SUPREME COURT OF THE UNITED STATES

Syllabus

BROOKE GROUP LTD. *v.* BROWN & WILLIAMSON TOBACCO CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 92–466. Argued March 29, 1993—Decided June 21, 1993

Cigarette manufacturing is a concentrated industry dominated by only six firms, including the two parties here. In 1980, petitioner (hereinafter Liggett) pioneered the economy segment of the market by developing a line of generic cigarettes offered at a list price roughly 30% lower than that of branded cigarettes. By 1984, generics had captured 4% of the market, at the expense of branded cigarettes, and respondent Brown & Williamson entered the economy segment, beating Liggett's net price. Liggett responded in kind, precipitating a price war, which ended, according to Liggett, with Brown & Williamson selling its generics at a loss. Liggett filed this suit, alleging, *inter alia,* that volume rebates by Brown & Williamson to wholesalers amounted to price discrimination that had a reasonable possibility of injuring competition in violation of §2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Liggett claimed that the rebates were integral to a predatory pricing scheme, in which Brown & Williamson set below-cost prices to pressure Liggett to raise list prices on its generics, thus restraining the economy segment's growth and preserving Brown & Williamson's supracompetitive profits on branded cigarettes. After a jury returned a verdict in favor of Liggett, the District Court held that Brown & Williamson was entitled to judgment as a matter of law. Among other things, it found a lack of injury to competition because there had been no slowing of the generics' growth rate and no tacit coordination of prices in the economy segment by the various manufacturers. In affirming, the Court of Appeals held that the dynamic of conscious parallelism among oligopolists could not produce competitive injury in a predatory pricing setting.

Held: Brown & Williamson is entitled to judgment as a matter of law. Pp. 9–34.

(a) The Robinson-Patman Act, by its terms, condemns price discrimination only to the extent that it threatens to injure competition. A claim of primary-line competitive injury under the Act, the type alleged here, is of the same general character as a predatory pricing claim under §2 of the Sherman Act: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market. *Utah Pie Co.* v. *Continental Baking Co.,* 386 U. S. 685, distinguished. Accordingly, two prerequisites to recovery are also the same. A plaintiff must prove (1) that the prices complained of are below an appropriate measure of its rival's costs and (2) that the competitor had a reasonable prospect of recouping its investment in below-cost prices. Without recoupment, even if predatory pricing causes the target painful losses, it produces lower aggregate prices in the market, and consumer welfare is enhanced. For recoupment to occur, the pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals. This requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will. The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb. If so, then there is the further question whether the below-cost pricing would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the scheme alleged would cause a rise in prices above a competitive level sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. The determination requires an estimate of the alleged predation's cost and a close analysis of both the scheme alleged and the relevant market's structure and conditions. Although not easy to establish, these prerequisites are essential components of real market injury. Pp. 9–17.

(b) An oligopoly's interdependent pricing may provide a means for achieving recoupment and thus may form the basis of a primary-line injury claim. Predatory pricing schemes, in general, are implausible, see *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.,* 475 U. S. 574, 588–590, and are even more improbable when they require coordinated action among several firms, *id.,* at 590. They are least likely to occur where, as alleged here, the cooperation among firms is tacit, since effective tacit coordination is difficult to achieve; since there is a high likelihood that any attempt by one oligopolist to discipline a rival by cutting prices will produce an outbreak of competition; and since a predator's present losses fall on it alone, while the later supracompetitive profits must be shared with every other oligopolist in proportion to its market share, including the intended victim. Nonetheless, the Robinson-Patman Act suggests no exclusion from coverage when primary-line injury occurs in an oligopoly setting, and this Court declines to create a *per se* rule of nonliability. In order for all of the Act's words to carry adequate meaning, competitive injury under the Act must extend beyond the monopoly setting. Pp. 17–20.

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(c) The record in this case demonstrates that the scheme Liggett alleged, when judged against the market's realities, does not provide an adequate basis for a finding of liability. While a reasonable jury could conclude that Brown & Williamson envisioned or intended an anticompetitive course of events and that the price of its generics was below its costs for 18 months, the evidence is inadequate to show that in pursuing this scheme, it had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics. No inference of recoupment is sustainable on this record, because no evidence suggests that Brown & Williamson was likely to obtain the power to raise the prices for generic cigarettes above a competitive level, which is an indispensable aspect of Liggett's own proffered theory. The output and price information does not indicate that oligopolistic price coordination in fact produced supracompetitive prices in the generic segment. Nor does the evidence about the market and Brown & Williamson's conduct indicate that the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in that segment. Pp. 20–33.

964 F. 2d 335, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, SOUTER, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE and BLACKMUN, JJ., joined.