Ninth Circuit Lets Stand Robinson-Patman Ruling That May Expose Manufacturers to Liability for Trivial Pricing Differences

Oct 13, 2026

Categories:

Publications

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***LA International Corp v. Prestige Brands Holdings, Inc.*, Nos. 24-3776, 24-5009, 24-5227 (9th Cir. August 28, 2026)**

The U.S. Court of Appeals for the Ninth Circuit declined rehearing of a panel decision holding that plaintiffs need not prove "substantial" competitive injury to sustain a claim under Section 2(a) of the Robinson-Patman Act (RPA), 15 U.S.C. § 13(a). Previously, the panel affirmed a district court's judgment in favor of the wholesaler plaintiffs following a jury verdict finding that defendants Prestige Consumer Healthcare, Inc. and Medtech Products Inc. sold Clear Eyes Redness Relief Eye Drops at a lower price to the wholesalers' larger competitors. Circuit Judge Forrest, joined by Circuit Judge VanDyke, dissented from the denial of rehearing, warning that the panel decision erased the RPA's "substantiality" requirement and created a circuit split that exposed manufacturers to treble-damages liability "over the most inconsequential of decisions about what to charge for their products."

Background

Prestige Consumer Healthcare, Inc. manufactures Clear Eyes Redness Relief eye drops. Ten wholesale distributor plaintiffs alleged that Prestige gave club and warehouse customers a 5% discount, instant rebates, and promotional payments on their purchases of such drops while denying those benefits to the plaintiffs. The plaintiffs claimed their sales declined as club and warehouse sales increased.

A jury found Prestige liable as to nine of the 10 plaintiffs, awarding about $350,000 in Section 2(a) damages over nine years; treble damages, plus fees and costs, raised the total recovery above $4

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million. Five California plaintiffs also prevailed under the state's Unfair Practices Act.

The central issue was whether Section 2(a) requires proof that price discrimination *substantially* impaired the plaintiffs' ability to compete. Section 2(a) prohibits price discrimination where its effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition." The district court rejected Prestige's proposed instruction incorporating the substantiality requirement, reading the statute in the disjunctive: the word "substantially" modifies only the clause "to lessen competition or tend to create a monopoly," not the separate clause "to injure, destroy, or prevent competition." Accordingly, the jury was instructed only that the plaintiffs needed to show "a reasonable possibility of harm to competition." *LA Int'l Corp. v. Prestige Brands Holdings, Inc.*, 168 F.4th 608, 619 (9th Cir. 2026).

The Ninth Circuit affirmed, holding that an RPA plaintiff need show only that "some" sales or customers were displaced, not substantial displacement. The panel also vacated the fee award, holding that the district court improperly discounted prevailing market rates based on plaintiffs' counsel's small firm size.

Judge Forrest's Dissent

Judge Forrest argued that U.S. Supreme Court precedent requires a Section 2(a) distributor plaintiff to show its ability to compete was substantially impaired. Allowing liability from "some sales" displacement, she warned, invites suits over inconsequential pricing decisions.

Interpretation of Statutory Text

The dissent's core argument is grammatical. The panel read the disjunctive "or" as severing the modifier "substantially" from the second clause of Section 2(a). Judge Forrest countered that, as a matter of ordinary English, a modifier appearing before a series of phrases applies to each phrase in the series.

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The dissent also invoked legislative history: Congress built Section 2(a) atop Section 2 of the Clayton Act, which limited price-discrimination liability to situations where the effect "may be to substantially lessen competition or tend to create a monopoly." When Congress enacted Section 2(a) and added the "to injure, destroy, or prevent competition" language, it simultaneously moved the word "to" from before "substantially" to after it. This repositioning, Judge Forrest argued, signals congressional intent that "substantially" would modify both clauses, invoking the presumption that "a change in phraseology creates a presumption of a change in intent." *Crawford v. Burke*, 195 U.S. 176, 190 (1904).

Circuit Split

Judge Forrest charged the panel with creating an unacknowledged split with the Second Circuit's 2015 decision holding that a Section 2(a) claim can fail where the plaintiff's ability to compete was only trivially impaired. The Second Circuit warned that accepting minimal evidence of displaced sales creates "an irrebuttable presumption of competitive injury" that "introduces theoretical rigidity into an area of law that aims to respond to economic reality." The dissent catalogued extensive additional support for the substantiality requirement from the Third, Fifth, Seventh, Eighth, and D.C. Circuits, as well as leading antitrust treatises and decades of scholarly commentary — all reflecting what she called the "consensus view of the Robinson-Patman Act within the antitrust field."

The Panel's Analytical Errors and Policy Consequences

The dissent faulted the panel for misreading the text, relying on cases where substantiality was not disputed, and elevating legislative purpose over enacted language.

On policy, Judge Forrest said substantiality confines liability to discrimination that actually threatens competition, especially where disfavored buyers lack alternatives. Here, the plaintiffs sold competing eyedrop brands, and the jury awarded only about $350,000 over nine years — roughly $2,777.78 annually for each of

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five plaintiffs — which she characterizes as trivial.

She also warned that eliminating substantiality could hurt small distributors if larger rivals use Section 2(a) to attack discounts given to those small distributors and predicted the Ninth Circuit's decision could attract technical RPA claims seeking treble damages and fees.

Key Takeaways

- **Lower liability threshold in the Ninth Circuit.** Wholesaler RPA plaintiffs may now prevail in suits against manufacturers without proving substantial impairment to their sales; "some" lost sales or customers may suffice.
- **Treble damages and fees amplify exposure.** Even modest, arguably immaterial sales displacement can generate significant total exposure once statutory trebling and mandatory attorney-fee awards are applied.
- **Circuit split may invite Supreme Court review.** Judge Forrest's asserted split with a 2015 decision by the Second Circuit creates a possible path for Supreme Court review. On October 6, 2026, the Ninth Circuit stayed its mandate for 90 days to give Prestige time to file a petition for a writ of certiorari.
- **Review discount and promotional programs.** Companies should audit discounts, rebates, and promotional-payment arrangements offered to large retailers but not proportionally available to competing distributors, particularly for sales to distributors within the Ninth Circuit's jurisdiction.
- **Federal Trade Commission (FTC) enforcement may temper the practical impact of expanded private liability.** Although the Ninth Circuit's decision lowers the bar for private plaintiffs pursuing RPA claims against manufacturers, recent FTC actions suggest that federal enforcement of the statute may be receding. The FTC recently resolved its price-discrimination case against Southern Glazer's Wine and Spirits through a consent decree that imposes no monetary payment unless Southern Glazer's violates the order by offering

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significantly less favorable pricing to independent retailers. In addition, the FTC's dismissal of its price-discrimination action against a major food and beverage corporation last year may signal a broader shift away from aggressive RPA enforcement.

In light of the Ninth Circuit's lower threshold for RPA claims — and the potentially significant exposure created by treble damages and fees — manufacturers, distributors, and retailers should carefully evaluate their pricing, discount, rebate, and promotional programs. For further guidance on assessing risk and strengthening compliance practices, please contact the authors or any attorney with FBT Gibbons' Antitrust & Trade Regulation team.

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