OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BROOKE GROUP, LTD., Petitioner v. BROWN & WILLIAMSON TOBACCO CORPORATION

CASE NO: 92-466

PLACE: Washington, D.C.

DATE: Monday, March 29, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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BROOKE GROUP, LTD., :

Petitioner :

v. : No. 92-466

BROWN & WILLIAMSON TOBACCO :

CORPORATION :

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Washington, D.C.

Monday, March 29, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

PHILLIP AREEDA, ESQ., Cambridge, Massachusetts; on behalf of the Petitioner.

ROBERT H. BORK, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 92-466, Brooke -- Brooke Group Limited v. Brown & Williamson Tobacco Corporation.

Mr. Areeda, you may proceed.

ORAL ARGUMENT OF PHILLIP AREEDA

ON BEHALF OF THE PETITIONER

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

The jury in this case found predatory price discrimination by respondent Brown & Williamson, in violation of the Robinson-Patman Act. And --

QUESTION: That predatory price violation was discrimination among its wholesalers.

MR. AREEDA: Yes, Your Honor. The form of the -- the form of the discrimination was in rebates to wholesalers designed not to be passed on to consumers.

QUESTION: Brown & Williamson wholesalers.

MR. AREEDA: Brown & Williamson wholesalers. In fact, the wholesalers were not brand specific, but to wholesalers with whom it -- to whom it sold, yes.

QUESTION: And how -- did it find how that hurt those -- that discrimination hurt your clients?

MR. AREEDA: Yes, Your Honor. The -- this

discrimination resulted in net prices to B&W that were below its average variable cost. These prices below average variable cost, these rebates, had to be met by Liggett in order to retain the patronage of the wholesalers on whom it depended.

QUESTION: So you had wholesalers doing business both with Brown & Williamson and with Liggett.

MR. AREEDA: Yes, sir.

QUESTION: But as I understand the instructions, the jury could have found in your favor even if it made no finding that the sales were below average variable cost.

MR. AREEDA: No, Your Honor, I think the instructions --

QUESTION: Or is that the argument in this case?

MR. AREEDA: That's the argument of the other side. The instructions, fairly read, did require the jury to find that B&W engaged in below-cost pricing with a reasonable prospect of recoupment before it could find that there was the injury to competition that it did find.

Furthermore, B -- the B&W experts in court admitted that the pricing was below average variable cost. To be sure, they sought to draw the string from that admission by introducing alleged tax savings, but there's no evidence -- the brief of the other side cites no evidence at all of any realized tax savings. So --

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QUESTION: And is it your theory of the case that this is part of your burden, to show that it was below average variable cost?

MR. AREEDA: Yes, Your Honor, we do. We accept the burden of showing that prices were discriminatory, below average variable cost, and were undertaken with a reasonable prospect of recoupment.

QUESTION: I don't understand. Discriminatory, in what respect were they discriminatory here? As between different wholesalers, right?

MR. AREEDA: A scheme -- the rebates were based on volume. And a volume rebate, for example 75, 80 cents a carton, for wholesalers who handle 1,500 cases during some period.

QUESTION: Right.

MR. AREEDA: And lesser rebates to other -- to wholesalers who did not handle that volume.

QUESTION: Right, right.

MR. AREEDA: Now, these are discriminatory volume rebates.

QUESTION: I can understand how that discrimination would hurt a small wholesaler, one that does not buy in high volume. I do not see how that discrimination is a form of discrimination that -- that in any way focuses in upon your client.

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MR. AREEDA: The discrimination triggers the statute. The statute only applies in the case of price discrimination. The -- there is admitted price discrimination, and therefore the statute is triggered. Now, what is the connection between such discrimination and my client? Such discrimination makes predation cheaper.

That is, if you offer your below-cost prices to some of your customers and you charge other customers higher prices, though still below cost, the overall burden, the financial burden on the predator, is diminished, making predation -- thereby facilitating predation. That is why the statute covers discrimination of this kind, And that is what the jury found here as well, that the discrimination facilitated the predation.

QUESTION: Well, I thought it covered discrimination of this kind in order to protect the person who's being discriminated against.

MR. AREEDA: But --

QUESTION: And I just don't see how your client is being discriminated against by this discrimination.

MR. AREEDA: My client is not being discriminated -- the -- in primary line -- allow me to back up, Your Honor. The Robinson-Patman Act covers so-called primary line price discrimination and secondary

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line price discrimination. The kind of price discrimination which you have focused on, Justice Scalia, is the secondary line price discrimination that has the impact of harming the disfavored buyer, the disfavored wholesaler.

Primary line price discrimination, that price discrimination which has an impact on competitors in the market, is what is at issue in this case. Price discrimination never has an impact on competitors directly. It has an impact on competitors only because it can facilitate predatory pricing, and that is what -- that is what happened in this case.

QUESTION: Well, I thought you said in answer to my question, Mr. Areeda, that it did have an effect on your client because your client had to change its procedures in order to continue to retain the business of the wholesaler.

MR. AREEDA: Exactly, exactly. It has -- the -- it's -- the discrimination and the below-cost pricing force the client. The client, of course, doesn't pay or receive -- doesn't pay the discriminatory prices, he reacts to them just exactly as you've described.

And that reaction subjects Liggett to severe losses which, as B&W predicted persistently in its documents, would induce Liggett to raise its list prices,

designed -- which has the effect of raising consumer prices. The consequence of this --

QUESTION: And so what exactly are the losses that Liggett is suggest -- subjected to?

MR. AREEDA: When it has to match the below-cost -- when it has to match the rebates the -- of the defendant, of the respondent, which are below cost. To match those below-cost rebates forces it to bear losses.

QUESTION: But is it because the -- is it because Brown & Williamson discriminated among its wholesalers that Liggett has to do that, or because Brown & Williams was selling below cost?

MR. AREEDA: Both. It's -- the sales below cost are what directly causes the losses to the competitor, to the rival. It is the discrimination that facilitates the sales below cost. The statute is triggered by the discrimination. It is the below-cost pricing that hurts rivals. It is always the below-cost pricing that hurts rivals.

QUESTION: Well, why it is -- I don't -- I still don't see why the discrimination facilitates the scheme. I mean what -- it would seem to me the scheme would be even more effective if you didn't just offer these below-cost prices to some people, but if you extended them

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even further to everybody, inflicting even more punishment upon the person you're seeking to -- to predate, if -- if that's a verb.

MR. AREEDA: That -- that might be. That might be the consequence. But the reason that it facilitates, the reason it facilitates is that it makes the expenditure on predation less. Now, it's true -- it is true, Your Honor, that if all -- if prices were lowered uniformly, the burden on the rival could be greater, which is what you -- which is what you've focused on. But at the same time, it's also true that by not having to extend the lowest prices to all of your customers, the predator expends less on his predatory program.

QUESTION: Is this the difference between a Sherman Act section 2 claim and a Robinson-Patman Act claim? And beyond that, I want to know could you have brought this suit as a section 2 Sherman Act claim?

MR. AREEDA: The answer to your -- the answer to your questions are respectively yes and no. I'll explain.

(Laughter.)

MR. AREEDA: To your two questions are yes and no. First, the difference between the two statutes is that the Sherman Act does not require any price discrimination. A second difference between the two statutes, which gives the answer to your second question,

is that the Sherman Act as conventionally required -- interpreted, requires single-firm monopoly. And we do not contend that there's a single-firm monopoly in this -- in this case.

What is in issue in this case --

QUESTION: May I ask you sort of a preliminary question? Was there anything in this case, or any evidence in this case that there was any secondary-line injury to competition?

MR. AREEDA: Was --

QUESTION: Was there proof, for example, that the wholesalers were injured?

MR. AREEDA: That -- no one has litigated that question, Your Honor.

QUESTION: There was never a suggestion that the discrimination would be unlawful if that kind of injury to competition ensued, and then the next question is was your client damaged by the illegal discrimination. They didn't -- nobody argued the case in that way.

MR. AREEDA: The -- no one answered -- argued the case on that basis, but let me answer your -- let me answer your question. If the only injury in a case were secondary line -- were secondary-line injury, then, no, I would not think a competitor of -- of the discriminator would be entitled to sue.

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QUESTION: In other words, if a -- if a food chain, for example, discriminated between a chain store and an individual small, and by that means got a large account away from a competing supplier, that would be --

MR. AREEDA: No.

QUESTION: -- There would be no action in that.

MR. AREEDA: We would not contend -- I do not contend that that is an offense. I do not contend in any way that the competitors injury here was the injury to competition in the primary line. It was derivative from --

QUESTION: I know. That would not be the injury to competition. The injury to competition makes the statute -- would cause a statutory violation to occur, and then the statutory violation might injure a -- but, anyway, that theory isn't even involved.

MR. AREEDA: That's not -- that's not here.

QUESTION: Okay.

MR. AREEDA: What is here is that the losses, as B&W predicted, induced Liggett to raise its consumer prices, its list prices. The result there was to narrow the gap between regular brand -- the regular brand product and the generic product.

QUESTION: Now, Mr. Areeda, you -- you agree that under Matsushita's holding that essentially there has

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to be a reasonable hope of recoupment of the loss?

MR. AREEDA: Yes, Your Honor. We do -- we do accept that burden.

QUESTION: Uh-huh.

MR. AREEDA: We do believe, and we have proposed, in fact, as the -- as the rule in this case in our brief, that a reasonable prospect of recoupment should be required as a means of -- as a means of reinforcing -- making the court feel more comfortable that predation is actually taking place.

QUESTION: So to that extent Utah Pie is not to the contrary or it is limited somehow?

MR. AREEDA: Utah Pie did not reach that issue.

QUESTION: Uh-hum.

MR. AREEDA: Utah Pie came early in the thinking about predatory pricing and did not reach the issue as to whether recoupment would be required.

QUESTION: Well, tell me what differences you have with the respondent's legal theory in this case. Does it boil down to a question of fact for us, or is there a difference in legal theory between you and the respondent?

MR. AREEDA: The respondent suggests that he agrees with our position, that -- that predation oligopoly is possible, but all of the arguments in the respondent's

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brief are that is it impossible. And the lower court, the Fourth Circuit, upset the jury verdict not on the basis of reviewing the facts of the case, but on the grounds that a mere 12 percent firm -- a mere oligopolist could not believe that recoupment was economically rational.

And I'd like -- what I'd like to put before you is that recoupment is economically rational in the circumstances of -- of this case. Recoupment -- that is recoupment and success in predation are really the same thing. Success is what hurts the consumers. Success also brings about the payoff to the predator.

Now, recoupment and success is possible whenever predation can bring about or achieve supracompetitive prices. In this market it's quite well established that prices are supracompetitive. And the maintenance of those supracompetitive prices on regular-brand product was, in fact, the object of the predatory scheme.

QUESTION: But that's not what your -- the officers of your client testified. I thought they -- they testified that it was a competitive industry.

MR. AREEDA: I know, Your Honor --

QUESTION: Can you -- can you contradict that, I mean?

MR. AREEDA: Your Honor, the -- competitive, when used by businessmen, means lots of rivalry.

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Competitive when used by economists and judges means that the market tends toward competitive-level prices. In this market what the plaintiff's executives testified to was that prices were fair and yes, we're not engaged in conspiracy with anybody.

That does not at all negate the textbook -- the fact that this industry is the textbook example of supracompetitive prices. And the textbooks cited by both sides, such as the Scherer book, say so. It is the classic example of supracompetitive prices and it was the purposes -- it was the purpose and effect of defendant's conduct to protect those supracompetitive prices by narrowing that discount.

And the result of what it did, the result of what defendant did, was not only was the gap narrowed, but from -- but prices rose, all prices rose, regular brands and the generic product. Prices --

QUESTION: On your theory, Mr. Areeda, does it matter what the market share of the oligopolist is? Yours was 12 percent. Could there be a 2 percent oligopolist who could make a case here?

MR. AREEDA: It's a matter of arithmetic, Your Honor. The question is whether there's a sufficient payoff for -- from the predatory pricing to the actor, to the predator. Where the 12 percent firm will get 12

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percent of the benefit, to so speak, of holding regular brand prices up, a smaller firm will receive a smaller benefit. At some point the benefit would be so small as to make undertaking the risk of predation too great. But in this case the 12 percent firm reaped enough and it expected to reap enough from doing this.

I'm saying that prices in the business, prices rose. Regular -- from the date when B&W entered the black-and-white, the generic business, to the close -- to the close of the record, the price of regular-brand cigarettes rose 67 percent. The price of generics, including the subgenerics, that is weighing in the subgenerics that have been -- that have been mentioned -- the price of all generics rose 74 percent.

That demonstrates the narrowing of the gap, but it also demonstrates the injury to consumers and the success of the project. During this period -- regular brand prices up 67 percent, generic prices up 74 percent -- inflation was about 20 percent cumulative, costs were constant, and demand was falling.

QUESTION: Well, I guess the project wouldn't be successful, though, if the -- if the -- if the price gap was narrowed but the volume of the -- of the generics increased substantially.

MR. AREEDA: It did.

QUESTION: Which it did, here, didn't it?

MR. AREEDA: Yes. Yes, it's an undisputed fact that the volume of generics grew.

QUESTION: So you -- you can -- you don't achieve anything by a bit of a narrowing if the volume of the -- of the generics increases.

MR. AREEDA: Oh, you achieve a great deal if you could raise the average price.

QUESTION: Well, it depends -- it depends on -- on what the volume increase is --

MR. AREEDA: Yes.

QUESTION: -- As compared to the price differential, I suppose.

MR. AREEDA: Yes, it does. And if you take the -- you take the prices that appear in the record and you take the volume numbers that appear in the record and weigh the prices by the volume over the period, you find that the average price rose from something under $26 in this -- in the -- at the beginning of the period to something over $40 -- that's per thousand.

QUESTION: Uh-hum.

MR. AREEDA: -- At the -- at the end of this period. So the average price is rising considerably. Volume greater but average price higher, consumers therefore hurt.

QUESTION: Mr. Areeda, one of the -- one of the things that the predator in this situation had to anticipate was not only the ability to recoup later, but also that the other oligopolists would not -- would not think that the predator was seriously trying to sell in the -- in the off-brand market, right?

MR. AREEDA: Yes.

QUESTION: And why -- why would -- why would you be confident about that? And certainly the outcome doesn't justify the confidence because a lot of other people got in quite substantially, didn't they.

MR. AREEDA: I -- I beg to suggest that the outcome does establish the confidence, but let me explain.

QUESTION: All right.

MR. AREEDA: B&W itself predicted that its fellow oligopolists would be likely to enter the discount segment of the business, the generic sector of the market. B&W predicted that in advance of the repositioning of Doral, if you -- if one has that in mind, and afterwards. It predicted that others would enter the market, but that the others shared B&W's interest in narrowing that gap.

Now, this isn't clairvoyance on B&W's part. It's a recognition of the objective facts of the market. The objective fact of the market is that everybody in this market except Liggett has as its mainstay the high price

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regular brands. Liggett was the only one -- it was the maverick in the market. It was the only one that did not have a big stake in regular brands.

And it's on that account that B&W predicted with confidence that the others would enter the business. And once they got in the business would, like B&W, seek to narrow the gap to manage prices and profitability upwards. And that is exactly what happened, Your Honor.

The fact that the generic segment grew in size is, I suggest, more a response to the explosion in prices that came, rather than anything else. It is that explosion in prices that demonstrates the injury to consumers.

Further, during the -- during the time when B&W was itself engaged in these escalating rebates in early '84, Doral, a so-called branded generic by Reynolds, was in the market.

QUESTION: Right.

MR. AREEDA: And it did not feel obliged to lower its price while B&W was escalating its rebates, and did not feel obliged to raise its own rebates. The Doral rebates were something like 16 cents a carton; the big B&W rebates were something like 70 to 80 cents a carton. R.J. Reynolds did not feel obliged to match this rebate offered by B&W, and thus well understood -- must well have

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understood what was going on.

During the period of these below-cost prices, moreover, regular brand prices themselves were rising. So it was not an instance in which because of B&W's conduct the fellow members of the oligopolist would ruin their 50 years of supracompetitive pricing by starting to lower their regular-brand prices. They didn't. They did the opposite; they continued to raise regular-brand prices as before, and after.

The further point that I'd like to emphasize -- one further theoretical point that I'd like to reassure you about is that B&W's argument is that a 12 percent firm cannot subject a maverick in the market to losses without the cooperation of fellow oligopolists. In some market circumstances that may be true; it's not true in this market circumstance.

In this market circumstance, the -- the upsetting element to the oligopoly was the black-and-white pricing, was the generic prices. And B&W, acting alone, had ample capacity to bring those prices down below average variable cost, and thereby to subject Liggett to the pressures that disciplined it.

If there are no further questions, Your Honors, I'd like to reserve the remainder of my time for rebuttal.

QUESTION: I have a question, if I may. I just

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want to be sure I know what the issues are in the case. I gather the plaintiff had the burden of establishing three things -- price discrimination, after proving price discrimination. One, injury to competition to violate the statute; two, injury to itself --

MR. AREEDA: Right.

QUESTION: -- The fact of damage. And three, that that damage was so-called antitrust in --

MR. AREEDA: Yes.

QUESTION: Which of those three issues are in dispute?

MR. AREEDA: I believe, fairly put Your Honor, only the first issue is in dispute. That is that the -- the respondent disputes the injury --

QUESTION: Whether there was an injury to competition.

MR. AREEDA: -- To competition, but does not dispute injury, in fact, to Liggett. Or at least we may hear differently in a few minutes, but my understanding is they do not dispute that, in fact. And while they argued below a great deal about antitrust injury, they were really arguing that there was no violation.

If -- let me put the antitrust injury question to rest. If there is a violation -- the reason we find a violation is because there is injury to the rival which

will ultimately redound to the injury of consumers. I mean that's why we have a rule against predatory pricing. So if there is a violation, then the plaintiff's injury flows from the reason for finding the violation, and therefore there is antitrust injury.

The principal issue in the case, if I haven't emphasized it enough, is that there was a jury verdict below. And much of the factual controversy that the respondent's devotes its brief to does not really address the question.

Because even if you think there's some doubt about the facts, the judgment, notwithstanding the verdict given below, cannot be affirmed unless no properly instructed jury could find pricing below cost with a reasonable prospect of recoupment. And we believe that every properly instructed jury not only could but should find that.

Mr. Chief Justice, I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Areeda. Mr. Bork, we'll hear from you.

ORAL ARGUMENT OF ROBERT H. BORK

ON BEHALF OF THE RESPONDENT

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

Let me begin by just clarifying the question of issues. We have only the issue of competitive injury here today. The issues of antitrust injury and causation, as well as new trial motions, were before the Fourth Circuit and were not decided and remain to be decided if need be.

Now, let me go to the jury question. What I intend to show, discuss is oligopolistic coordination, which Liggett claims, recoupment which they claim, and intent to predate. I can show you, I think, from uncontested facts that none of those things exist. So that --

QUESTION: These are all factual arguments. There's no legal difference between you and the petitioner.

MR. BORK: I don't think there is, Your Honor. This is entirely --

QUESTION: Mr. Areeda, I suppose, would disagree and say that your position is that this sort of suit simply cannot be maintained when an oligopoly is the defendant -- when an oligopolist is the defendant.

MR. BORK: Mr. -- Justice Kennedy, that is not our position.

QUESTION: But is that Mr. Areeda's position?

MR. BORK: His position --

QUESTION: As you understand it?

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MR. BORK: You mean his position about my position?

QUESTION: Yes.

(Laughter.)

MR. BORK: I think that's right. But that's --

(Laughter.)

MR. BORK: -- But I don't accept it and I hope I can not stop from denying that that's my position.

(Laughter.)

MR. BORK: No, I think oligopolistic predation could occur in some circumstances. I don't think it could occur in this circumstance, and I think -- I'm sure that it did not and I can prove that it did not.

QUESTION: Because of the nature of this particular market.

MR. BORK: Because of that and also because -- we've heard that Brown & Williamson predicted and planned this whole campaign. You will see that there's not a single document in this appendix or in the record anywhere that shows any such prediction or planning.

We're told that, in fact, they went out and got the cooperation of their fellow oligopolists. You will see from the facts they did not. We're told that the gap -- they tried to narrow the gap between generic cigarettes and full-price branded cigarettes. That did

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not happen either and Liggett's chart shows it. And we're told they have an intent to predate, and I can show you that there's no -- there's no evidence for that whatsoever.

QUESTION: Mr. Bork, are you -- are you defending the -- I know you're defending the judgment of the court of appeals, but are you -- are you defending their rationale for --

MR. BORK: Well, I don't think the court of appeals, Justice White, said what Liggett says they said. They said that the economic theory here was --

QUESTION: Well, are you defending their theory, whatever it was?

MR. BORK: Yes.

QUESTION: Uh-hum.

MR. BORK: I am indeed. They said the facts here don't bear out Liggett's theory, and the facts do not.

QUESTION: They thought -- but what did they concentrate on, on the factual, that there couldn't have been any anticipation of recoupment?

MR. BORK: No. Well, they said it was not in this case. And -- and furthermore, they relied heavily upon the document called the final proposal that Brown & Williamson made to its parent corporation just before

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entering generics, after Doral had been introduced by RJR. And, indeed, that final proposal is a crucial document here, and I think they were quite correct to rely upon it.

But I wanted to meet first the assertion that there is a jury verdict here which must be respected. The facts here are such that even if the jury had answered special interrogatories finding all of the things that Liggett says they found, I think j.n.o.v. would have been proper because there are no facts to back up -- there would be no facts to back up such a verdict.

But in fact, as we've said in our brief and I won't dwell upon it at length, these instructions the judge gave clearly permit the jury to find liability solely on the basis of the intent of bad intent, generalized bad intent in Brown & Williamson documents. And, indeed, that's what Liggett argued to the judge, that bad intent plus injury to Liggett was enough.

And he instructed -- if you look at instructions 16, 18, and 29, you will see that the jury always was given alternative ways to find liability here. And we have expanded that in our brief --

QUESTION: Well, Mr. Bork, the court of appeals, as I understand it, didn't reverse -- it didn't uphold the directed verdict or judgment on the basis of bad instructions.

MR. BORK: No, but I'm -- the point I'm making here, Your Honor, Mr. Chief Justice, is not that we should be entitled to a new trial. The point I'm making here is you can infer nothing from the jury verdict because of the instructions. That is the jury was given an impermissible route to find B&W liable, and that route was simply aggressive or bad statements in pre-Doral documents. And instructions 16, 18, and 29 clearly offer the jury that choice.

And moreover, when the jury, on the eighth day of its deliberations, said the written instructions it had before were kind of confusing and it needed help on the question of competitive injury, the judge gave an off-the-cuff oral statement in which he stressed bad intent and a generic submarket, which, of course, he later said shouldn't have been in the case. So that it seems to me almost probable that the jury found B&W guilty for some aggressive statements in its documents.

We had a -- we requested instruction that we had to sell below cost, intend to sell below cost. The judge agreed, but didn't give -- and the jury could have found, if you look at those instructions, that B&W is liable on the basis of pre-Doral bad statements in documents, without finding any oligopolistic coordination, without finding any below cost pricing, without finding any

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prospect of recoupment, and in reliance on a nonexistent generic submarket.

But let me get on to the -- the merits of the case, because I said that there's -- the jury verdict really tells us nothing. And, in fact, the case should be reversed for that reason alone, because a jury which is allowed to find liability solely on bad intent, I think has just -- I think that violates this court's ruling in Spectrum Sports.

QUESTION: Well, Mr. Bork, do you -- do you think the Fourth Circuit was correct when it said that, if I have it right, in the absence of an agreement among the oligopolists, which nobody contends is the fact here, membership alone in an oligopoly provides no basis for proof of illegal conduct? Is that -- is that accurate or is that --

MR. BORK: I think what it said is accurate to this extent, Justice O'Connor. Membership in an oligopoly alone is not proof of illegal conduct, but the -- the court very carefully said that it was not ruling out Liggett's theory as a matter of law, and the district court said that too. They both said they were ruling against Liggett on the facts, that there was no substantial evidence here even viewing the facts in the light most favorable to Liggett.

QUESTION: Do you think the Fourth Circuit thought that it had defined a conspiracy or a monopoly?

MR. BORK: Well clearly not, Justice O'Connor. It -- the Fourth Circuit clearly left open the possibility that you could have primary-line violation without a conspiracy or a monopoly.

Indeed, it recognized Utah Pie. Now, Utah Pie is a case where there was no conspiracy alleged, there was no monopoly, so that the Fourth Circuit's interpretation of section 2(a) does not make it merely redundant under the Sherman Act.

But I wanted to get onto the theories of injury from price discrimination here. I think Professor Areeda said that using price discrimination facilitates predation because the predator doesn't have to spend as much money. It is also true that the alleged victim doesn't have to spend as much money, so the price discrimination facilitates resistance to predation in the same amounts as it facilitates the predation. There is simply no injury here from price discrimination.

But this case, I think it is profitable to compare it to Matsushita because this case, our case, Brown & Williamson's case, satisfies both the majority rationale in that case and the dissent's rationale. The economic theory here is utterly implausible and, in

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addition, the facts refute it.

Unlike Matsushita, there was here no expert witness talking from facts of record. The expert witness here was an advocate. He stated the facts sometimes in contradiction to Liggett's executives, and he -- the facts he assumed have no basis in this record.

Also unlike Matsushita, this is not a summary judgment case. The district court here let this case go to trial, heard all of the evidence, reread it for 5 months, and then wrote a very thoughtful j.n.o.v. opinion. So that I think primarily both courts below rested upon factual determinations that there's simply, even favorably viewed to Liggett, no substantial evidence to back up their case.

And, indeed, there's not. If you take a look --

QUESTION: I suppose the trial judge thought that he had erred in instructing the jury, did he?

MR. BORK: No, the trial judge did not think he erred in instructing the jury.

QUESTION: But I think that you do -- I take it you -- you think the instructions were -- were invalid in the sense that they would permit the jury to arrive at a conclusion that the law didn't permit.

MR. BORK: That is quite correct, Your Honor. But --

QUESTION: So there is a -- quite a difference, a legal difference between you two in terms of the validity of the instructions.

MR. BORK: Well, yes, but I don't think that's -- that's not a theory of -- that's a theory of how you read the instructions, a disagreement about how you read the instructions, but I don't think those instructions, 16, 18, and 29, can be read any other way than that the jury can find B&W liable for bad intent alone.

And, indeed, Liggett says that's not adequate, bad intent alone is not adequate. They did say that was adequate at the trial level; at the appellate level they don't say it's adequate. But I don't think there's any possibility of reading those instructions in any other way.

Now, this is a powerful tale that Liggett tells in its brief, but it is just that, it's a tale. And if you take a look at the final proposal -- that is Liggett put in evidence the document that destroys its own case -- you will not find before the final proposal any plan to do all the things Liggett says B&W planned to do. It's expressed nowhere. In the final proposal itself, which is at Appendix 127, every one of Liggett's claims about our plans is contradicted, and this is the last planning

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document there is before we went in.

For example, Liggett says we were going to save $350 million of lost branded profits by attacking them in generics. If you'll look at the final proposal, Brown & Williamson is saying that it's going to lose $350 million to generics, without relation to anything that it does. And it proposes entering generics not to discipline Liggett, there's not a word of that -- entering generics to make some profits in generics to replace some of the profits it's losing on brandeds.

Now, the proposal also states that given RJR's repricing of Doral as a generic -- and RJR, of course, is one of the industry giants -- there is no reason for B&W to be concerned about expanding the generic -- generic segment. The segment is going to expand. It also states in that proposal that RJR has shown its willingness to accept low Doral prices indefinitely, which is hardly a sign that they expect somebody to manage prices up.

They said the economy or generic segment of the market is established and will be a major part of the market. The proposal assumes that the current percentage gap between generic and full price cigarette prices is at 35 percent and will continue throughout the 5-year planning period.

It assumes -- it speculates as to what other

companies will do, and they will have differing responses. There is some speculation that some of them might try to manage prices up. That's the ordinary thing, you try to think about your competitors and what they might do. But the document recognized that RJR was willing to accept low prices on Doral indefinitely and predicted that the 35 percent price gap would continue.

So when that document, which is the crucial document in this case -- and which the Fourth Circuit emphasized because, as the Fourth Circuit said, Liggett heavily relied upon this document. But there's no mention of disciplining Liggett, there's no mention of pricing below cost. And, indeed, every document you look at that mentions cost, including this one, explicitly states that Brown & Williamson will not go below cost. There's no mention of signalling to others for narrowing a price gap or slowing the growth of generics or recouping any losses on generics from branded prices.

Now, Liggett subpoenaed the executives and the documents of Phillip Morris and RJR. And in -- nowhere in that, in those documents or in their testimony, was there nay indication that they thought they were getting any kind of a signal from Liggett -- from Brown & Williamson. And they both said that they offered volume rebates because -- as Brown & Williamson did -- because Liggett

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and RJR offered volume rebates, which were necessary in the market.

Now, there can be no doubt, and I think this fact kills -- alone kills Liggett's case. There can be no doubt that Brown & Williamson intended to expand the generic segment when it entered it, because it is undisputed that Brown & Williamson offered black-and-white cigarettes to 1,000 wholesalers who had never carried them before. And that sure is not a way to contain the growth of a segment. That's a fact and no amount of theorizing can change it.

There's also no doubt that Brown & Williamson did not intend to price below cost. When Brown & Williamson went in, Liggett concedes that its first rebate offer was above cost. After that, every rebate increase was initiated by Liggett. A predator doesn't go in with prices above cost.

And it's also undisputed that every time a new rebate -- every time Liggett started a new rebate, Brown & Williamson's financial officer calculated that Brown & Williamson could raise its rebates and still make profit, because it had been instructed by its parent to make a profit on sales.

QUESTION: Mr. Bork, I gather from your argument, and I'm not suggesting your argument, that you

see this as primarily a sufficiency of the evidence case. Was there enough evidence on the part of the plaintiff, Liggett, to go to the jury? And you're saying there wasn't.

MR. BORK: There clearly wasn't, Mr. Chief Justice. The only evidence in this case are the assertions of William Burnett, the plaintiff's economist, and those assertions are about facts, they do not rest on any record facts.

For example, we've touched upon this before, Liggett's executives said at their depositions that there was no tacit collusion, no supracompetitive prices and profits, and so forth. We moved for summary judgment on that basis. They filed affidavits saying they didn't understand what those terms meant and they shouldn't be held to it.

The judge let the case go to trial. At trial they came back -- after having conferred with the economists, they came back once more and said no oligopolistic interdependence, no tacit collusion, no supracompetitive prices and profits.

Now, that's not because businessmen talk differently than economists. They'd been talking to an economist. But those are not just fact witnesses who are intimately familiar with pricing. Those are the officers

of Liggett.

QUESTION: Mr. Bork, can I interrupt with a question here? I want to be sure I'm on the same wavelength. Those would show, I gather, no actual injury to competition. But I gather the statutory test isn't actual injury, but a probability or reasonable possibility, I don't know what -- how the judge instructed the jury here. So the mere fact that the actual injury didn't develop wouldn't necessarily be a complete defense, would it?

MR. BORK: Justice Stevens, I think what I'm saying is a complete defense. They said -- Liggett's theory, which is a very complicated careen-shot theory, is that Brown & Williamson could price below cost in generics because they would stop the transfer of smokers from branded to generics, or slow it down, and they could recoup their losses that way.

Now, they said, it was their fact statement, that they -- in order to recoup their losses there had to be supracompetitive profits and prices in brandeds. If that's not there, then there is no reasonable prospect of recoupment.

QUESTION: Well, what if there was a -- a reasonable possibility of such supracompetitive profits?

MR. BORK: Well, I don't know -- I don't --

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QUESTION: Maybe there wasn't, I don't know, but it doesn't seem to me that there -- the proof that there was -- in fact, they didn't develop. Is that -- I'm not sure that's a complete defense under the statute.

MR. BORK: No, the theory, Justice Stevens, was that they were there already and Brown & Williamson could count on those supracompetitive profits being there.

And these Liggett executives -- and not just fact witnesses when they denied it, these are the people who were authorized by law to bind the company, and they come in and say an essential element of our case is missing and we want triple damages.

But that's true throughout this, this case. Their --

QUESTION: In the -- your point about the expert is the expert said, based on his analysis of the market, the profits were, in fact, supracompetitive, even though the executives didn't realize it. Is that what it boils down to?

MR. BORK: I don't think they -- I think they had a better notion than he did.

QUESTION: But, I mean, that is what it boils down to, I gather, that -- that they thought the profits were perfectly normal and the economist thought they were abnormal.

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MR. BORK: You know, one of the reasons, Your Honor, why profits are -- look large in this industry is twofold. There are accounting problems, as Liggett admits. One is the most valuable assets these companies have are not on the books, and that's their tradenames, trademarks. And accounting records don't allow you to put them in the books.

QUESTION: Well, let me --

MR. BORK: And the other --

QUESTION: Let me be sure I get an answer to my question before I get lost.

MR. BORK: All right.

QUESTION: It's hard to keep -- is it correct that what you're saying to us is that the management people said the profits were perfectly routine and the expert said that they were abnormal, abnormally high, and because the expert and the management disagreed we must agree with management?

MR. BORK: He said -- he said two things, profits are abnormally high and it was due to tacit collusion or oligopolistic interdependence. The management denied both of those things. And I don't see how a company can come in -- it's not a question of who you believe. I don't see how a company can come in -- the client itself can walk in and deny its own case, and then

the lawyers say yes, but I have an economist over here that will -- who will contradict. That just doesn't make any sense to me.

But in addition to that, quite aside from that --

QUESTION: Maybe they hadn't read Chamberlain's book.

(Laughter.)

MR. BORK: That might be a virtue on their part.

Anyway, we have this utter absence of a prediction, utter absence of a plan. Now, Liggett gets its only chance to say that Brown & Williamson's corporate policy was Brown & Williamson's -- they stated that by citing seven times one document, which is at Joint Appendix 61, and that document which Liggett, in the Joint Appendix, has wrongfully -- has wrongly, wrongfully I didn't mean -- wrongly identified as by Mr. Olges, is, in fact, as they now say, by a Ms. Tharaldson, in rough, handwritten notes.

And she says in there, in one phrase, about -- something about putting a lid on Liggett, and also possibly signalling competition. Ms. Tharaldson was in a sales hierarchy which has nine tiers. She was in the seventh tier, two from the bottom. And there is no evidence anywhere that anybody else in the corporation,

certainly not an officer in charge, ever saw those notes, and certainly not that they ever adopted those notes as corporate policy.

Moreover, those notes actually support Brown & Williamson, and not Liggett, because twice in there, at Joint Appendix 68 and 74, she says that Brown & Williamson will not price below cost even if Liggett does. So whatever putting a lid of Liggett might mean, it didn't mean pricing below cost.

So there's --

QUESTION: She also says that somebody else will go in if we don't.

MR. BORK: Somebody else will -- somebody will go into the market.

QUESTION: That's right. And it's a strange attitude for a predator to take. Why should I -- why I take the loss if somebody else will come in, and her notes say someone else will PM/RJR sooner if we don't go in. Why -- let somebody else do the predation and I'll reap the profits. Why should I -- why should I be the --

MR. BORK: I --

QUESTION: Take the losses. I can't understand that.

MR. BORK: I agree with you. Particularly, why should the smallest company.

But there's one other point I really want to get to, and that's this point about raising prices and narrowing the gap. And I really want to call the Court's attention to Joint Appendix 325. It's a chart -- it is Liggett's chart, and it shows prices from May 1980 to 1989, June, and the gap between generics and brandeds. Now --

QUESTION: What page is this?

MR. BORK: This is Joint Appendix 325, Volume II.

This is Liggett's chart. And Liggett has been saying that in December 1983 the gap stood at 40 -- or almost 41 percent, and it came down to just about 27 percent by June of '89. If you look at the chart, they have chosen the two most extreme figures there are.

And if you come along, start from -- in May 1980, the top left, when Liggett was alone in the field the gap was 29.9, it dropped about a point in November and then it began rising. So the gap rose and it stayed above -- it stayed above where it was in 1980 up until June of 1989. So if we were narrowing the gap, we did a very poor job of it. We didn't narrow the gap.

Also, notice the prices there. Liggett was raising prices steadily from the beginning of the generics, from 1980, up through the period when we

entered.

QUESTION: When was this suit commenced?

MR. BORK: It was commenced as soon as we announced we were going to go into generics.

QUESTION: Which was what year?

MR. BORK: It was July, '84.

QUESTION: So some -- some of the -- some of the -- the suit was going on during some of this period when the gap had actually increased.

MR. BORK: Yes. And there's one other thing about this chart. Liggett has compared only its black-and-whites with generic -- with brandeds. Philip Morris and RJR were selling black-and-whites by the time of the trial at over 50 percent off the price of brandeds, some narrowing of the gap. Moreover, Liggett doesn't mention that it was selling a branded generic, Pyramid, at 50 percent off the price of brandeds. So there was no plan to narrow the gap and there was no narrowing of the gap. The gap fluctuated.

That's about all I can say, Your Honors. The fact is the district court specifically found, at page 36a of the petition, "No substantial record evidence supports Burnett's alignment of interest theory," that's the oligopolistic theory. "Even before B&W began selling black-and-white cigarettes, RJR had entered the generic

segment by repositioning Doral at generic prices. Burnett conceded that RJR had no anticompetitive intent and that Doral's entry expanded the generic segment."

The court noted that they tried to sell a lot of cigarettes to replace Philip Morris as number one. Furthermore, the court said there is no evidence that any of the other major cigarette companies had an interest in slowing the growth of generics. Then five of the six companies sold generics, today all six do. We started with 2.8 billion cigarettes being sold in generics, that jumped to 80 billion, and today it's about twice that. So there's been no slowing of the growth of generics, but rather quite the contrary.

This is a lawsuit by one full-line competitor against another full-line competitor, both of whom were profitable throughout the period of predation. And I think the only inference one can draw, after looking at the facts and seeing that there was no plan to do what Liggett accuses us of and that no such things happened in the market, is that this was a lawsuit designed initially just to keep Brown & Williamson out of black-and-white cigarettes. You have to be very careful with a lawsuit like this, because there's potential for --

QUESTION: Thank you, Mr. Bork.

Mr. Areeda, you have 5 minutes remaining.

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REBUTTAL ARGUMENT OF PHILLIP AREEDA

ON BEHALF OF THE PETITIONER

MR. AREEDA: Thank you, Your Honor.

I notice that --

QUESTION: Mr. Areeda, do you -- do you agree with Mr. Bork's answer to my question, that this seems to be mostly just an argument about sufficiency of the evidence?

MR. AREEDA: No, Your Honor. The court of appeals, the decision in the court of appeals, was not based on facts. There are only two facts mentioned in the court of -- relied on, really, by the court of appeals. One was the 12 percent market share of Brown & Williams, on which the court built its theoretical suspicions, and the other was the growth of the generic sector, which the court below thought confirmed its theoretical suspicions.

I observe further that Mr. Bork, in the course of his argument, couldn't resist saying the theory was impossible, as well as arguing that -- from his viewpoint, that the facts didn't support it. Indeed, the facts for this Court, as it should have been for the court of appeals, ought to be taken as in the form consistent with the jury verdict.

QUESTION: What was the court of appeals -- the basis for the court of appeals' opinion?

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MR. AREEDA: I read the court of appeals, Justice White, as saying that only a monopolist or a cartel can successfully predate. That everybody else is so filled with uncertainty, that no rational person would do what B&W did in this case.

QUESTION: That wasn't much different from the -- from the district judge's theory, was it?

MR. AREEDA: No. The district judge was a little more qualified, Your Honor. The district judge said well maybe -- maybe it could be detrimental in some cases, maybe predation could succeed in some cases, but it couldn't succeed here because, using the same argument that Mr. Bork used, the Liggett officials testified they weren't engaged in tacit collusion.

QUESTION: So you think the court of appeals erred as a matter of law.

MR. AREEDA: Absolutely, Your Honor. The court --

QUESTION: Not --

MR. AREEDA: The court there has none of the apparatus -- the answer is yes. There is not -- in the court of appeals' opinion, there's none of the apparatus of factual review. Indeed, except for one line at the beginning of the opinion reporting the existence of a jury verdict, one would never know there had been one as one

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reads the court of appeals' opinion.

And as far as the argument as to what the jury found or didn't find, the question is -- the issue is judgment notwithstanding the verdict can only be supported if no properly instructed jury could find on the record. And what we ask -- what we ask this Court to find is that the court of appeals' theory is wrong and in the concrete facts of this case, to rule that a jury could reasonably find a reasonable prospect of -- of recoupment.

Justice --

QUESTION: The -- what would the result of that be, then? It would go back to the court of appeals? I mean, just somebody should --

MR. AREEDA: Yes.

QUESTION: -- Have a shot at saying whether the district court's theory was right.

MR. AREEDA: Yes, it would go back to the court of appeals.

QUESTION: And then the court of appeals would decided whether there was sufficient evidence to support the verdict.

MR. AREEDA: The court -- the court of appeals would then have to examine the remaining evidentiary questions, yes, Your Honor.

On -- Justice Scalia, you asked in particular a

question of Judge Bork that I'd like to respond to. You asked why would the 12 percent firm take the hit of engaging in predation. And the answer is to be found in the B&W documents.

The B&W documents say the larger firms, Philip Morris and Reynolds, are unlikely to do this because they would fear antitrust liability. So --

QUESTION: I understand. I was -- I was referring to the Olson memorandum which specifically said that if we don't get in, these other two will get in.

MR. AREEDA: The earlier document -- a few pages earlier in the record, the B&W -- the B&W more formal documents say something like the following. B&W -- Reynolds and Philip Morris are likely to enter especially if somebody else doesn't constrain the growth of the segment. And that somebody else, of course, was -- was B&W.

I'm not going to respond to all of the factual points raised by -- by Judge Bork, because they are covered in -- they are covered in the brief, and I believe adequately responded to. The one -- I would like to respond, to address one point that has not been put on the surface today, but that the amici have urged upon this Court.

The amici urge upon this Court that the Fourth

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Circuit decision should be upheld because oligopolistic predation is, at best, rare, and any legal rule that admits the possibility of it will end up chilling price competition.

I think that's wrong, that position is wrong. It's wrong because no one knows the frequency of oligopolistic predation. Secondly, even if it's rare, Congress has made the judgment that monopoly is not required to violate this statute, and the statutory text does not authorize immunity for the oligopolistic predator who gets caught, as B&W has here. Thirdly, as with monopolistic predation -- monopolistic predation is also thought often to be rare, yet the Court responds to that supposed infrequency not --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Areeda.

MR. AREEDA: Thank you.

CHIEF JUSTICE REHNQUIST: The case is submitted.

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)

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Brooke Group, Ltd., Petitioner V. Brown & Williamson Tobacco Corporation

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BY Ann Marie Federico

(REPORTER)