

## Second Circuit Affirms *Drug Mart v. Am. Home Products* Decision, Further Limiting Robinson-Patman Act Liability

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On August 27th, the U.S. Court of Appeals for the Second Circuit affirmed the Eastern District of New York's decision in *Drug Mart Pharmacy Corp. v. Am. Home Products Corp.*, holding that the lower court was correct to grant summary judgment to pharmaceutical manufacturers accused by a group of small retail pharmacies of price discrimination in violation of the Robinson-Patman Act. In so doing, the Second Circuit held that substantial differences in price over time were insufficient to support the so-called *Morton Salt* inference of competitive injury when evidence of lost sales proved that only a "small" number of customers were lost to favored purchasers based on discriminatory prices. Despite evidence that plaintiffs lost on average 18 customers per year per location and 54 transactions per year, the court held such lost sales to be de minimis and insufficient to show the "substantial" competitive effect required by the Robinson-Patman Act. In effect, this ruling collapses the *Morton Salt* inference into the other traditional method of showing harm to competition through lost sales. This decision is the most significant post-*Volvo* decision holding that the *Morton Salt* inference of competitive injury was rebutted and would, if followed in other circuits, increase the bar for plaintiffs.

Please click [here](#) for a copy of the decision. For questions about how it may impact you or your business, please contact the attorneys below or any other member of the Antitrust/Competition practice with whom you work.

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