

# Litigator of the Week: Steptoe's Susan Esserman Scores for Free Trade

Esserman led a coalition that included PepsiCo and Reynolds Consumer Products to Victory in a high-stakes trade fight at the International Trade Commission.

By Jenna Greene  
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**Lit Daily:** Tell us a little about your clients and this case.

Susan Esserman: Our clients are a coalition of large U.S. customers of PET resin, a major input for widely-used plastic packaging for beverage (water bottles and soft drinks), food, and other consumer products.

U.S. producers of PET resin had brought this antidumping investigation seeking to restrict foreign supply at a time of a critical U.S. supply shortage in the market. Steptoe represented this coalition of consumers and served as lead counsel coordinating the defense of the case.

The coalition included the American Beverage Association (with PepsiCo as lead), Reynolds Consumer Products (including Graham Packaging Company and Pactiv LLC), and importer iResin. A number of additional U.S. consumers stood to benefit from the outcome, but in light of the infrequent number of negative ITC determinations, they decided not to participate.

**What makes PET resin worth fighting over?**

PET resin is the major input for ubiquitous plastic packaging that is used in a wide range of beverage bottling and food applications. Plastic bottles have become the packaging of choice since it is lightweight, strong, and sterile. Other popular consumer end-uses for PET resin include bottles for food (e.g. salad dressings, jams and jellies, peanut butter, edible oils), household cleaners, cosmetics and carpet fibers.

**What were the circumstances that gave rise to the dispute?**

The dispute was triggered by the filing of an antidumping petition by U.S. PET resin producers, which operate in the United States but are all owned by major global producers. The petitioners were represented by Paul Rosenthal, Kathleen Cannon, David Smith, Grace Kim and Brooke Ringel of Kelley Drye & Warren LLP.

The petition was filed at the time of a serious U.S. supply shortage in which the petitioning U.S. producers had difficulties meeting growing U.S. demand. In fact, the U.S. producers themselves imported substantially from their own foreign



affiliates to meet U.S. demand, but at this critical time, they sought to shut off other foreign supply of PET resin.

**What happened when the Commerce Department considered the petition?**

For antidumping duties to be imposed, the U.S. Department of Commerce must find that imports were sold at less-than-fair-value and the ITC must find that imports caused or threatened to cause material injury to the domestic industry.

Both investigations proceed entirely independently from one another.

In this case, Commerce had found the imports were sold at less-than-fair-value and assessed antidumping duties ranging from 5 to 275 percent for imports from the five different countries under investigation. However, because the ITC ultimately found no material injury, no antidumping duties will be levied.

**What were the key questions before the ITC?**

The legal standard for an affirmative injury determination is whether the imports under investigation are a cause of material injury or threaten material injury to the U.S. industry.

Key to establishing injury is showing injurious import pricing—leading to price suppression or depression or underselling of U.S. producers. These pricing issues were critical to the outcome of this case. The timing and extent of the shortage and its significance from a legal standpoint were also quite important.

**Was there an overarching narrative or theme in your case?**

Our clients (large U.S. customers) felt passionately that it was unjust for domestic PET resin companies to seek to cut off access to imported product from five countries at a time of a dire shortage of U.S. supply.

This seemed especially unjust when these domestic companies were unable to satisfy our clients' needs and themselves had to import from their own foreign affiliates to meet U.S. demand.

These large customers, so knowledgeable about actual market conditions, provided compelling evidence for the record. In the end, the record evidence won out.

**Who was your co-counsel and how did you work together?**

We worked with Sidley Austin, which represented the Pakistani PET resin producer and Neville Peterson, which represented a U.S. importer/ purchaser, Niagara Bottling.

We coordinated the defense briefing and hearing strategy. As the hearing presentation for the defense is limited to one hour, we needed to ensure that the full range of defense arguments were covered. We retained an economist firm to work with all parties in order to provide a unified presentation of the data.

**What do you think were some of the keys to your success?**

We worked hand and glove with our clients and developed intensive knowledge of the industry under investigation and the highly unusual shortage conditions that exist today. With a deep understanding of the clients' business and the market, we were better able to champion our clients' position, leverage the applicable legal arguments and rebut petitioners' allegations.

Another critical element to success was strong teamwork, and the team's optimistic outlook, winning attitude, and steadfast belief in our clients' position. Every member of the team made important contributions to the case.

**What made this case different from the typical ITC trade fight?**

This case was different in that large U.S. customers that purchased almost exclusively from the U.S. petitioners played the dominant role in the defense. As a result, they had intimate knowledge of the market to a degree different than the typical case defense led by foreign producers.

Also unusual were the shortage conditions in the market such that the U.S. producers were unable to meet our clients' PET resin needs.

**How do you (and your clients) feel about the result?**

Our clients are extremely relieved at the outcome, which allows them to access sorely needed materials at a time of shortage in the market. They had been very concerned that the additional trade restrictions would exacerbate the already serious supply shortage they have faced, which could have led to major production disruptions.

**What impact do you think this case might have?**

This decisive negative determination shows the serious analytical approach that the commission took in this case. Each investigation is separate, and for each, there needs to be substantial evidence to support claims. Although the determination will not be issued until November 21, the depth of the Commission's analysis was obvious in the commissioners' questioning at the hearing.

**Trade is a hot political issue these days. As a former trade official, what are your thoughts on the Trump administration's policies?**

Antidumping and countervailing investigations provide an important and effective remedy to protect U.S. producers from injurious unfair trade practices.

To reach an affirmative determination and impose anti-dumping or countervailing duties, the ITC must find that the imports under investigation are a cause or threat of injury to the U.S. industry. The current administration, as well as past administrations, support strong antidumping law enforcement.

However, unlike solely discretionary presidential decisions such as the tariffs levied against Chinese imports, antidumping investigations are formal proceedings in which determinations are made after a full investigation on the record. Further, the International Trade Commission is an agency independent from the executive branch.

The Trump Administration has adopted an active and aggressive trade policy and has imposed trade measures by invoking rarely-used statutes such as Section 232 of the Trade Expansion Act of 1962. The Trump Administration's trade policies have created uncertainty and an unpredictable environment for many U.S. companies and have dramatically changed the portfolio of work for U.S. trade lawyers.

A major trade policy issue to watch is the administration's Section 232 investigation whether auto imports threaten to impair U.S. national security and should therefore be subject to trade restrictions. The administration's decision in this case has potentially serious implications, especially since the U.S. auto industry is globalized.