In the

Supreme Court of the United States

J. TRUETT PAYNE COMPANY, INC.	:	
Petitioner,	:	
v.	:	No. 79-1944
CHRYSLER MOTORS CORPORATION,	:	
Respondent.	:	

Washington, D.C.
January 21, 1981

Pages 1 through 49

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

J. TRUETT PAYNE COMPANY, INC.,

Petitioner,

v. No. 79-1944

CHRYSLER MOTORS CORPORATION,

Respondent.

Washington, D. C.

Wednesday, January 21, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:32 o'clock a.m.

APPEARANCES:

C. LEE REEVES, ESQ., 2222 Arlington Avenue, South, Birmingham, Alabama 35205; on behalf of the Petitioner.

J. ROSS FORMAN, III, ESQ., 1600 Bank for Savings Building, Birmingham, Alabama 35203; on behalf of the Respondent.

C O N T E N T S

ORAL ARGUMENT OF	PAGE
C. LEE REEVES, ESQ., on behalf of the Petitioner	3
J. ROSS FORMAN, III, ESQ., on behalf ov the Respondent	21
C. LEE REEVES, ESQ., on behalf of the Petitioner -- Rebuttal	46

- - -

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Payne v. Chrysler Motors.

Mr. Reeves, I think you may proceed whenever you ready.

ORAL ARGUMENT OF C. LEE REEVES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. REEVES: Mr. Chief Justice, and may it please the Court:

I represent Petitioner J. Truett Payne Company. We filed this secondary line Robinson-Patman Act price discrimination case, resulted in a verdict and judgment in favor of the petitioner. After a motion for judgment notwithstanding verdict was denied, in the 5th Circuit it was appealed and the 5th Circuit reversed on the grounds that the plaintiff, petitioner in this instance, must prove the specific lost sales or lost profits. And that is the only method of proving the fact of the injury. And a second and underlying factor in the reversal was that the petitioner failed to prove a reasonable estimate of the amount of the price discrimination or damage and that the actual amount of the discrimination was not sufficient by which the court could estimate the damage, or by which the jury could estimate the damage.

This Court is faced with the damage issues under the

Robinson-Patman Act and Section 4 of the Clayton Act, which bring into focus the 5th Circuit's requirement of a plaintiff proving specific lost profits or lost sales as the only means of recovering under the Robinson-Patman Act, and whether or not that requirement imposes an inflated standard of proof thereby effectively denying private attorney generals the ability to enforce the Act and recover for a wrong; and secondly, whether or not the amount of the price differential is sufficient evidence to give a reasonable and proper estimate of the amount of the damage.

The 5th Circuit in its opinion misconstrues not only the law but I believe in misconstruing the law underlying the problem was misconstruing Payne's position. It stated that Payne claimed that in a total vacuum price discrimination alone was sufficient to give rise to an injury under Section 4 of the Act, of the Clayton Act.

And I submit that that is the basis upon which the court totally ignored this Court's findings and holdings in Bruce's Juices case, in 1947, and the FTC v. Morton Salt case in 1948.

QUESTION: Well, do you concede that findings of discrimination under the Act, without any evidence sufficient to survive a motion for a directed verdict, dealing with causation and damage, would be insufficient to support a monetary award?

MR. REEVES: Mr. Justice Rehnquist, I would say that if price discrimination alone with absolutely no other evidence is the only evidence before the Court, then I would say that that's true; that price discrimination in a vacuum cannot be found to cause injury.

QUESTION: Well, what about price discrimination plus the fact that the two customers are competitive? Is that enough?

MR. REEVES: I think you have got to go farther. I would not mind that finding.

QUESTION: Well, I wouldn't think you would; yes.

MR. REEVES: But I would submit to Your Honor, Mr. Justice White, that in this case there was substantial corroborating evidence supporting an inference of injury resulting from substantial price discrimination taking place, occurring in a market where there was keen competition and in the face of tight profit margins, and where the substantial price discrimination could have been reflected in the retail sales price. Now, under those circumstances the 5th Circuit didn't address that, it just said, the only way that you could prove injury is to show proof of lost sales and lost profits, but under the circumstances in this case the jury, the fact finder, whether it be a jury or a court, could have inferred injury from the existence of those factors, plus the price discrimination itself.

So, in answer to your question, I think that this Court need not address whether or not price discrimination standing alone in a vacuum gives rise to injury or competitive injury. Because the facts of this case show a substantial supporting -- substantial corroborating evidence supporting not only the proof of actual competitive injury, not just a finding of a likelihood or probability of injury, but testimony that competition itself was harmed, and support an inference that would support the jury's finding which could give rise to an inference of damage to the disfavored purchaser.

QUESTION: Do you think that Mr. Payne's testimony itself without the testimony of Dr. Ignatin would have required the district court to submit the case to the jury on the issue of damages and required it to accept an award of damages that was within the range of his testimony?

MR. REEVES: Under the -- no other rebutting evidence whatsoever, yes, Mr. Justice Rehnquist, I do. Because that would then be a case where you would have price discrimination, not in a vacuum, but disregarding Mr. Payne's testimony, which the 5th Circuit discounts by saying that this is a conclusion of one of the injured parties, I still say that it is corroborating evidence which put together with the vast amount of other corroborating evidence would permit at least, at the very least, the jury to determine

the fact of whether or not there was damage. And the 5th Circuit says, it doesn't address these other --

QUESTION: Well, what if you have only these two questions on the damage issue, and they're put to Mr. Payne by Mr. Payne's counsel, "Mr. Payne, were you damaged by this price discrimination?" Answer: "Yes." Question: "How much?" Answer: "$75,000." End of direct; no cross. Is that submissible to the jury on the damage issue and sustainable?

MR. REEVES: I believe, under even the standards that this Court has established on proof of damage and proof of amount of damage, that you would have to go farther than just mere self-serving conclusions in the absence of any other supporting evidence.

However, if -- like in this case -- the amounts of the price discriminations which resulted -- Chrysler, in a rebate program -- let me just go into the background just a moment, if it please the court.

Rebate programs were formulated by Chrysler whereby the amount of money that was paid to the competing dealers in the Birmingham market was determined by a quota that was reached, or not reached, by the competing dealers. The quotas were different for each dealer, and the price rebate would thereby lower the price and cause the discrimination, if everybody were not rebated the same price on the same model automobile.

And in this case there was evidence of substantial amounts of discrimination occurring, sometimes several hundred dollars per automobile, in a period -- we're talking about 50 or more automobiles a month, and these rebate programs lasted two and three months in duration. So, when you put that, Mr. Justice Rehnquist, together with Mr. Payne's testimony, the actual fact of the price discrimination, the duration of the substantial nature of it, and the amounts of it, then I say that that would be an issue that should be submitted to the trier of fact, as to whether or not the trier of fact could infer damage without proof of specific lost sales or lost profits.

The testimony in this case showed that during a 3-1/2-year period from approximately December, 1970 -- November, 1973 -- May, 1974, when Payne went out of business, that the price discrimination totalled about $81,000. There were 16 rebate programs which caused the price discrimination, and of those 16 programs 13 caused damage to Payne, and that damaged -- that Payne was not favored, he was a disfavored dealer in those 13. Of those other three programs, one of the programs was a program that had a quota established by Chrysler by which the dealer had to reach that quota in order to get paid and Payne reached that one quota and did not get injured in that program. The other two programs where there was no discrimination were an across-the-board

percentage rebate to everybody on a per car basis, so there was no discrimination at all. So, out of those 16 programs over a 3-1/2-year period, Payne was injured, was a disfavored dealer in 13 of them.

There was testimony not only by Payne that his company lost business in the form of lost sales, but also that his company in order to maintain sales had to overallow on the used car tradein, and that was a factor in the testimony of Dr. Ignatin and in the testimony, as a matter of fact, of Chrysler's witnesses which analyzed the used car business of Payne, saying that, one, that the main problem with Payne was its used car business was losing money. So you've got the fact that Payne testified that he was overallowing in order to get business coupled with the corroborating testimony that there was a real problem in the used car business, coupled with a factor of substantial, sustained price discriminations over 3-1/2 years. There was testimony of an actual decline in the market, percentage of the market that Payne had from 1971 and 1972.

There was also testimony that the price discrimination adversely affected competition and injured competition because it had a two-pronged effect. The first thing was that it did not permit Payne to compete on an even and equal basis. He was at a trade disadvantage because his cars cost more than the other competing dealers.

Secondly, the price of a new car is determined by the discounting off of the list price, and everybody knows that, and the economist that analyzed the industry in Birmingham determined that because the competing dealers, the favored dealers, did not have to discount off list price quite as much as they otherwise would have since they were favored and Payne was not favored with the rebate, with the price discrimination, and because Payne could not discount off list price as much as he otherwise would have done because of the lack of the price rebate, that that raised the price, the ultimate retail price to the consumer in the market to a slight degree.

And the 5th Circuit in its opinion did not consider all of this evidence as giving rise at least to the submission to a jury as to whether or not injury in fact under the antitrust laws could be caused. The 5th Circuit said that the only way you can prove injury is to prove lost profits or lost sales.

This Court considered the same issue in a different context in Bruce's Juices v. American Can Company, and in that case, although the ultimate finding was much narrower, the Court was faced with an analysis exactly the same as in this case, because the plaintiff in that case had said that the price discrimination statute ought to void the contract involved in the transaction where there was price discrimination.

The court said, and the plaintiff also said, that the treble damage remedy under the Robinson-Patman Act was ineffective. This Court said, no, because all that there would be normal, or all that would be necessary in the absence of extraordinary circumstances would be to prove the substantial price differential, and that would be damage, and the amount of that damage would be that differential.

In that finding, and it's more than mere dictum -- I know that Chrysler characterized it as dictum -- but this court had to analyze how you would prove price discrimination, how you would prove damage under the Act that would be an effective remedy. And it recognized that, it recognized what Chrysler ignores, and what the 5th Circuit ignores, and that is that the defendant in a price discrimination case would always have the chance of rebutting the inference of injury. It's not an automatic injury rule, despite their characterization of it; it gives rise to an inference of injury.

The factfinder should be allowed to determine whether in fact there was injury or not. And if substantial evidence is introduced by the defendant showing that these "extraordinary circumstances" exist in the marketplace, then price discrimination, whether it be substantial or sustained, is not going to give rise to the damage. But it is a jury issue.

QUESTION: Do you agree with all of the Bruce's

Juices language on page 746, 330 U.S., where the Court says that the plaintiff here is not complaining of the high price of the object sold, but it's complaining that he didn't get enough of what he wanted, in effect? In other words, that to analogize to your case in my mind at any rate you're complaining not of the discount and rebates as such but that other people got more of them than your client?

MR. REEVES: Only in the context, Mr. Justice Rehnquist, of the competition in the market, because that in effect reduced the price. There was testimony by both the expert witnesses that that reduced the price of automobiles and that the automobiles, originally, each model was priced the same. Therefore, the product that was being sold in the market was costed, cost more to Payne than it did to the other dealers who were competing in that very same time frame under that very same program for the sale to the very same customers in that market, and that put Payne at a total disadvantage in sales.

Now, there are several things that can happen when that occurs. The disfavored purchaser could keep his same price and eat the higher cost, and reduce the profit. Or he could have passed the price increase, the higher cost, along to the customer, in which there's an expectation of lost sales.

But this Court has said in Hanover Shoe case

and in the Illinois Brick case that it is insurmountable almost to predict the effect of the higher cost of a product upon, or measure the effect a higher cost will have on the sales of a company. And therefore, to require proof of an actual loss in sales volume traceable directly to the price discrimination as the only means of proving the fact of damage, flies in the face of what this Court has said is the policy behind enforcing the antitrust laws.

QUESTION: In Bruce's Juices, on page 746 the Court is discussing the refusal to outlaw these discounts flatly, and it says, at the top of the page, "They become illegal only under certain conditions and when they are illegal it is as much a violation to accept or receive as to allow them. Bruce, in one of the years included in its balance of account, purchased more than a half-million dollars of cans on which it received precisely the kind and amount of discount that now it asserts to be illegal."

Isn't that to a certain extent true of your client?

MR. REEVES: To a certain extent it's true that Chrysler's rebates lessened the price, the ultimate price of the car to my client. But it didn't, it put our client at a disadvantage, because our client had a higher cost on those very same cars than the favored dealers. I think that what you may be getting at is whether or not the fact that there was a benefit to my client, does that countervail away against

the fact that there was a larger benefit to his competitor? And I submit that the answer is an unqualified no; it doesn't matter that Payne received a benefit, because ultimately the other people, the competing dealers, received a less-priced automobile and were able to take away either sales either profits, or either use more customer-attracting services and get the business and let Payne not withstand the difficult times in the market that eventually caused its demise.

QUESTION: Well, counsel, suppose before a discrimination takes place, two competitors are each selling 500 cars a year and then the manufacturer lowers the price to one of the dealers but not to the other. Afterwards, they are both selling 500 cars a year, and the only thing that's happened is that the disfavored dealer is not making the same profit as his competitor, and he has lost profits, but he hasn't lost any sales. He's lost profits. Now is that enough to give rise to injury?

MR. REEVES: Yes, Mr. Justice White, it is.

QUESTION: Well, is that an injury to competition?

MR. REEVES: It's an injury to competition; yes, it is.

QUESTION: Did the Court of Appeals here assume an injury to competition but then just say, the injury to competition, there's no proof that it caused any injury to

your client?

MR. REEVES: The Court of Appeals, if I read their opinion correctly, stated that the proof of price discrimination by itself does not prove competitive injury, nor does it prove --

QUESTION: It began its opinion by saying that it didn't need to decide whether or not there had been a violation of the Robinson-Patman Act.

MR. REEVES: That's correct.

QUESTION: And if there had been a violation of it -- but I guess it proceeded to assume that there had been one, and if there had been one, then there was an injury to competition.

MR. REEVES: It did not --

QUESTION: So it necessarily said that even if there was a violation there was not causation.

MR. REEVES: That's -- right. They never addressed whether or not under the elements of Section 2(a) of the Act were met. But it simply went off on the fact that no injury, according to it, was proved, because no lost profits and no lost sales were shown.

QUESTION: Well, if -- why didn't you just take the -- if you really are prepared to support your answer to my question of a while ago, I suppose you would say that whether your client lost sales in this case or not, he paid

more for his cars, and therefore he lost some profits.

MR. REEVES: Absolutely.

QUESTION: That's all you have to say.

MR. REEVES: I think that the 5th Circuit recognized that.

QUESTION: Well, but they didn't. They said that --

MR. REEVES: Well, they distinguished paying more for cars and lost profits. They distinguished that by saying under the enterprise doctrine that just means that my client was not as well off as the more favored dealers. It did not -- this is their rationale, this is the 5th Circuit rationale -- that it didn't damage Payne because he had to pay a higher price, it merely made the other competitors in a better position. Well, that's turning the whole theory of price discrimination on its head, as it were, because the evil that price discrimination is designed to remedy is the difference, the lower cost, to the favored dealer.

It doesn't matter whether you say it's an overcharge or an undercharge, it's still an injury in the form of eventually --

QUESTION: Well, my example to you, though, the 500-car example, the disfavored dealer is making the same profit, after the discrimination. He just isn't making the profit his competitor is. Can you say he lost profits?

MR. REEVES: Yes, you can, Mr. Justice White.

That ignores the economic reality of the marketplace in that had the disfavored dealer received a lower cost, it might have and could have theoretically in a competitive market reduced its sales price, retail sales price, maximized its volume, keeping the same profit margin, and thereby, since it had more volume and more profit -- more volume times the same profit margin, it lost profits. And that is the whole theory of our economic system.

QUESTION: The fact is, though, that after the discrimination, in my example, the favored dealer didn't pick up any sales.

MR. REEVES: Well, the favored dealer may not have wanted to pick up sales. It could have kept its same price. I believe that's what your hypothetical envisioned. And therefore it could have done a lot of things. It could have cut back on its advertising, it could have pocketed the additional profit, it could have done a lot of things. But the end result is that because the favored dealer has a lower cost the economic opportunities, the position in the market of the disfavored purchaser is injured.

That's what this Court said in Morton Salt. And it used the words, "There is an obvious inference of damage" to a merchant that pays a higher price for the same product than its competing merchants and the competing seller.

QUESTION: Mr. Reeves, is there any evidence in

this record of injury to competition other than the injury to your client?

MR. REEVES: Yes, Mr. Justice Stevens, I believe I mentioned just briefly that the economist testified that the price discrimination resulted in a two-pronged effect. Number one, it made my client less able to compete, less able to have as much profit. Secondly, it raised slightly the retail sales price to the ultimate consumer in the market. Therefore you have two types of injuries to competition. Certainly competition is supposed to envision the most efficient use of resources to get the lowest price to the ultimate consumer.

QUESTION: He testified that the market price as a whole was raised by reason of the discrimination?

MR. REEVES: As, in his view, that was the effect of that type of rebate program.

QUESTION: I see.

QUESTION: Well, and the very fact that your client went out of business resulting in three competitors for selling Chrysler-Plymouths instead of four would be an injury to competition, wouldn't it?

MR. REEVES: That's another piece of corroborating evidence that supports --

QUESTION: But that's only corroborating if you assume that he went out of business because of the price

discrimination.

QUESTION: That's the allegation that the Court of Appeals disagreed with.

MR. REEVES: That's true, but the Court of Appeals again took the position, Mr. Justice Stevens, that despite the expert testimony by Dr. Ignatin that the price discrimination -- if there had not been any price discrimination, Payne would not have gone out of business. They said that's just not supportable.

Why? I don't know. It may have been that in a footnote to the opinion in the 5th Circuit they said that Dr. Ignatin prefaced his testimony about that by saying that it was speculation.

Well, that is an inaccurate statement and I mentioned that in my brief on the merits, and the 5th Circuit just made an error, because I cited to the record where he answered a question, that it's speculative. He answered in that fashion, to a question from counsel for Chrysler that, is there any way to formulate a rebate program that does not discriminate? He said, well, it's speculative, but I can tell you this, had there not been any discrimination, absent that, Payne would not have gone out of business.

And that was the testimony, and how that can be discounted when an expert economist -- that's the only way we can try to prove injury is to get someone other than conclusory

statements which the 5th Circuit has said is not permissible.

QUESTION: Is this much true, that if the Court of Appeals is correct in believing there was a violation, or at least assuming there was a violation, it must have assumed that at least some of the expert's testimony was truthful, at least the part about raising prices? If it disregarded all the testimony about hurting your client, because injury to competition is an ingredient of a statutory violation, so they apparently believed part of what -- were willing to assume that part of his testimony was credible and part may not have been.

MR. REEVES: I think that's a good inference, if you will, from the reading of the 5th Circuit's opinion but I would like to say also that the statutory requirements under Section 2(a) are even less than showing injury to competition. All you need to show is a probability of injury to competition.

QUESTION: That may be so to show a violation.

MR. REEVES: To show a violation --

QUESTION: But you don't -- doesn't a treble-damage claimant have to prove an actual injury to competition?

MR. REEVES: Not the competition, Mr. Justice White. I think he could prove injury to the business, the disfavored purchaser, because he is -- competition.

QUESTION: That is, you say even if it were found

that there actually was not, or even if -- you could say, even though there's no proof of actual injury to competition, the plaintiff could recover?

MR. REEVES: I don't think so. I don't think, in your way of saying it, because proof of injury to the business is proof of injury to competition.

MR. CHIEF JUSTICE BURGER: We will resume there at one o'clock, counsel.

(Recess)

MR. CHIEF JUSTICE BURGER: Mr. Forman, you may proceed any time you are ready.

ORAL ARGUMENT OF J. ROSS FORMAN, III, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. FORMAN: Mr. Chief Justice, and may it please the Court:

The issue in this case is what must a private plaintiff prove in order to be entitled to recover treble damages for an alleged violation of Section 2(a) of the Robinson-Patman Act?

The 5th Circuit in its holding in applying the teachings of this Court in the Brunswick decision held that more than a mere threat of anti-competitive injury had to be shown to entitle recovery of treble damages. It held that the plaintiff had to go further and show that it had in fact suffered antitrust injury as a result in this case of

the sales incentive programs, and provide some useful measure of the amount of such injury.

The court analyzed what the Robinson-Patman Act was designed, or the injury it was designed to prevent, and held that in order to prove a case of damages the petitioner, or the plaintiff, had to show that competitive use was made of a price advantage by a favored competitor, and that as a result of this competitive use competition was injured by profits being drawn, or sales being drawn from the injured or from --

QUESTION: Well, don't you think we have to judge this case on the assumption there was a violation of the Act?

MR. FORMAN: I think the 5th Circuit said they had not decided that issue. I think what they were saying was that, well, he really had to go further.

QUESTION: Yes; even if there was. So there wasn't causation?

MR. FORMAN: There was not causation.

QUESTION: However, there was an injury.

MR. FORMAN: I think that the significance is that to show the substantive violation of 2(a) you only, at least under Morton Salt and that FTC action, you only have to show a reasonable possibility that injury might result from a price discrimination. The court said at that showing, even if such a showing had been made in this case, that that was

not significant or substantial enough to allow recovery of injury. You had to go forward and show that the injury to competition had in fact occurred and that the plaintiff was injured because of this injury.

QUESTION: Well, what about in my example of the two dealers with each selling 500 cars? Suppose I vary that. Each of them is selling 500 cars before a discrimination takes place. And then the manufacturer raises the price to the disfavored dealer, keeps the price the same to the favored dealer, and afterwards they both sell exactly the same number of cars; the only thing is, the disfavored dealer isn't making the same unit profit, net profit, that he was before. Is that proof of injury to his business?

MR. FORMAN: Not necessarily, if it didn't affect the competition, it if was no -- it seems to me there may not have been competition in that hypothetical, but I say, if you --

QUESTION: Well, they were both competing with one another. I certainly will put that in, in it. But the only thing that happens, they both sell the same number of cars afterwards, but the disfavored dealer isn't making -- he's just lost profits, that's all.

MR. FORMAN: Well, I would think that under the structure of the Robinson-Patman Act, there probably would not be a violation. I think the Act is not designed to --

QUESTION: There would not be injury, you think, or what -- ?

MR. FORMAN: I think it would not be under 2(a) because the Act is not designed, I think, to insure that everybody is going to pay the same unit price for what they purchase. I think the Act is only there to remedy a situation where the competition between the favored and the disfavored dealer is disrupted because of a payment of a lower price. But some competitive use has to be made by the favored dealer.

QUESTION: But if his -- the lowering of his profits certainly makes him less effective, threatens his effectiveness as a competitor?

MR. FORMAN: It may threaten his effectivness, but until something actually happens I don't believe he has a cause of action. Plus, I think in this case he would have to go ahead and prove that it did threaten his ability to compete. I know Mr. Reeves used the example that, well, if he's paying more, it may have inhibited his ability because he couldn't lower his price and thereby draw more sales, and so forth. That's purely hypothetical. There's no proof in this case that Mr. Payne would have lowered his price, there's no proof of what would have happened if he had lowered the price of his cars, whether he would have attracted new sales. There's no evidence as to what profit he may have realized

if he had done that. There's simply no proof in this case that he did suffer any antitrust injury.

QUESTION: Therefore, in answer to my brother White's question, your answer would be that in his hypothetical case there wouldn't be a violation of the Robinson-Patman Act, because there would not be injury to competition, since each dealer continued to sell the same number of cars as he had in the past.

MR. FORMAN: I think that's correct, sir.

QUESTION: Therefore, you wouldn't get to the next step of whether or not the plaintiff had shown injury?

MR. FORMAN: To himself.

QUESTION: Because there wouldn't be a violation of the Act.

MR. FORMAN: Correct.

QUESTION: Let me ask you, Mr. Forman, supposing that the two dealers handled both the Chrysler cars and also General Motors cars, and General Motors and Chrysler agreed to charge a higher price to one than the other. And they did that, and they nevertheless continued to sell 500 cars apiece. Would there be any violation of law?

MR. FORMAN: I think then you've got a price-fixing conspiracy.

QUESTION: You've got a violation of the Sherman Act. Would you have any injury to either one of them?

MR. FORMAN: Well, I think you would because that case is an overcharge case. I think it's important to keep in mind that price discrimination --

QUESTION: What assurance -- whether you call it an overcharge or price discrimination, how does it differ in terms of its impact on the person who makes less money than if the illegality had not been present?

MR. FORMAN: I think the difference is in the design of the two acts. In the overcharge cases it's always assumed that the person is paying more than the competitive price. He's paying more than he would have if there had been no conspiracy. If there was no conspiracy he would have paid less. In a price discrimination case -- and this is a good example, in this case, when Mr. Payne and the other dealers in the Birmingham area purchased their cars, they were paying the same price, there'd be no violation or alleged violation of the Robinson-Patman Act. All right, only when a car is later sold under one of these sales incentive programs can there even be any arguable price discrimination. Now, if there had been no incentive programs the fellow would not have been paying a lower price, Mr. Payne would not have been paying a lower price for his cars.

QUESTION: Well, how can you say that? If there had been no incentive programs, maybe we would just would have had a uniform price reduction to both. Instead of charging

initially a higher price followed by rebate, you might start out with a lower net price in the first instance to avoid the violation.

MR. FORMAN: So if Chrysler had lowered the --

QUESTION: I suppose instead of initially charging $5,000 and later rebating $500, you might initially just charge $4,500. That would be -- and if you did that, instead of having a rebate program, I suppose that the disfavored purchaser would have been better off.

MR. FORMAN: Well, he'd have been a little bit better off, but I think the key in the Section 2(a) case is how much worse off you are because somebody else received a lower price than you did. I think if the Act was structured purely to look at the benefits to one dealer, it probably would have been worded differently. You probably would not have had the injury to competition.

QUESTION: Would the case be different if instead of a rebate you originally had a list price of $4,500 and then without announcing it publicly they wrote a letter to Payne that said that we've decided to charge you $5,000 a car from now on, and they just raised the price to Payne without -- Payne never did know what his competitors were getting, anything like that? Secretly, he had to pay a higher price. Would he have a cause of action? He still sold the same amount of cars, just made less money on each one.

MR. FORMAN: Just made less money out of it. I would think you have not really shown any injury to competition because he's paying more.

QUESTION: But if they raised the price by agreeing with their competitor to do it, why then, of course he would have an injury?

QUESTION: And in the first case there would not be a violation of the basic substantive statute. In the second case there would be, because you'd have a conspiracy to fix prices, which is a violation of the Sherman Act. In each case there might be proof of injury.

MR. FORMAN: Well, I think in the Sherman Act case you don't have to show any competition.

QUESTION: First of all, you have to show a violation of the law.

MR. FORMAN: Is maybe the answer, you don't have to show that Mr. Payne was competing with anybody. If they raised the price by fixing it, he has a cause of action there, but by the Robinson-Patman Act you've got to have two sales. You've got to have two sales to compare, and somebody has to have received a lower price and made some competitive use of that lower price.

QUESTION: Well, I understand the argument how one may be a violation of law and the other is not. I'm just -- because this case turns on whether there is an injury to

the plaintiff. I'm just questioning in terms of injury to the plaintiff, is there really a difference, a meaningful difference between the two cases?

MR. FORMAN: I think there is in terms of antitrust injury, which is the injury that is defined in Brunswick that flows from the anticompetitive effects of the violation. And I think you could perhaps look at the reasoning behind the enactment of Robinson-Patman, and what was Congress trying to do? And I think the answer is, they were trying to prevent an underselling. What they were concerned about was the growth of the chain stores at the expense of the independent retailer. They were concerned about their ability to undersell the independent retailer and draw sales from the independent retailer or draw profits if the fellow tried to compete, match that competition.

Now, if they designed the Robinson-Patman Act, I think, to remedy that situation where profits were being drawn away from the disfavored competitor. And I think that has to be kept in mind when reading the statute. They were not concerned necessarily with fixing a uniform price. I think that's important also. Congress only wanted to remedy a situation where there had been or possibly would be competitive injury. And under Brunswick you had to go forward and prove that there was in fact competitive injury to be entitled to recover. Plaintiff's reliance on Morton Salt does not help him

in this case, because that was not a damage case. Section 4 of the Act was not involved in any manner. All the Court held there was there was sufficient evidence to allow the FTC to infer that there was a reasonable probability that there might be injury to competition.

It is true that the Morton Salt case showed, or said, you didn't necessarily have to show injury to competition or that competitive use was actually made of the price advantage. However, that case is not applicable because Brunswick has held that you've got to go further than that.

QUESTION: But it is applicable to suggest that my hypothetical, or maybe Justice White's hypothetical, that sales to two different prices, where there is no transfer of business back and forth, would violate the Robinson-Patman Act in a proceeding brought by the Commission?

MR. FORMAN: It would bar him proceeding. But there you're not concerned with treble damages. I would suggest to the Court there's an awful difference between an injunctive action to prevent future violations, or even future injury, than in a treble-damage case where you actually are recovering substantial amounts of damage. And to do that you've got to prove that you were in fact damaged. I think that's an important distinction there.

Petitioner has stated in his argument that there was substantial proof, corroborating proof of antitrust injury

in this case. He talked about underselling, proof of underselling by the other competitors, he talked about lost sales, he talked about forcing business -- Mr. Payne was forcing business, he talked about having to overallow on used cars. The only evidence in this record to substantiate those accusations are Mr. Payne's bare allegations to that effect.

QUESTION: Well, you can say that they're just bare allegations but he did say he lost sales.

MR. FORMAN: And I would suggest that he had to go forward and show that he lost sales. To prove you lost sales is something that's done every day in antitrust.

QUESTION: Well, he says, I own the business, I know how many cars I've been selling lately, and I know that I haven't been able to sell as many cars as I used to.

MR. FORMAN: I think he'd have a number, then, to give you, but he's submitted no number here of the number of automobiles --

QUESTION: Well, if he had just said, by the way, and what I mean is, I lost 20 sales. That would be enough?

MR. FORMAN: Well, I think he should have something --

QUESTION: Or does he -- should he have to call an accountant and get out his records, that sort of thing?

MR. FORMAN: I would submit that you probably do.

You should have some evidence there to corroborate what he says.

QUESTION: Well, why do you need corroboration? You need corroboration in some rare kinds of cases but --

MR. FORMAN: Because if you don't, I don't think you have any protection for the defendant.

QUESTION: Well, the court could say, I just don't believe you. But are you going to say, well, we believe you, but you need some corroboration, or what?

MR. FORMAN: Pardon me?

QUESTION: Well, what if the court believes him, that he did lose sales? Could they give judgment?

MR. FORMAN: I don't see how. I don't know in this case, of what that damage was; unless he shows some lost sales or some measure of it.

QUESTION: Well, he says, I lost sales in the amount of $80,000, out of which I could have have made $80,000 in profit. Is that enough?

MR. FORMAN: He said, I would have made $80,000 in profit? I would hope he could substantiate that by some records. I think that's the only protection a defendant has. Otherwise the plaintiff could say anything.

QUESTION: Well, if the judge were to say to him, I believe you all right, but you have to prove it with some papers? Is that what you suggest?

MR. FORMAN: I think that's right. I think you have to prove it with some evidence, some statistical evidence.

QUESTION: Well, why isn't his testimony evidence?

MR. FORMAN: It isn't evidence because there is not enough there to protect a defendant. He is free to say anything he wants to say, and unless -- where you're attempting to recover treble damages, you ought to have to really prove what in effect you're saying.

QUESTION: Well, you're not saying it's not evidence, you're saying it's insufficient evidence?

MR. FORMAN: It's insufficient evidence to substantiate the verdict.

QUESTION: Even though you may believe him?

MR. FORMAN: I think he has to have some substance behind it. I think if he's got some way to correlate what he says --

QUESTION: You're just saying that it's conclusory?

MR. FORMAN: Correct. He's saying nothing other than what he says in his complaint, really, is a complaint enough to establish a case?

QUESTION: Conclusory is something that one usually hears applied to pleadings rather than evidence. Suppose in a personal injury action, a plaintiff gets on the stand and

says, I paid out of pocket $2,500 in medical bills, and he's not cross-examined about it and it's a bench trial and the judge makes a finding of fact, the plaintiff paid out of pocket $2,500 in medical bills. The plaintiff has never produced a single bill.

MR. FORMAN: I think you may have the best evidence rule there would be applicable, to show the bills rather than showing his pure testimony of what he claims he paid.

QUESTION: Do you mean the judge couldn't rule with it?

MR. FORMAN: Provided you didn't object on best evidence, or demanding best evidence. I think there the bills would be the best evidence.

QUESTION: Well, suppose he didn't object? Could the judge give him damages? Of course he could.

MR. FORMAN: He might in that case. Yes, Your Honor.

QUESTION: What records, if any, did Mr. Payne produce?

MR. FORMAN: He didn't produce any records other than his financial statements which were submitted to Chrysler.

QUESTION: Did you demand any records, any of the records you are now talking about? Did you try the case?

MR. FORMAN: Parts of it, Your Honor.

QUESTION: Well, did counsel for Chrysler demand --

MR. FORMAN: I think we demanded all the documents that he had.

QUESTION: And how did the court rule on that?

MR. FORMAN: At trial we didn't. It turned out we didn't get them all, but --

QUESTION: Did the trial court sustain your request that all documents be produced?

MR. FORMAN: Well, it was not -- no, he overruled us, Your Honor. He allowed that document into evidence which is one of our, another grounds on appeal in this case. But it says to me basically that if Mr. Payne can merely say without even giving any figures of any kind that he was undersold by his competitors, that he lost sales, that he forced business, that he overallowed on used cars, well, you can just read in his complaint, and that would substantiate a finding. In fact, I think in this case it's clear that he didn't overallow, that he didn't force business, and he didn't lose sales. And I think that's borne out by the statistical evidence that I have on page 8 of my brief -- page 10; I'm sorry, a chart that compares the sales of the various dealers, compares the gross profits of the various dealers. There Mr. Payne was realizing the highest average gross profit of any of the dealers, of the four dealers, with whom he alleged he competed.

That certainly is not evidence of him having to force business, plus it appears that his --

QUESTION: Do those figures relate to the models on which he claimed there was a price discrimination?

MR. FORMAN: Well, he claimed in his brief that, every sale, there was a discrimination.

QUESTION: I understand him to say there was a price discrimination on some at some periods of time, and some models, but not constantly?

MR. FORMAN: It did vary among styles.

QUESTION: And I thought he said some of the rebate programs were lawful and some were unlawful?

MR. FORMAN: Well, he determined that on about whether he was the most favored dealer, is what it boils down to. In fact, I think that's an important issue or point in this case, is that under these programs there was no one favored dealer. The programs lasted only some three months at a time, and who was the favored dealer varied between all four of them, including Mr. Payne. And I think the -- if I can make reference to the joint appendix, I would refer the Court to page 271 which shows the average difference per unit over a three-year period that was realized by the incentive payments. The difference worked out to be only $11 among the most favored, so-called most-favored dealer, which was Central, and the least-favored, who was Roebuck,

$51 per car. I think that shows the inherent fairness of these programs, how everything did tend to equalize out and that there would not have been any competitive injury.

QUESTION: Of course, that goes to the question of violation, doesn't it?

MR. FORMAN: Well, I think he also has to show that there was in fact actual competitive injury, and that --

QUESTION: He did go out of business, didn't he?

MR. FORMAN: Well, he claimed -- the violation had to occur prior to that time.

QUESTION: That's a fact that's consistent, at least, with his testimony, isn't it?

MR. FORMAN: Right, but the violation had to occur prior to him going out of business.

QUESTION: Right, but the fact that he did not survive in the competitive market is consistent with his theory that he suffered some harm that caused him some --

MR. FORMAN: Well, I think there's also evidence in the case that the reason that -- and I think this average gross profit on the retail sales demonstrates that his new car sales was not hurting. He was realizing the best profit of any of the dealers on the new car sales, and that's the area where the sales incentive programs would have affected him. What his problem was as demonstrated by the statistical evidence in here, is in his used car operation.

QUESTION: I still am not sure you answered my question, whether those profit margins on the new car sales on page 10 of your brief related to the models and the periods of time when the price discrimination claimed to be illegal was in effect? Or do they cover his sales -- ?

MR. FORMAN: They cover his sales for the entire year, but as counsel for the plaintiff indicated, I think, on footnote 3 of his brief, he says, "it is obvious that there were rebates paid on almost every single car sold at retail by the various dealers."

I submit in that instance that the averaging is a fair way to look at it. In fact, he tried to make use of averaging in his brief when he tried to show a tight profit margin. He averaged the profits over an entire year. And if he should have broken that down by the sales incentive programs, if we should have, he should have also.

QUESTION: There is some discussion in the briefs about the used car business and how much they made on over-allowances, or something like that, on each used car transaction. Is there record evidence supporting his arguments on that?

MR. FORMAN: It shows that his used cars was low and that's on page 269. However, Mr. Payne himself -- there was no evidence in this case to relate that low used car profit to these sales incentive programs. Mr. Payne indicated

that the reason for that low profit was that he was forced to wholesale his used cars. And that was the reason for low profit. And I think that Mr. Payne's testimony there certainly ought to make that point clear, or certainly require him to come forward and show some actual transaction where he actually did overallow on a used car, if in fact he ever did. That's really evidence that Chrysler can't produce, whether he overallowed. That's something that's in his peculiar knowledge, that's something that he has to --

QUESTION: If it's within his peculiar knowledge and he gives testimony that's based on his peculiar knowledge, would that be sufficient to support a conclusion on the testimony?

MR. FORMAN: I would think he'd have to come forward with some documents to show, and there shouldn't be --

QUESTION: If there's documents, then it's just not within his peculiar knowledge. Then you're saying it's available?

MR. FORMAN: Well, if it's within the company, it certainly is, within his accountant -- they certainly could have shown a transaction and said, look, this car, we overvalued it, at this price. And in fact there's no way you can say from these used car profits, or things of this weight, to show an overallowance. You would have had to have some testimony as to what value they entered the used cars on their books at, whether it was at the inflated value, or

whether it was at the retail value. There was no evidence to that effect, no showing to that effect.

And I might go on to show, even if this Court should feel that there was some proof of an antitrust injury, that the plaintiff still is not entitled to recover, because there is no evidence as to the amount of that injury. The plaintiff's case rests entirely on this Court allowing price discrimination to be the proper measure of damage.

QUESTION: Was there a verdict in this case?

MR. FORMAN: There was a verdict, Your Honor.

QUESTION: And did you object to any of the instructions?

MR. FORMAN: Yes, Your Honor, we did object to some instructions.

QUESTION: Of course, you don't argue now that there are any instructional problems?

MR. FORMAN: Well, the 5th Circuit didn't reach that issue. There were several issues raised before the 5th Circuit which were not decided by the Court because they decided on failure to prove antitrust injury.

QUESTION: I take it that the jury must have decided not only that there was proof of injury but they knew how much it was?

MR. FORMAN: Well, the only evidence in this case that was submitted, which is evident from a review of the

record, is this mathematical calculation of what they considered was the price discrimination.

QUESTION: Well, you think the jury departed from its instructions?

MR. FORMAN: They would have had to, Your Honor, because there was no other evidence.

QUESTION: But you don't complain about the instructions about causation and the fact of injury and the amount? The instructions are all right in that regard?

MR. FORMAN: We did object to some instructions, yes, Your Honor.

QUESTION: On those particular ones or not?

MR. FORMAN: I don't think we did --

QUESTION: In any event, the jury did not --

MR. FORMAN: We did not on the math because he said that the price discrimination is not a proper measure.

QUESTION: But the jury certainly thought there was some evidence of -- I know you say there wasn't, but --

MR. FORMAN: That's our point, here, that there wasn't any. The only thing they could have based it on was the price discrimination, that's what the plaintiff argued in his closing argument.

QUESTION: Do you say that the jury's rendition of a money judgment for you is inconsistent with the doctrines of RKO v. Bigelow, and Story Parchment where you're talking

about business damages and their inherent difficulty of proof?

MR. FORMAN: Yes, Your Honor, but those -- they allow some reasonable means of reflecting the antitrust injury. Here there is no -- they didn't reflect any lost sales or the amount of any overallowance or the amount of profits that were drawn from him in forcing business. He merely said, here's a mathematical calculation, this is the price discrimination, and we should be entitled to it. In fact, I think the --

QUESTION: Well, he went on, then. You agree he went on and said, and said that he lost sales.

MR. FORMAN: That's right, but he offered no showing of what the profit would have been in a normal everyday --

QUESTION: Yes, I know, but he testified as to that, didn't he?

MR. FORMAN: He stated purely --

QUESTION: Didn't he testify in court on that?

MR. FORMAN: He said we lost --

QUESTION: And the jury must have believed him. Or they could have.

MR. FORMAN: But there was no measure of what the profits would have been from losing those lost sales. There was no measure whatsoever, there was no number of lost sales.

There is no way they could have determined the amount of the damage. In fact, I think the very way they computed the price discrimination in this case shows that it couldn't reflect any antitrust injury. What they did was simply divide the number of cars they sold during a program period into the amount of money that was received by the dealer. When Mr. Payne didn't receive the highest per-unit rebate he took the difference between what the highest dealer received and what he received, and multiplied that by the number of cars that he was selling. In that instance, he stated he was injured more by the more cars he sold, not by the less cars. I say that no way that type evidence is reflective of any antitrust injury. In fact, I would submit to the Court that if you were to overrule or reverse the 5th Circuit, you would in fact be adopting the automatic damage rule which I thought the plaintiff was advocating; at least I thought he was in his initial brief.

It would be absolutely no burden on the plaintiff to prove a Robinson-Patman Act. All he'd have to do is to by some mathematical calculation to show a price difference, come in and say, these are my competitors. They allowed, because of this price difference, they could undersell me, I lost business, I overallowed on used cars. Here is the difference. Award that to me.

QUESTION: Didn't you -- I suppose you asked the

judge not to take the case to the jury, give the case to the jury at all?

MR. FORMAN: Yes, Your Honor.

QUESTION: And after verdict you asked for judgment notwithstanding verdict?

MR. FORMAN: Yes, Your Honor.

QUESTION: And the judge disagreed with you?

MR. FORMAN: That's correct, Your Honor.

QUESTION: So he didn't buy your argument of no evidence?

MR. FORMAN: He did not, Your Honor, because --

QUESTION: And he didn't buy your argument there wasn't evidence about amount?

MR. FORMAN: No, Your Honor, he didn't, but there wasn't any, that's the point. I think review of the record, he was in error. And that's what the 5th Circuit found after reviewing his transcript. They found no supporting evidence to support the --

QUESTION: I know, but they had to do away with his own testimony as sufficient evidence to prove anything.

MR. FORMAN: Correct. For they had to say that was not sufficient evidence --

QUESTION: What if they were wrong on that?

MR. FORMAN: I would hope, without arguing -- this is evidence that they could indeed -- he should have been

able to produce them. This plaintiff is asking for treble damages.

QUESTION: Well, that may be so, but what if we disagree with you on that? What if we say, well, that was evidence, and if the -- and -- it was entitled to be credited by the judge or the jury. Then what? Then what?

MR. FORMAN: Well, then, you will come to the measure of, did he --

QUESTION: I know you think we'd be wrong, but what should we do if we are so grossly erroneous?

MR. FORMAN: Well, then I think you can tell them that he provide a reasonable measure of the amount of his injury. He didn't. He relied purely on the amount of price discrimination, which Congress -- they have considered that matter, and they simply rejected it when they adopted the Robinson-Patman Act, as set forth in our brief in some detail. And I think, when you're dealing with a statutory offense like this, this Court must consider what Congress did, and if Congress rejected that remedy, this Court should not come forward and provide such a remedy.

QUESTION: The trial judge rejected that remedy too, didn't he, in his instructions?

MR. FORMAN: He did, Your Honor, and --

QUESTION: He gave the instruction on that precise point that you wanted?

MR. FORMAN: That's correct, Your Honor. He said it was not the measure of damage, but the -- as the 5th Circuit said, there wasn't any other evidence in the case. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Reeves.

ORAL ARGUMENT OF C. LEE REEVES, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

QUESTION: Mr. Reeves, may I ask you a question at the outset? In the summary of your argument, the first sentence states, "The plaintiff in a private price discrimination action must only prove sufficient price discrimination from which a jury can infer injury to competition."

And in the Court of Appeals, the opinion, as I read it, proceeded on the theory that you were arguing and relying on the automatic damage concept. Have you changed your position on that?

MR. REEVES: I don't think so, Mr. Justice Powell. We contend that injury to a business is in fact injury to competition. If you have less competitors, if one is put out of the market, if one is less able to compete, or for whatever reason, then that in itself weakens competition and is injury to competition as well under Section 2(a) of the Act, as well as the injury under Section 4 of the Clayton Act.

QUESTION: So that if you prove discrimination, you're entitled to damages?

MR. REEVES: If you prove discrimination that is sufficient to show or allow a jury to reach the inference of injury, yes, Mr. Justice Rehnquist. Not just -- for instance, this is not a per se, this is not an automatic, it's got to be sufficient discrimination to permit the reasonable inference. That's exactly what this Court was holding in Morton Salt.

QUESTION: Well, are you saying that even if this owner hadn't got on the stand and said he lost sales or profits, that you should win?

MR. REEVES: I am. I'm saying it both ways. There is adequate evidence, statistical evidence of tight profits, testimony of lost sales, testimony that people came into the shop and were shopping competition saying that they couldn't buy at Payne because it was high, or wouldn't buy at Payne.

QUESTION: Would you defend the 9th Circuit's view of the Robinson-Patman Act?

MR. REEVES: I do, and the 8th Circuit's, and the 7th Circuit's, in Bargain Car Wash, Mr. Justice White, as not permitting -- or not saying automatic damage, because it is, there's always the possibility of rebuttal by the defendant if the extraordinary circumstances this Court talked about in Bruce's Juices are present. For instance, if there is such an inelastic market that it really doesn't matter --

QUESTION: What do you do with the congressional history, where they had a presumptive damage provision and they eliminated it during the course of enacting the Robinson-Patman Act?

MR. REEVES: That is the presumption -- the presumptive damage rule was in the Senate's version of the bill. It was eliminated in conference due to legislative bargaining without comment. And I say to Your Honors that if you utilize that negative inference just because it was originally in there, without finding out the real reason behind why it was eliminated, then you totally disregard the purpose of the Act.

QUESTION: Well, then you say there is a presumption of damage?

MR. REEVES: I say that this Court should reaffirm the minimum damage rule that it indicated in Bruce's Juices and in Morton Salt which permits an inference of damage, at least in that amount, subject to rebuttal, and that the mere fact that there was at one point a provision of presumptive damages does not mean that that, the elimination of it by Congress meant that Congress didn't want that type rule, because that rule was redundant. It was always extant under the Clayton Act, Section 4 of the Clayton Act, as is pointed out in our original brief and reply brief; I think the Ladoga decision permitted it. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:35 o'clock p.m. the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1944

J. TRUETT PAYNE COMPANY, INC.,

V.

CHRYSLER MOTORS CORPORATION

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Bill G. Gibson