's motion-to-dismiss ruling. “Would it make any sense to pull this one now?” she asked. Based on his dissent, Ferguson is not against

enforcement of the RPA — he just didn't see the case against Southern Glazer's as the best vehicle to enforce it.

Given that Holyoak also strongly opposed bringing the case, Ferguson would seemingly have the votes at the commission to settle or withdraw the matter from litigation.

But it doesn't appear that the parties are in settlement discussions. In the report yesterday, which Southern Glazer's filed jointly with the FTC, they said that although they "remain open to exploring settlement possibilities," they "do not believe that [alternative dispute resolution] would be productive at this time."

Nelson said that given the current Trump administration's concern about the prices consumers are paying for products, "it does make sense" that RPA enforcement "would still be an area of focus."

Other benefits to continuing with the case would include how it may shed light on the commission's burden of proof for establishing a RPA violation and how much harm to competition the agency must show. "That will remain to be seen, because we're still at the motion-to-dismiss stage here," Nelson said.

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