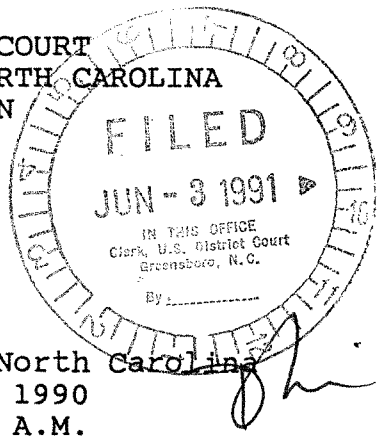
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



LIGGETT GROUP INC.,	C-84-617-D
vs.	
BROWN & WILLIAMSON TOBACCO CORP.	Greensboro, North Carolina February 15, 1990 9:30 o'clock A.M.

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE FRANK W. BULLOCK, JR.,

AND A JURY

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I N D E X

E X H I B I T S

DEFENDANT'S	MARKED FOR IDENTIFICATION	REC'D INTO EVIDENCE
D-1327R - Carton of Georgopolo cigarettes		176

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Jo Ann M. Snyder, CVR-CM
United States Court Reporter
Middle District of North Carolina
3514 Charing Cross Road
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juror, and for you, if you want.

All right. Marshal, if you'll bring the jury in, please?

(Jury in at 9:40 A.M.)

THE COURT: Good morning.

ALL JURORS: Good morning.

THE COURT: All right. Ladies and gentlemen, it's my turn now, I suppose. And you've heard all of the evidence, the arguments of counsel, and it's my duty to give you the instructions of the Court concerning the law applicable to this case.

It's your duty as jurors to follow the law as I shall state it to you and to apply that law to the facts as you find them from the evidence in the case. You are not to single out one instruction alone in stating the law, but must consider the instructions as a whole. Neither are you to be concerned with any - with the wisdom of any rule of law stated by me. Regardless of any opinion you may have as to what the law is or ought to be, it would be your violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would be a violation of your duty as the judges of facts to base a verdict upon anything other than the evidence in this case.

Now I am going to give you this afternoon, each of

you, copies of the jury charge that I am giving you now, when I get a clean copy. But I would ask you to pay particular and close attention to these instructions as I am giving them to you now, and not necessarily rely on the written copy of the instructions that I will be giving to you later.

Now in deciding the facts of this case, you must not be swayed by prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as I give it to you, and reach a jury verdict regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through natural persons as its agents or employees. And in general, any agent or employee of a corporation may bind a corporation by his acts and declarations made while acting within the scope of his authority delegated to him by

a corporation, or within the scope of his duties as an employee of the corporation.

As stated earlier, it is your duty to determine the facts and in so doing you must consider only the evidence I have admitted in the case. Now the term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments of the lawyers are not evidence in the case. The function of a lawyer is to point out those things that are most significant or most helpful to their side of the case, and in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you. Also, during the course of the trial I occasionally made comments or asked questions of a witness or admonished a witness concerning the manner in which he or she should respond to the questions of counsel. Do not assume from anything that I have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts.

The lawyers in this case are not guilty of anything except possible overexuberance at times, and don't be concerned with anything that I may have said as a result of any evidentiary disagreements or any other discussions we had during this trial. I would be pleased to have any of the lawyers in this case represent me at any time.

So while you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

Now I said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the judges of the credibility or believability of each witness and the weight to be given to his or her testimony. In weighing the testimony of a witness, you should consider his relationship to the plaintiff or to the defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he or she testified; his candor, fairness, intelligence, and the extent to which he or she has been supported or contradicted by

other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

A witness may be discredited or impeached by contradictory evidence by showing that he or she testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something or has failed to do something, which is consistent with the witness's present testimony.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

Now the rules of evidence provide that if scientific, technical or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify and state his opinion concerning such matter.

You should consider each expert opinion received in

evidence in this case and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

Now the burden is on the plaintiff, that is, Liggett and Myers, in a civil action such as this, to prove every essential element of its claim by a preponderance of the evidence. That's sometimes called the greater weight of the evidence. It means the same thing. Remember the example I gave when the case started about preponderance or greater weight of the evidence? That means that the plaintiff must tip those scales just slighly on its side.

There is another issue in this case that the defendant has the burden of proof on, but I will talk to you about that later in these instructions.

Now a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not. In other words, to establish a claim by the preponderance of the evidence or by the greater weight of the evidence merely means to prove that the claim is more likely

so than not so.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them. If the proof should fail to establish any essential element of the plaintiff's claim by a preponderance of the evidence, the jury should find for the defendant as to that claim.

Now there are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of the case. One is direct evidence, such as testimony of an eyewitness. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. The law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all of the evidence in the case, both direct and circumstantial.

There's an example I sometimes use to illustrate the difference between direct and circumstantial evidence. For example, suppose a mother baked a chocolate cake for dessert, and she left it in the house and went out for a while, and when she came bacl she found a big piece of the cake missing.

And she calls her son, and she says, "Johnny, did you eat the cake I made for supper?" And he says, "No, Mother, I did not eat the cake." Well, suppose his little sister comes running up and says, "Yes, he did, too. I saw him eat the cake." That is direct evidence, the testimony of the sister.

Well, let's suppose there's no little sister around to tell on him, and he denies eating the cake. And his mother says, "Johnny, let me see your hands," and he holds out his hands and there's chocolate on them. And she looks at his lips, and she sees crumbs. Well, she hasn't seen him eat the cake, but she's seen evidence from which she can conclude that he ate the cake. That is circumstantial evidence.

During the course of the trial, I instructed you that some documents and statements were admitted for a limited purpose only and not in some instances for the truth of the statements therein, and you must follow that instruction.

When attorneys for both sides stipulate or agree to a fact, you should accept that stipulation as true and regard the fact to which they have stipulated as proven.

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to the questions asked of the witness in advance of trial by one or more of the attorneys for the

parties in the case. Such testimony is entitled to the same consideration and is to be judged as to credibility and weighed and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been presented and had testified from the witness stand.

Now as you know, there are two primary issues in this case. The first one - well, not necessarily the first one, but the one that I'm going to instruct you on first is the issue under the Robinson-Patman Act, what we have been calling generally the antitrust issue. Then I'm going to give you some instructions on the trademark issue.

Now as far as the Robinson-Patman Act claim is concerned, Liggett and Myers contends that Brown and Williamson's volume rebates on its black and white cigarettes in 1984 and 1985 constituted price discrimination in violation of the Robinson-Patman Act, and that it is entitled to damages as a result. On the other hand, Brown and Williamson contends that it did not violate the Robinson-Patman Act and that any loss suffered by Liggett and Myers was due to vigorous competition, changes in consumer demand, or other lawful reasons.

It is my job to inform you what the law is, and it is your job to apply the law to the facts as you see them. First, I'd like to tell you generally what the Robinson-Patman Act provides and what must be shown in order

for Liggett and Myers to recover any damages.

As you know, Liggett and Myers contends that Brown and Williamson violated the act in connection with Brown and Williamson's sales of black and white cigarettes in 1984 and 1985.

Now Section 2(a) of the Robinson-Patman Act states, and I'm quoting, "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchases of commodities of like grade and quality where either or any of the purchases involved in such discrimination are in commerce, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives benefit of such discrimination or with customers of either of them."

In order to establish its claim under the Robinson-Patman Act, Liggett and Myers must prove with respect to a set of compared black and white cigarette purchases each of the following elements by a preponderance or greater weight of the evidence:

One, that at least one of the sales being compared was made across a state line. There's no dispute about that.

Two, that each sale was for use or resale in the

United States. There's no dispute about that.

Three, that the products sold were physical items. That is undisputed.

Four, that the sales being compared were made by Brown and Williamson at or about the same time. There's no dispute about that.

Five, that the products involved in the sales being compared were of like grade and quality. There's no dispute about that.

Six, that Brown and Williamson charged discriminatory, that is, different net prices to different purchasers in actual sales transactions. There is no dispute that Brown and Williamson charged different prices.

Seven, that there is a reasonable possibility that the discriminatory pricing may harm competition in the cigarette market.

And eight, that Liggett and Myers was injured in its business or property because of Brown and Williamson's discriminatory pricing.

If you find that the evidence is insufficient to prove any one or more of these elements, then you must find for Brown and Williamson and against Liggett and Myers on the Robinson-Patman Act claim.

Now as I said, six of the eight elements are undisputed, and they need not be considered by you in your

deliberations. So you are instructed to find, one, that at least one of the sales of Brown and Williamson's black and white cigarettes was made across a state line. Two, that each pertinent sale of Brown and Williamson's black and white cigarettes was for use and resale in the United States. Three, that the black and white cigarettes sold were physical items. Four, that the black and white cigarette sales being compared were made by Brown and Williamson at about the same time. Five, that the black and white cigarettes involved in the sales being compared were of like grade and quality. And six, that in the sale of the black and white cigarettes Brown and Williamson charged discriminatory, that is, different, net prices to difference purchasers in actual sales transactions.

You shall not consider any of these issues further in determining whether Brown and Williamson violated the Robinson-Patman Act.

Now Section 2(a) of the Robinson-Patman Act does not make all discrimination in price concerning goods of like grade and quality unlawful. By itself, there's nothing illegal about a company engaging in price discrimination. Rather, a price discrimination within the meaning of Section 2(a) of the Robinson-Patman Act, is merely a price difference and nothing more.

In order for you to find that Liggett and Myers has

established a claim under the Robinson-Patman Act, Liggett and Myers must show by a preponderance or greater weight of the evidence, one, that Brown and Williamson's price discrimination in the sale of black and white cigarettes had a reasonable possibility of injuring competition in the cigarette market. And two, that Liggett and Myers was injured in its business or property because of the discriminatory pricing of Brown and Williamson in the sale of black and white cigarettes.

These are the disputed issues in the case which you must decide. If you find that the evidence is insufficient to establish either one of these elements, you must find for Brown and Williamson and against Liggett and Myers.

Before instructing you further on the disputed issues which you must decide, it is important that you understand what a market and a sub-market is and the importance of these concepts to your consideration of the issues in the case.

Now the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross elasticity - remember that phrase? - of supply and demand between the product itself and substitutes for it.

Within the broad market, well-defined sub-markets may also exist, which in themselves constitute product markets for antitrust purposes. The boundaries of such

markets are determined by examining various indicators such as industry or public recognition of the sub-market as a separate economic entity, product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

All of these factors must be examined in determining whether a well-defined sub-market exists in the broader market. The sub-market test is not merely whether what product can be substituted for the use of another product, but whether products may be reasonably interchanged for the purposes for which they are produced when prices, uses and qualities of these products are considered.

The term "sub-market" is a technical term which depends on the specific factors about which I have instructed you. It does not necessarily have the same meaning as terms you have heard in this trial such as "segment" or "category." The fact that witnesses and lawyers may refer to a "value-for-money segment" does not necessarily have any economic significance and does not establish as such the existence of a sub-market.

I have instructed you that one of the relevant factors in determining whether there is a sub-market in this case is whether the industry or the public recognizes low-priced cigarettes as a separate and distinct economic

entity. This is only one of the factors you must consider, and you may not find existence of a sub-market based on consideration of this factor alone. Your decision on this question must be based on a consideration of all of the factors which I have just instructed you about.

Now an example of a market and a sub-market may further your understanding of these economic concepts. For instance, when you shop at the grocery store, lemon products are a separate market, since no other goods serve the same purposes and uses which lemons do. In the broad lemon market, there are well-defined sub-markets such as fresh - such as the fresh lemon sub-market and the reconstituted lemon juice sub-market.

Although the end use by consumers of fresh lemons and reconstituted lemon juice is often the same, there are important distinctions between the two products such as price, consumer and industry perceptions, packaging, production facilities, quality, distribution and spoilage. Because of these distinctions, despite the similarity in and use - despite the similarity in end use by consumers, fresh lemons and reconstituted lemon juice are different sub-markets of the same broad lemon products market.

Lemons, of course, have nothing to do with this case. They just serve as an example to aid your understanding of what a market and a sub-market is.

Now sub-markets do not exist in every market. For example, 32-ounce soft drink bottles are not a well-defined sub-market of the soft drink bottle market. The reason is that 16 and 64-ounce soft drink bottles are ready substitutes for 32-ounce soft drink bottles. Although size is a unique characteristic of 32-ounce soft drink bottles, few other notable distinctions exist between 32-ounce soft drink bottles and 16 and 64-ounce soft drink bottles since contents, packaging, end use, vendors, consumer and industry perception, and sensitivity to price changes are all the same. Therefore, 32-ounce soft drink bottles are not a well-defined sub-market of the soft drink bottle market.

As with lemons, 32-ounce soft drink bottles have nothing to do with this case. They only serve as an illustration that not all markets have well-defined sub-markets.

The broad market in which Liggett and Myers claims that Brown and Williamson's price discrimination in the sale of black and white cigarettes had a reasonable possibility of injurying competition is the market for all cigarettes, branded and price value, in the United States. Neither Liggett and Myers nor Brown and Williamson dispute that the relevant market in which to evaluate a reasonable possibility of injury to competition is all cigarettes.

Liggett and Myers contends that price value

cigarettes are a well-defined sub-market of the cigarette market. Brown and Williamson disputes this. The term "price value cigarettes" means the generic portion of the cigarette market, and both black and white and branded generic cigarettes are properly included under the price value label.

You must decide two things. Are price value cigarettes a well-defined sub-market of the cigarette market, and was there a reasonable possibility of injury to competition in the cigarette market as a whole due to Brown and Williamson's price value activity. Your answer to these questions are important, and I will instruct you later how your answers to these questions will affect the evidence you will consider in determining whether Brown and Williamson violated the Robinson-Patman Act.

Once you have considered the market/sub-market question, you must distinguish between conduct which is lawful competition and conduct which is unlawful competition. Please note that mere diversion of business from one competitor to another competitor or to other competitors is not, in and of itself, unlawful.

The first element you must consider in determining whether Brown and Williamson violated the Robinson-Patman Act is whether Brown and Williamson - is whether Liggett and Myers has shown by a preponderance of the evidence that Brown and Williamson's price discrimination in the sale of black

and white cigarettes had a reasonable possibility of injuring competition in the cigarette market as a whole.

By reasonable possibility, I mean just that. It is not necessary for Liggett and Myers to establish that Brown and Williamson's price discrimination actually injured competition. Liggett and Myers need only show that Brown and Williamson's conduct had a reasonable possibility of injuring competition in the cigarette market.

On the other hand, Liggett and Myers must show more than a mere possibility of injury to competition in the cigarette market. There must be a reasonable possibility of injury to competition. Of course, if Liggett and Myers shows that actual injury to competition in the cigarette market occurred due to Brown and Williamson's price discrimination in the sale of black and white cigarettes, then the reasonable possibility of injury to competition element is satisfied.

By injury to competition, I mean the injury to consumer welfare which results when a competitor is able to raise and to maintain prices in a market or well-defined sub-market above competitive levels. In order to injure competition in the cigarette market as a whole, Brown and Williamson must be able to create a real possibility of both driving out rivals by loss-creating price cutting, and then holding on to that advantage to recoup losses by raising and

maintaining prices at higher than competitive levels.

You must remember that the Robinson-Patman Act was designed to protect competition rather than just competitors, and therefore injury to competition does not mean injury to a competitor. Liggett and Myers cannot satisfy this element simply by showing that they were injured by Brown and Williamson's conduct. To satisfy this element, Liggett and Myers must show by a preponderance of the evidence that Brown and Williamson's conduct had a reasonable possibility of injuring competition in the cigarette market, and not just a reasonable possibility of injuring a competitor in the cigarette market.

Earlier I instructed you whether price value cigarettes are a well-defined sub-market of the cigarette market. Your decision on that question will be very important in determining whether Brown and Williamson's activity had a reasonable possibility of injuring competition in the cigarette market. If you determine that price value cigarettes are a well-defined sub-market of the cigarette market, then as a threshold matter, before examining the injury to competition element of Liggett and Myers' Robinson-Patman Act claim, I charge you that injuring competition in the - I charge you that Brown and Williamson could not have had a reasonable possibility of injuring competition in the cigarette market unless Brown and

Williamson had market power or a realistic prospect of obtaining market power in either a well-defined price value sub-market or in the cigarette market as a whole.

If you determine that price value cigarettes are not a well-defined sub-market of the cigarette market, then as a threshold matter, before examining the injury to competition element of Liggett and Myers' Robinson-Patman Act claim, I charge you that Brown and Williamson could not have had a reasonable possibility of injuring competition in the cigarette market unless Brown and Williamson had market power or a realistic prospect of obtaining market power in the cigarette market as a whole.

Now market power must be distinguished from market share. Market share is the percent of sales a company has in a market or sub-market compared to its competitors. For example, if a company has a 20 percent market share, it's competitors have an 80 percent market share.

On the other hand, market power is the power of a company to control prices and to exclude rivals in a market or well-defined sub-market. The power to control prices is simply the ability of a company to establish and to maintain higher price points for its products in a market or well-defined sub-market without suffering a loss of business to its rivals. The power to exclude rivals means the ability of a company to discipline or exclude existing rivals and to

prevent new rivals from entering the market or well-defined sub-market. If other rivals can with reasonable ease take the place of any excluded or disciplined competitor, then competition cannot be injured in a market or a well-defined sub-market.

For Robinson-Patman Act purposes, market power is the relevant concept you must closely examine. The market share of a company is one factor, but not the only one, which can help you determine whether that company possesses market power. If you find that Brown and Williamson did not possess market power, then you must find for Brown and Williamson and against Liggett and Myers on the Robinson-Patman Act claim. This is because Liggett and Myers cannot demonstrate that Brown and Williamson had a reasonable possibility of injuring competition in the cigarette market unless Brown and Williamson possessed market power.

Now if you determine that Brown and Williamson possessed sufficient market power, then a reasonable possibility of injuring competition in the cigarette market can be shown in either one of two ways. First, Liggett and Myers may show through market analysis that Brown and Williamson's price discrimination in the sale of black and white cigarettes actually injured competition in the cigarette market. Or two, Liggett and Myers may show that Brown and Williamson had predatory intent from which you may

infer that Brown and Williamson's price discrimination in the sale of black and white cigarettes had a reasonable possibility of injuring competition in the cigarette market as a whole.

The first way for Liggett and Myers to establish that Brown and Williamson's price discrimination in the sale of black and white cigarettes had a reasonable possibility of injuring competition in the cigarette market as a whole is through market analysis. Market analysis is looking at what actually happened in the cigarette market over a relevant time period to determine whether Brown and Williamson's price discrimination in the sale of black and white cigarettes actually injured competition in the cigarette market as a whole.

In making this determination, you should consider whether the cigarette market was more competitive before or after Brown and Williamson's entry into the price value business. In this regard, you may wish to consider changes in cigarette prices as a whole and the availability of any special promotions as well as the relative price differences between full revenue branded and price value cigarettes.

If you find that Liggett and Myers has established through a preponderance of the evidence, that Brown and Williamson's conduct actually injured competition in the cigarette market, then the reasonable possibility of injury

to competition element is satisfied and you need not consider whether Brown and Williamson had predatory intent.

The second way, in addition to market analysis for Brown and Williamson - or for Liggett and Myers to establish that Brown and Williamson's price discrimination in the sale of black and white cigarettes had a reasonable possibility of injuring competition in the cigarette market as a whole is through examination of Brown and Williamson's intent when it entered the black and white cigarette business.

Predatory intent, from which a reasonable possibility of injury to competition may be inferred, can be shown in either one of two ways: First, predatory intent may be inferred from proof that Brown and Williamson priced its relevant cigarette product below the reasonably anticipated average variable cost of manufacturing and selling that product over a relevant time period, and/or predatory intent may be found through direct evidence of Brown and Williamson's statements, documents or conduct.

You must remember that no matter what you decide about whether Brown and Williamson possessed predatory intent, you may only infer a reasonable possibility of injury to competition in the cigarette market from predatory intent if you find that Brown and Williamson had sufficient market power.

Predatory intent is the state of mind in which a

company plans to discipline and to exclude rivals from a market or a well-defined sub-market so that it can earn higher than competitive profits on its products in that market or well-defined sub-market.

Predatory pricing happens when a company foregos short-term profits in order to develop a market position such that the company can later raise prices and recoup profits. Predatory pricing differs from healthy competition pricing in its motives. A predator by its pricing seeks to impose losses on other firms, not garner gains for itself. Price reductions that constitute a legitimate competitive response to market conditions are not predatory.

Now to infer is to make a reasoned, logical conclusion that a disputed fact exists on the basis of another fact which has been shown to exist. The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion which you, the jury, are permitted - but not required - to draw from the facts which have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense. For example, an inference of decreased competition may be overcome by evidence indicating that competition actually increased.

If you determine that Brown and Williamson possessed

market power, the law allows you to infer that Brown and Williamson's conduct had a reasonable possibility of injuring competition in the cigarette market so long as you find that Brown and Williamson acted - at least as long as you find that Brown and Williamson acted with predatory intent. There are two ways that Liggett and Myers can show predatory intent. I will instruct you now on the first way, the average variable cost test.

Earlier I instructed you that you must determine whether price value cigarettes are a well-defined sub-market of the cigarette market. This decision is crucial to your proper application of the average variable cost test. I will explain the average variable cost test to you shortly, but right now you must understand that you cannot apply this test correctly until you determine whether price value cigarettes are a well-defined sub-market of the cigarette market.

If you find that price value cigarettes are a well-defined sub-market of the cigarette market, then, in applying the average variable cost test, you must look at whether Brown and Williamson priced its black and white cigarettes below reasonably anticipated average variable cost. If you find that Brown and Williamson did price its black and white cigarettes below reasonably anticipated average variable cost, then you may - but need not - infer that Brown and Williamson had predatory intent.

On the other hand, if you find that price-value cigarettes are not a well-defined sub-market of the cigarette market, then you should not apply the average variable cost test since there is no evidence that Brown and Williamson priced its full line of cigarettes, branded and price value, below reasonably anticipated average variable cost.

The average variable cost test is a double-inference test, because if you find that Brown and Williamson priced below its reasonably anticipated average variable cost, you may infer that Brown and Williamson had predatory intent, and from predatory intent you may infer that Brown and Williamson's conduct had a reasonable possibility of injuring competition in the cigarette market as a whole.

Now I would like to take a moment and explain the component parts of the average variable cost test to you. Costs are divided into fixed costs and variable costs.

Fixed costs do not vary with the number of goods that a company produces and sells. Because these costs are incurred regardless of the quantity of products sold, you should not consider fixed costs in determining whether Brown and Williamson's prices were predatory.

Variable costs, on the other hand, are those costs which increase or decrease directly with changes in output. Average variable cost is the sum of all variable costs divided by the total number of units of output in a relevant

time period. Remember, variable costs, those costs that change directly with a company's output, are the only relevant costs for purposes of the average variable cost test.

The determination of which costs are variable and which are fixed is a matter for you to decide. You should only apply the test if you find that price value cigarettes are a well-defined sub-market of the cigarette market. If so, to apply the test you must determine what Brown and Williamson's average variable cost was for black and white cigarettes and then determine whether the net prices Brown and Williamson charged for its black and white cigarettes were above or below reasonably anticipated average variable cost.

Once you have determined Brown and Williamson's reasonably anticipated average variable cost, you must decide whether or not Brown and Williamson priced below reasonably anticipated average variable cost. Price here means the net price.

Net price equals list price minus all discounts to the customer. You must remember that customer means the wholesalers and the direct-buying retailers to whom Brown and Williamson directly sold its black and white cigarettes. You should not equate customer with consumer.

Remember there are several steps that you must go

through in applying the average variable cost test. Now you've heard testimony from the various experts concerning their figures and their determinations applying the average variable cost test.

If you want to go through the exercise and apply it yourself, first you must decide whether price value cigarettes are a well-defined sub-market of the cigarette market. If you find that price value cigarettes are a well-defined sub-market, then you must decide the total net price of Brown and Williamson's black and white cigarettes. You do this by determining the dollar value of Brown and Williamson's black and white cigarette sales in the United States over a relevant time period. Then you must calculate the reasonably anticipated average variable cost of Brown and Williamson's total black and white cigarette output in the United States.

You calculate this by adding up all of the reasonably anticipated average variable - you calculate this by adding up all of the reasonably anticipated variable costs Brown and Williamson spent in manufacturing and selling black and white cigarettes in the United States over the same relevant time period which you used in deciding Brown and Williamson's total dollar sales. Then you compare your total price figure with your reasonably anticipated average variable cost figure. Only if Brown and Williamson's black

and white cigarettes are priced below reasonably anticipated average variable cost may you infer predatory intent from this cost price evidence.

If you find that price-value cigarettes are not a well-defined sub-market of the cigarette market, then you must not apply the average variable cost test since there is no evidence that Brown and Williamson priced its full line of cigarettes, branded and price value, below reasonably anticipated average variable cost.

Liggett and Myers contends that the appropriate time period for determining whether Brown and Williamson priced below its reasonably anticipated average variable cost is the 18-month period from June 1984 through December 1985.

Brown and Williamson, on the other hand, contends that you should look at the entire period from June 1984 to present, or at least from June 1984 through June 1987, to determine whether Brown and Williamson priced below its reasonably anticipated average variable cost.

It is for you to decide what the relevant time period is for determining whether Brown and Williamson priced below its reasonably anticipated average variable cost. In determining the relevant time period, you may use Liggett and Myers' time period or you may use either of Brown and Williamson's time periods, or you may want to arrive at a different time period which you consider relevant.

In determining whether prices are predatory, you must look at what Brown and Williamson reasonably believed its net prices and average variable cost would be. If you find that Brown and Williamson reasonably believed that its average variable cost would not exceed its net prices, but, that for unforeseen reasons, its average variable cost actually did exceed its net prices, then you must find that Brown and Williamson did not price below its reasonably anticipated average variable cost.

You must remember that the average variable cost test only creates an inference of predatory intent. Even if you find that Brown and Williamson priced its black and white cigarettes below its reasonably anticipated average variable cost, you may reject the inference of predatory intent. For example, this inference may be rejected if you find that Brown and Williamson was attempting to gain entry into a new portion of the cigarette business and offered net prices below reasonably anticipated average variable cost on an introductory basis only.

Also, you may, if you wish, reject an inference of predatory intent if you find that a substantial motivation for Brown and Williamson's entry into black and white cigarettes was LIFO decrement avoidance tax benefits.

In your deliberations you should consider, for example, whether Brown and Williamson actually obtained LIFO

decrement avoidance tax benefits as a result of selling black and white cigarettes, or whether Brown and Williamson actually considered LIFO decrement avoidance tax benefits when it decided to enter the black and white cigarette business, or whether LIFO decrement avoidance tax benefits were a substantial motivation for Brown and Williamson's entry into black and white cigarettes since Brown and Williamson incurred additional costs, including start-up costs, due to the generic venture which possibility offset the tax savings from LIFO decrement avoidance. Remember that start-up costs often are used for new assets which have a long life, however.

The second way that Liggett and Myers can establish predatory intent is through direct evidence of Brown and Williamson's statements and conduct. Statements that show predatory intent can be oral or written statements by Brown and Williamson personnel. In determining what weight to give these statements, you may consider whether the person making the statement had a voice in directing Brown and Williamson company policy and whether the person making the statement had direct responsibility for the particular subject matter in question.

Conduct can also indicate predatory intent. For example, if you find that Brown and Williamson knowingly copied Liggett and Myers' quality seal and leaf design, you

may consider this as some direct evidence that Brown and Williamson acted with predatory intent. You must determine the weight to give to Brown and Williamson's conduct.

When you consider direct evidence of predatory intent, you must be very cautious. The true intent of statements and conduct is often difficult to discern. Documentary evidence of predatory intent can be especially misleading and ambiguous, because the exact meaning of words is sometimes unclear and business people often use aggressive words to describe lawful competitive activity.

For instance, I have allowed you to hear some evidence regarding U.S. Tobacco and Georgopulo Company for the limited purpose of providing a yardstick to assist you in evaluating the competitive terminology used in business documents, and evaluating the effectiveness of using lower list prices as a way of competing for consumers at retail, if you find that the experiences of U. S. Tobacco and Georgopulo Company were considered by Brown and Williamson when it made its pricing decisions regarding black and white cigarettes.

You must remember, as I have told you before, there is no contention in this case that Liggett and Myers' conduct with respect to U. S. Tobacco and Georgopulo Company injured competition in the cigarette market. Neither U. S. Tobacco nor Georgopulo Company have any claims against Liggett and Myers in connection with any of the evidence you have heard

in this case.

Liggett and Myers must show more than just a reasonable possibility of injury to competition in the cigarette market in order to prove that Brown and Williamson violated the Robinson-Patman Act. The law provides that it must be the price discrimination which causes the reasonable possibility of injury to competition.

In this case, unless Liggett and Myers proves by a preponderance of the evidence that a reasonable possibility of injury to competition in the cigarette market was caused by differences in the prices Brown and Williamson charged for its black and white cigarettes, then Liggett and Myers has failed to carry its burden.

Several examples may be useful here. First, if you find that the reasonable possibility of injury to competition resulted merely from low prices, then you must find that Brown and Williamson's price discrimination did not create any reasonable possibility of injury to competition. Second, if you find that some other aspect of Brown and Williamson's conduct other than price discrimination caused a reasonable possibility of injury to competition in the cigarette market, then you must find that Brown and Williamson's price discrimination did not create a reasonable possibility of injury to competition in the cigarette market.

On the other hand, if you find that price

discrimination facilitated or made possible predatory conduct by Brown and Williamson, then you may find that it was the price discrimination which had a reasonable possibility of injury to competition in the cigarette market.

Remember, even if you decide that Brown and Williamson's conduct created a reasonable possibility of injury to competition in the cigarette market, you must find for Brown and Williamson and against Liggett and Myers if the conduct which created this threat to competition was something other than Brown and Williamson's price discrimination in the sale of black and white cigarettes.

If you find that Liggett and Myers has established by a preponderance or greater weight of the evidence, the elements of its claim under the Robinson-Patman Act, that is, you have found that Brown and Williamson's price discrimination had a reasonable possibility of injuring competition in the cigarette market as a whole, then you must find that Brown and Williamson has violated the Robinson-Patman Act, unless Brown and Williamson has established an affirmative defense under Section 2(b) of the Robinson-Patman Act.

Now an affirmative defense is one that Brown and Williamson has the burden of proving by a preponderance of the evidence. Section 2(b) of the Robinson-Patman Act states in general that - and this is a paraphrase - "nothing herein

contained shall prevent a seller rebutting the evidence by plaintiff indicating a possible violation of the Robinson-Patman Act by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor."

To establish the affirmative defense of meeting competition, Brown and Williamson must show by a preponderance of the evidence that it lowered its net prices of black and white cigarettes to customers in good faith with the intention to meet but not beat the equally low net price of Liggett and Myers' black and white cigarettes.

Good faith is the most important element of this defense. Good faith is shown if Brown and Williamson reasonably believed, over the relevant time period, that the net prices of its black and white cigarettes were meeting but not beating the equally low net prices of Liggett and Myers' black and white cigarettes.

Even if the net prices of Brown and Williamson's black and white cigarettes were actually lower to customers than Liggett and Myers' net prices, the defense is not lost if Brown and Williamson establishes by a preponderance of the evidence its good faith.

You must remember that even if all of the elements

of the Robinson-Patman Act are established, Brown and Williamson has an absolute affirmative defense if it shows that its black and white cigarettes' net prices were set in good faith to meet but not beat the equally low prices of Liggett and Myers' black and white cigarettes. If Brown and Williamson proves the meeting competition defense by a preponderance of the evidence, you must find that Brown and Williamson did not violate the Robinson-Patman Act. Only if you find that Brown and Williamson is not entitled to the meeting competition defense, may you consider damages.

If you find that Liggett and Myers has established by a preponderance of the evidence that Brown and Williamson violated Section 2(a) of the Robinson-Patman Act, and if you find that Brown and Williamson has not proven by a preponderance of the evidence the Section 2(b) affirmative defense on meeting competition, then you must consider whether Liggett and Myers is entitled to recover damages.

In order for you to determine that Liggett and Myers is entitled to damages, you must find that Liggett and Myers has proven by a preponderance of the evidence the following: One, that Liggett and Myers was in fact injured in its property or business; two, that Liggett and Myers suffered this injury due to Brown and Williamson's violation of the Robinson-Patman Act; and three, the amount of damages that Liggett and Myers has incurred.

I will now explain each of these elements to you further. Liggett and Myers can establish it was injured in its business or property if, by direct reason of Brown and Williamson's violation of the Robinson-Patman Act, it shows that it suffered financial losses in the period from June 1984 through December 1985, or another shorter time period which you are free to determine. These losses may include out-of-pocket expenses such as rebates or diminished returns on investment.

Next, Liggett and Myers must show that Brown and Williamson's price discrimination was a material cause of Liggett and Myers' actual injury. In making this determination, you may consider whether explanations other than Brown and Williamson's price discrimination were the real causes of Liggett and Myers' actual injury. These alternative explanations include, among others, one, competition by other cigarette manufacturers for full revenue branded sales; two, falling consumer demand in the cigarette market; or three, Liggett and Myers' own management shortcomings; or four, loss of consumer sales of black and white cigarettes which Liggett and Myers sold due to more popular branded generic cigarettes which Liggett and Myers did not sell.

You must remember that Liggett and Myers need not prove that Brown and Williamson's price discrimination was

the sole cause of Liggett and Myers' actual injury, nor must Liggett and Myers show that Brown and Williamson's price discrimination was a more substantial cause of injury than any other.

Liggett and Myers, however, must show that Brown and Williamson's price discrimination played a substantial part in causing Liggett and Myers' actual injury. Therefore, Liggett and Myers may not recover damages if you find that Brown and Williamson's conduct was not a material cause of Liggett and Myers' actual injury.

Finally, in order for Liggett and Myers to receive damages, it must provide sufficient evidence for you to determine the amount of damages it suffered from Brown and Williamson's illegal conduct. In determining a proper award of damages for Liggett and Myers, you must separate damages to Liggett and Myers from the lawful competitive activities of Brown and Williamson and the other cigarette manufacturers from damage to Liggett and Myers due to Brown and Williamson's illegal activities. Liggett and Myers may only recover damages for the illegal activities of Brown and Williamson.

Once Liggett and Myers has proven that it was, in fact, injured and that Brown and Williamson's conduct was a material cause of its injury, Liggett and Myers' burden of proving the amount of damages is somewhat lightened. You are

allowed to determine the amount of damages Liggett and Myers incurred based on the evidence which shows the extent of damages as a matter of just and reasonable inference, although the result may be only approximate.

However, this burden is not established by mere speculation and guesswork. Liggett and Myers is still required to put forward substantial and relevant evidence from which damage can be reasonably approximated.

Now you also know that Liggett and Myers has a trademark claim in this case, and Liggett and Myers has been granted three federal trademark registrations for the quality seal from the United States Patent and Trademark Office. These trademark registrations give Liggett and Myers a legal presumption that the quality seal is a valid trademark, that Liggett and Myers exclusively owns the quality seal and that Liggett and Myers has the exclusive right to use the quality seal in connection with the sale of cigarettes. Defendant has not contested the validity of Liggett and Myers' federal registration and trademark for its quality seal. You are therefore instructed to find that the quality seal was and continued to be a valid protectable trademark as of July 1983, the date set forth in Liggett and Myers' registrations.

Liggett and Myers has also been granted United States trademark registration for its leaf design. Plaintiff

has no claim for damages as a result of any use by defendant of the leaf design. You may, however, consider the leaf design to the extent it aids you in determining defendant's intent.

Liggett and Myers' cause of action for trademark infringement is limited to Brown and Williamson's oval closure seal. The oval closure seal was discontinued on packages shipped by defendant after July 1984. The leaf design was never used on any packages which were actually sold to the consumer.

After Liggett and Myers filed its lawsuit complaining about Brown and Williamson's use of its oval closure seal, Brown and Williamson stopped production of its oval closure seal and switched to a different closure seal with a picture of a lion and the phrase, "Superior Tobacco." Liggett and Myers does not claim in this case that Brown and Williamson's new closure seal design infringes any of Liggett and Myers' rights. The only issue for you to decide is whether Liggett has proved by the preponderance or greater weight of the evidence that Brown and Williamson violated Liggett and Myers' rights by using the oval closure seal in sales presentations and selling and shipping 18,000 cases of cigarettes - generic cigarette packages with the oval closure seal.

Liggett and Myers' trademark claim does not include

the generic black and white package. Liggett and Myers has no trademark claim to the black and white design as such. But you may consider the overall similarity of the packages in determining whether Brown and Williamson's oval closure seal likely would be confused with Liggett and Myers' quality seal.

Now the term "trademark" includes any word, name, symbol or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods and distinguish them from those manufactured or sold by others.

The function of a trademark is to designate goods as a product of a particular manufacturer or merchant and to protect against the sale of another's product as his.

A trademark is also a merchandising shortcut which induces a prospective purchaser to select what he wants or what he has been led to believe he wants. There is, therefore, a public interest in avoiding confusion in the use of trademarks.

Trademark rights are not lost if the purchasing public familiar with the trademark does not know the specific name of the manufacturer of the product sold under a mark. The purchaser need only expect to get the same product previously purchased or seen advertised under the mark.

Now the right to protection of a trademark comes from its use. When a manufacturer has established a

trademark right before anyone else, by use or in connection with a product, the right to use it becomes an exclusive right and the trademark is his or her property. No other person can use the same or similar designs in any manner which would be likely to cause consumer confusion, mistake or deception.

In a trademark action such as this, the parties that say certain facts exist must prove those facts by the preponderance or greater weight of the evidence. This is known as the burden of proof. As I had mentioned earlier, Liggett and Myers has the burden of proof on the trademark claim just as it has the burden of proof on the Robinson-Patman Act or antitrust claim. Now you must accept that Liggett and Myers has a valid trademark right in its quality seal. Liggett and Myers is not required to offer any evidence on the validity of its marks.

In this case, Liggett and Myers must prove by the preponderance of the evidence, first, that Brown and Williamson has infringed Liggett and Myers' quality seal trademark, and next the amount of damages, if any, which resulted from Brown and Williamson's infringement of the quality seal trademark.

As I said, Liggett and Myers does not seek damages for any infringement of the leaf design.

Now plaintiff's first claim, that is, the first

trademark claim, as we were calling it, is that Brown and Williamson violated the federal unfair competition section of the United States Trademark Act. This section encompasses various forms of unfair competition, including trademark infringement. Trademark infringement, however, occurs only when the defendant brings about the confusion in a particular manner by using marks confusingly similar to plaintiff's marks, and that is what we are talking about here.

The issue on the trademark claim is whether Liggett and Myers has proved by the preponderance of the evidence that Brown and Williamson's oval closure seal infringed upon Liggett and Myers' quality seal. To determine whether Brown and Williamson's oval closure seal infringed upon Liggett and Myers' quality seal, you must determine whether Liggett and Myers has proved by the preponderance of the evidence that an appreciable number of ordinary, prudent purchasers likely would be mistaken, confused or deceived by Brown and Williamson's oval closure seal as to the source of Brown and Williamson's generic cigarettes.

You should keep in mind that likelihood of confusion means probable confusion. It is not enough if confusion is merely possible. The test is whether the alleged similarity in closure seals would probably confuse an appreciable number of ordinary, prudent purchasers as to the source or origin of the generic cigarettes.

To determine whether trademark infringement exists, you must determine whether likelihood of confusion exists.

In determining whether or not there will be a likelihood of confusion caused by the use of defendant's oval closure seal on its generic cigarette packages, you may draw on your common experiences as citizens of the community. In addition to the general knowledge that you have acquired throughout your lifetimes, you must also consider the following factors.

You are not restricted in considering the issue of likelihood of confusion to the factors I am listing for you. Rather, you are to consider the seven listed factors along with any other factors that you believe reasonably bear upon the issue of likelihood of confusion, and each factor should be given whatever weight you regard as appropriate in light of the total evidence presented at trial.

The first factor you should consider is whether and to what degree Liggett and Myers' quality seal is either a strong or distinctive mark. The strength of a mark determines the scope of protection given the mark; strong marks are given greater protection than weak marks.

In determining the strength of the mark, you should consider the type of the mark which I will help define for you now. Marks such as Liggett and Myers' quality seal may be classified as either descriptive, suggestive or arbitrary.

A descriptive mark emphasizes a characteristic or trait of the product. A descriptive mark is a weak mark, entitled only to a restricted scope of protection.

A suggestive mark signifies some characteristic of the product, but requires the consumer to use his or her imagination to determine the nature of the product. A suggestive mark is stronger than a descriptive mark, and is given greater protection than a descriptive mark.

And finally, an arbitrary mark has no inherent relationship to the product with which it is associated. "Arbitrary" means that the symbol as it is ordinarily understood is applied to the goods in a totally fanciful or non-descriptive sense. An arbitrary mark is entitled to the most protection since it is the strongest mark.

Liggett and Myers' quality seal is a registered trademark. Registration by the United States Patent and Trademark office allows you to presume that a trademark is at least suggestive. Brown and Williamson may overcome this presumption by presenting evidence which you believe shows the lack of strength of the quality seal.

In determining the strength of the mark, you may also consider the use of the mark by third parties. If other companies use trademarks which were confusingly similar to the quality seal, the strength of the quality seal might tend to be diluted.

The second factor on the issue of likelihood of confusion is the degree of similarity between the plaintiff's trademark and the defendant's closure seal. In evaluating this factor, you should consider the overall appearance of plaintiff's and defendant's designs. In other words, ask yourself whether defendant's closure seal looks like the Liggett and Myers' closure seal.

As part of this determination, you should consider the marks in the context in which they are used. That is, you should consider the similarity of the packaging on which the plaintiff's and the defendant's marks appear. If there is a similarity in the placement of the design on the packages, this might enhance the similarity between the parties' mark.

Liggett and Myers and Brown and Williamson each offered four generic families of cigarette packages. If you find from the evidence presented to you that Brown and Williamson's generic package is visually similar to Liggett and Myers' generic packaging, then you may consider this fact in determining the similarity between the defendant's and the plaintiff's marks. But remember, the plaintiff has no claim for the generic package design as such.

Also, you should consider the designs of the parties in their entirety and not break them down by component or individual features. The comparison is not a side-by-side

test of the marks. The comparison is based on the overall appearance of the marks in question as they appear on the packages.

You should judge these similarities as they would be seen by an ordinary, prudent purchaser of the cigarettes. That is, your evaluation of the parties' marks must be based on the marks themselves as a whole as they would be viewed in the marketplace. You should not dissect the marks or review individual components of the marks. Similarity of appearance should be considered in light of the overall impressions given to ordinary, prudent purchasers upon independently viewing Liggett and Myers' quality seal and then subsequently viewing the defendant's closure seal.

The third factor for you to consider is the similarity of the products offered by each of the parties under their respective seal or mark. The greater the similarity between the products, the greater the possibility of a likelihood of confusion. Here, of course, both parties sold generic cigarettes.

Fourth, you should consider the similarity of the marketing channels or methods of sale used by the plaintiff and defendant such as the types of advertising, packaging and displays used, the way in which the products are sold, the types of retail outlets used for the products, and the way in which the products are selected and purchased.

The fifth factor you should consider is the similarity of the class of consumers to whom the products or the parties are sold, including the degree to which potential consumers for the product of one party would or would not be potential consumers for the other party's product.

The sixth factor to consider is defendant's intent in selecting its seal. You should consider whether the defendant intended to confuse or deceive the public and to benefit from Liggett and Myers' reputation by adopting and using the oval closure seal. Although the intent of the defendant constitutes an additional factor which may properly be considered, the law does not require Liggett and Myers to prove a wrongful or bad intent by Brown and Williamson in order to prove trademark infringement. Consequently, good faith or lack of intent is not a defense to a trademark infringement claim.

As evidence of intent to confuse or deceive the public you should consider whether, one, Brown and Williamson had knowledge of Liggett and Myers' quality seal, as well as its leaf design trademark, before Brown and Williamson adopted its own packaging; and, two, whether Brown and Williamson's oval closure seal is confusingly similar to Liggett and Myers' quality seal.

The seventh and last factor to consider in

determining likelihood of confusion is whether consumers have actually confused the plaintiff's product with the defendant's product. As with all of these factors, the only issue is confusion as to the oval closure seal, not the general black and white generic package. You should consider whether Liggett and Myers has shown that consumers were actually confused by the oval closure seal that Brown and Williamson sold. While Liggett and Myers is not required to show actual confusion in order to prove likelihood of confusion, proof of actual confusion, as well as the absence of proof of actual confusion, are helpful evidence.

If you find that Brown and Williamson intended to cause confusion in the marketplace as to Liggett and Myers' trademark, then a presumption arises that actual confusion has occurred. However, if you find that actual confusion, in fact, did not occur, then you may not presume actual confusion, regardless of Brown and Williamson's intentions.

You should keep in mind that Liggett and Myers, in its trademark application and registration, was required by the trademark office to disclaim the phrase "quality blend" apart from its mark. The purpose of a disclaimer is to show that Liggett is not claiming any exclusive rights to the words "quality" and "blend" except in the precise relation and association in which it appears in Liggett's mark. Thus, Brown and Williamson and others are free to use the word

"quality" in their closure seal.

Liggett and Myers' trademark registrations do not contain the phrase "20 Class A cigarettes." Liggett and Myers cannot claim any exclusive right to that phrase.

Liggett and Myers' federal trademark registrations do not include the colors black and gold as part of the trademark. Accordingly, Liggett and Myers can assert no exclusive right to use those colors on closure seals. However, as I said, you may consider each party's seal in the context in which it is used.

Now in addition to its federal trademark law claim, Liggett and Myers has also asserted trademark-related claims under North Carolina law.

Liggett and Myers' first state law claim is for common law trademark infringement.

Liggett and Myers' second state law claim is for common law unfair competition, alleging that Brown and Williamson has attempted to pass off its generic cigarette packs bearing the oval closure seal as Liggett and Myers cigarettes.

The North Carolina law of trademark and unfair competition is similar to the federal trademark law, on which I have already instructed you. The standard to determine liability under the state law claims is the same likelihood of confusion test as under the federal trademark law.

Liggett and Myers' two state trademark claims are limited to a determination of whether there is a likelihood of confusion between Liggett and Myers' quality seal and the oval closure seal of Brown and Williamson.

As I instructed you earlier on the federal trademark claim, Liggett and Myers does not seek any money damages for Brown and Williamson's use of the leaf design, because no cigarettes were sold with this design. Evidence of the leaf design may be considered by you only to the extent you find it aids you in determining Brown and Williamson's intent.

In summary, you may not find a likelihood of confusion unless you find that Liggett and Myers has proved, by the greater weight of the evidence, the existence of a similarity between Liggett and Myers' quality seal and Brown and Williamson's oval closure seal that would likely cause confusion of an appreciable number of ordinary prudent purchases as to the source or origin of the generic cigarettes. You should put yourselves in the shoes of the ordinary prudent consumer in the marketplace.

If you find federal trademark infringement, you may begin to consider the standards for an award of compensatory damages. Compensatory damages consist of the direct economic losses and out-of-pocket expenses to the plaintiff resulting from any infringement by the defendant.

If you should find that consumers are likely to

confuse Brown and Williamson's oval closure seal with Liggett and Myers' quality seal, after considering the instructions I have given you, then you have found trademark infringement. Before you can award money to Liggett and Myers for infringement, however, you must now also find that there was actual confusion by consumers as to the trademark.

You may find actual confusion by consumers as to the trademark in one of the following ways:

First, if you find that Brown and Williamson intended to confuse consumers, you may presume that consumers were actually confused. This presumption may be overcome by evidence which you believe shows that consumers in fact were not actually confused.

Or second, if you do not believe from the evidence that Brown and Williamson intended to confuse consumers as to the trademark, you may still consider any other evidence of actual confusion presented in the case.

If you cannot find that consumers were actually confused, either from making such a presumption by finding intent to deceive or from other evidence, then you may not award compensatory damages to Liggett and Myers for trademark infringment.

If you reach the issue of determining compensatory damages, you should consider whether Liggett and Myers has suffered monetary losses which Brown and Williamson's use of

the oval closure seal was a substantial factor in causing. A trademark owner may recover for all elements of injury to its business directly resulting from the infringer's wrongful acts. You must determine whether Brown and Williamson's use of merchandise containing its oval closure seal was a substantial factor that caused Liggett and Myers to reduce its prices by paying rebates. If you find that Brown and Williamson's use of the oval closure seal was a substantial factor in Liggett and Myers' offer of rebates, you may award damages for those rebates as a reduction in price. But you may not award money damages for rebates which you believe were not caused by Brown and Williamson's use of the oval closure seal.

On the other hand, if Brown and Williamson's use of the oval closure seal was merely incidental, or if Brown and Williamson's conduct was so removed from the injury as to be only a remote cause, then Brown and Williamson's use of the oval closure seal would not be a substantial cause of Liggett and Myers' payment of rebates.

The mere fact that the business of the plaintiff has been injured does not in and of itself prove that the plaintiff's payments of rebates were substantially caused by any conduct on Brown and Williamson's part. You are not to assume from the mere fact of injury that the defendant's conduct substantially caused that injury. If the injury

occurred as a result of the way in which the plaintiff conducted its business, or was due to other causes, or due to matters over which the defendant had no control and for which the defendant was not responsible, then the conduct of the defendant would not be a substantial cause of the injury to Liggett and Myers' business.

So I instruct you that if Liggett and Myers has proved by the greater weight or preponderance of the evidence that Liggett and Myers' business was injured by Brown and Williamson's infringement of Liggett and Myers' quality seal trademark and that Brown and Williamson's conduct was a substantial cause of that injury, then it would be your duty to find causation between defendant's conduct and plaintiff's injury. If on the other hand you fail to find that Liggett and Myers' business was injured by Brown and Williamson's infringement, or you are unable to say what the truth is, then it would be your duty to find no causation between defendant's conduct and plaintiff's injury.

If you reach the issue of determining compensatory damages, you should attempt to answer the question: What is the amount of money required to right any wrong done to Liggett and Myers by Brown and Williamson's use of the oval closure seal? Under the law, Brown and Williamson is liable for all damages suffered by Liggett and Myers as a result of the infringment, if any, of Liggett and Myers' quality seal.

Any difficulty or uncertainty in measuring the precise amount of damages does not permit recovery by Liggett and Myers. Although you should not determine compensatory damages by mere speculation, you may use your best judgment based on the evidence to determine compensatory damages.

If you find that Liggett and Myers suffered an actual loss and that this loss was substantially caused by the infringement of its trademark, then you must determine whether Liggett and Myers could have and should have avoided any of its injury. A person seeking damages for the wrongful act of another must do that which a reasonable person would do under the circumstances to limit the amount of the damages. It is for you the jury to decide whether Liggett and Myers acted as a responsible corporation would have acted when it spent money on rebates in an alleged response to Brown and Williamson's use of the oval closure seal. A reasonable corporation is one which exercises the care of a corporation of ordinary prudence in similar circumstances.

In assessing damages, if any, you should choose figures that will reasonably compensate Liggett and Myers for any actual injury that you may find resulting directly from Brown and Williamson's use of the oval closure seal. This award should not be based on mere speculation or conjecture. Therefore, if you cannot determine the amount of actual damages suffered by the plaintiff, you may award what is

referred to as "nominal damages," such as one dollar. Where any award of damages would be based on mere speculation, Liggett and Myers is entitled only to nominal damages.

If you have found in favor of Liggett and Myers for two state claims, the common law trademark infringement of the quality seal or common law unfair competition of the quality seal, if you find in Liggett and Myers' favor on either one or both of those state law claims, then you may determine what amount of punitive damages, if any, Liggett and Myers is entitled to recover. Punitive damages are in addition to any compensatory damages you may award. Under these state law claims a jury is permitted under certain circumstances to award the injured party punitive damages to punish the wrong doer for extraordinary or outrageous conduct and to serve as an example or warning to others not to engage in such conduct.

Under the North Carolina common law claims for trademark infringement and unfair competition, you may award punitive damages if you have found that the plaintiff, Liggett and Myers, was entitled to compensatory damages under either or both of the state law claims even though such compensatory damages may have been small.

The award to Liggett and Myers of only a small sum of money as compensatory damages, for example, one dollar, would not prevent you from awarding punitive damages if you

find that an award of punitive damages is justified.

If you reach this issue of punitive damages, the burden of proof is on Liggett and Myers to prove, by a preponderance of the evidence, that the circumstances justify an award of punitive damages. The fact that you have awarded compensatory damages for either of the state law claims - either or both state law claims - will not automatically justify an award of punitive damages.

Punitive damages are not to be awarded as a matter of right. They may be awarded only, if you, the jury, finds that the conduct of the defendant, Brown and Williamson, is so outrageous as to justify punishing it or making an example of it. Upon making such a finding, whether or not to award such damages and the amount to be awarded, within reasonable limits, are matters within the sound discretion of the jury. There must be an element of aggravation accompanying the conduct which causes the injury, including whether the wrong is done willfully or with actual malice or under circumstances of rudeness, insult, indignity, oppression, or in a manner which demonstrates a reckless and wanton disregard of the plaintiff's, Liggett and Myers', rights.

So, members of the jury, I instruct you that if you find by the preponderance of the evidence that Brown and Williamson's conduct was accompanied by such aggravating circumstances as, under the instructions I have just given

you, would permit an award of punitive damages, then you may award the plaintiff, Liggett and Myers, an amount which in your discretion will serve to punish the defendant, Brown and Williamson, and to deter others from committing like offenses.

Of course, the fact that I have given you instructions concerning the issues of plaintiff's damages, either on the anti-trust or the trademark infringement damages, should not be interpreted by you in any way as an indication that I believe the plaintiff should or should not prevail in this case.

Your verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must consider the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hestitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges; judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Now upon retiring to the jury room, you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and who will be your spokesperson here in court.

Now a Form of Verdict has been prepared for your convenience, and when I send you back copies of the charge, if not before, I am going to send you copies of the verdict sheet. And it is going to, generally, have a number of issues, approximately ten or twelve, for you to answer. And the first issue is going to be something to the effect that, "Did Brown and Williamson engage in price discrimination that had a reasonable possibility of injuring competition in the cigarette market as a whole in the United States?" And there will be a space in there for you to answer yes or no.

The next issue is likely to be, "If so," that is, if you've answered the first issue, yes, "did Liggett and Myers suffer injury to its business or property as a result of such price discrimination?"

A third issue, "Did Brown and Williamson engage in price discrimination in good faith with the intention to meet, but not beat the equally low net prices of Brown and Williamson?" Another space for you to answer yes or no.

Fourth issue, "What amount of damages, if any, is Liggett and Myers entitled to recover from Brown and Williamson as a result of Brown and Williamson's violation of the Robinson-Patman Act?" And there will be a space there for a dollar amount to be filled in. And there's an instruction under that issue that directs you specifically, as I have instructed you in these instructions. "Do not consider this issue unless you have answered yes to both issues one and two and no to issue number three." That is, you don't reach the issue of damages under the Robinson-Patman Act unless you have first found that Brown and Williamson engaged in price discrimination that had a reasonable possibility of injuring competition in the cigarette market as a whole in the United States and that you have also found that Liggett and Myers suffered injury to its business or property as a result of such price discrimination and have also found that Brown and Williamson did not engage in price discrimination in good faith with the intention to meet, but not beat, the equally low net prices of Liggett and Myers. And that instruction is specifically given under issue four, the damages amount, that you don't consider damages unless you've answered yes to both issues one and two and no to issue number three.

And then there's a fifth issue. "Did Brown and Williamson violate the United States Trademark Act by

infringing Liggett and Myers' quality seal trademark?" A space to answer yes or no there.

Another - sixth issue, "Did Brown and Williamson violate the North Carolina common law of trademarks by infringing Liggett and Myers' quality seal trademark?" A place to answer yes or no there.

Seventh issue, "Did Brown and Williamson violate the North Carolina common law of unfair competition by infringing Liggett and Myers' quality seal trademark?" A space to answer yes or no.

Eight issue, "Did Brown and Williamson intend to infringe Liggett and Myers' quality seal trademark?" A place for your answer there.

Ninth issue, "Were consumers actually confused by Brown and Williamson's infringement of Liggett and Myers' quality seal trademark?" A space to answer there.

Tenth issue, "What amount, if any, is Liggett and Myers entitle to recover from Brown and Williamson as compensatory damages for Brown and Williamson's infringement of Liggett and Myers' quality seal trademark?" A space there for damages, if any, to be filled in.

Eleventh issue, "What amount, if any, is Liggett and Myers entitled to recover from Brown and Williamson as punitive damages for violation of the North Carolina common law of trademarks for unfair competition?" A space there for

damages to be filled in, if any, and a specific reminder under that instruction: "Do not consider this issue unless you have answered issue six or seven yes and have awarded compensatory damages in issue ten." In other words, you don't consider the punitive damage issue unless you have answered yes, you found a violation of either or both of the state common law issues and have also awarded compensatory damages for - under issue ten.

You'll take the verdict form or will have the verdict form in the jury room with you. And when you've reached unanimous agreement as to your verdict, you will have your foreperson fill it in, date it, and sign it and notify the marshal that you're ready to return to the Court.

If during your deliberations you desire to communicate to the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the marshal, who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally.

I caution you, however, that with regard to any message or question you might send, that you should never state or specify any numerical division you have among you at the time.

Now what we're going to do now for the next few

minutes, I am going to ask the marshal to escort you to your jury room and I will ask you to remain there and not begin any discussions or deliberations at this time. I am going to give the attorneys for the parties an opportunity to make any objections or requests for additional instructions as a result of the charge that I have just given you. If I determine that additional instructions are appropriate, I will ask the marshal to bring you back in the courtroom. On the other hand, if I determine that no additional instructions are necessary, I will have Ms. Vaughan advise you or the marshal advise you of that fact, make the exhibits available to you and you may begin your deliberations. The exhibits that have been admitted during this trial are numerous, as you know, but they're all available to you and you are free to - they will be in the jury room for you to examine any one or as many of them as you wish during your deliberations.

Now we're going to observe, generally, the hours we have been observing during the trial of this case. I am going to let you, of course, go back to your homes or motels at night. You may go to lunch just as you have been doing. I give you the same cautions that I have been giving you throughout and it's especially important at this time. If you go out together for lunch or any other time, don't discuss the case among yourselves. The only time you're to

deliberate is when you're in that jury room and all nine of you are in there. If anybody tries to contact you in any way about this case during the day or night or over the weekend, at any time, report them to the marshal or to the Court immediately.

Don't discuss it with anyone until this case is over. I know your family and friends are going to be asking you about it and asking you about your deliberations. Just tell them you can't discuss it; that after the case is over, you'll be glad to tell them about it or answer any questions they have. That's strictly up to you. You don't ever have to discuss it with anybody if you don't want to.

I don't anticipate anything in the news media concerning this matter, but I warn you again, nobody knows more about the case than you do. So don't read, look at or listen to anything that might appear in the news media concerning this matter. If there's something your family or friends want to save for you that might appear, you're welcome to use it after you have returned your verdict. But until that time, please remember the instructions I have given you.

Each morning when we come into court I will ask you - those of you who come in early, don't begin your deliberations until you come in here at 9:30 and I can determine that all of you are here and tell you to go to your

jury room and begin your deliberations. We will come back in here at 5:00 and you will be excused for the day unless you advise us that you are making progress in your deliberations and want to go longer. At lunchtime I am not going to ask the lawyers to be back or have you brought back in the courtroom. Those of you who do go out to lunch, remember the same instructions that I have given you, only discuss it when the lunch period is over and you're in the jury room and all nine of you are together.

Ms. Vaughan is going to come in at 9:30 - I mean, at 12:30 and tell you that you may go to lunch at that time and we want everybody back at 1:45 and she will come in at 1:45 to make sure everybody is back.

Some of you are staying in your jury room during lunch. Don't discuss the case; don't engage in any deliberations. We will know that you are not deliberating between 12:30 and 1:45 and we will know that we will not be expected to hear from you at that time.

But during your deliberations, except for those times, please don't leave your jury room for any reason. Notify the marshal if you have any request. If some emergency comes up and you need to use the telephone, please notify the marshal and he will help you go to the telephone. Otherwise, don't leave your room. And again, when you come in, please don't be standing about in the halls. Go on into

your jury room both before and after court.

The lawyers in the case are not being unfriendly, but I have instructed them not to, of course, engage in any conversation with you and if they don't tell you good morning or something like that, don't think that they are being rude, should you run into them. It's just strictly the instructions that I have given them.

All right. If you will go in your jury room and just wait there for a few minutes, please.

(Jury out at 1:30 P.M.)

THE COURT: All right. Each side has submitted instructions in detail, obviously, many of which I did not give, as you are aware before and now, many of which I incorporated in my instructions in other ways. You do not need for the record, if your objections are the failure to give every instruction that you requested, I will note your objections to that. And if we don't have clean copies of your requested instructions, please see that they are available to the Clerk, Ms. Vaughan, so that they can be part of the record. But I will be glad to, first from the plaintiff as far as any other objections or requests for instructions, to hear from you at this time.

MR. HOGELAND: Your Honor, there are two or three that I think - the jury instructions, based on what we heard this morning. We do object, Your Honor, to the - I know this

you see, urges it.

I'm just rarely in a position of doing it, and I think it will cut down on numerous questions, although we are going to get some questions - I'll be amazed if we don't - from the jury.

But I have been delayed in getting a clean copy. And, of course, I've had to write in here.

So whether I'll get that to them before 5:00 today, I don't know. But we will see.

Let's get the jury in. Do this. Let them get started. We'll talk about the exhibits. They have all the documentary exhibits available to them now with the turn of a key.

All right, Marshal, if you would, please.

MR. FOSTER: Do I understand, Your Honor, that you are not going to make any change in the trademark instruction?

THE COURT: Right.

MR. FOSTER: All right. Thank you.

THE COURT: I read some more cases on that, too.

(Jury in at 2:15 p.m.)

All right, ladies and gentlemen, I'm going to - sorry that you were delayed, but we are going to be ready here in just a minute for you to begin your deliberations.

But we've had some extensive discussions in these

two perhaps complicated areas of the law, making it easy for you to understand and clarifying anything that I have given.

And I'm going to give you one instruction that I think clarifies the definition of market and sub-market somewhat, and then I'm going to give you another instruction about calculating average variable cost that I had an inadvertent error in it that - particularly when you see the written copy of the charge - could have led you astray. You will probably not notice that much difference in the charge.

But you remember I instructed you about markets and sub-markets and said within the broad market well-defined sub-markets may also exist, which, in themselves, constitute product markets for antitrust purposes.

The boundaries of such sub-markets are determined by examining various indicators such as industry or public recognition of the sub-market as a separate economic entity.

The product's particular characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors - I told you that all of these factors must be examined in determining whether a well-defined sub-market exists in the broader market.

However, I want to point out to you now that the existence of a sub-market or its lack of existence does not require the presence or absence of all of the factors that I

have just given you.

I said you must examine all of the factors, and then I went on to say the sub-market test is not merely whether one product can be substituted for the use of another product but whether products may be reasonably interchanged for the purpose for which they are produced when prices, uses, and qualities of the product are considered.

Now I also instructed you earlier about - if you wish to make your own calculation of the average variable cost test.

And you have, of course, seen calculations made by the experts, and Mr. Bacon, and others who have testified here in court.

But there are several steps you must go through in applying the average variable cost test, and I'm going to go back through it one more time, having made the change that I missed in the first one - the first time.

First, you must decide whether price value cigarettes are a well-defined sub-market of the cigarette market.

Second, if you find that price value cigarettes are a well-defined sub-market, then you must decide the total net price of Brown and Williamson's black and white cigarettes.

You do this by determining the dollar value of Brown and Williamson's black and white cigarette sales in the

United States over a relevant time period.

Third, then you must calculate the reasonably anticipated average variable cost of Brown and Williamson's total black and white cigarette output in the United States.

Fourth, you calculate this by adding up all of the reasonably anticipated variable costs Brown and Williamson spent in manufacturing and selling black and white cigarettes in the United States over the same relevant time period which you used in deciding Brown and Williamson's total dollar sales.

Fifth, then you compare your total price figure, as measured by sales over a relevant time period, with your reasonaby anticipated total variable cost figure, as measured over the same relevant time period.

Only if Brown and Williamson's black and white cigarettes are priced below reasonably anticipated average variable cost may you infer predatory intent from this cost pricing evidence.

And sixth, if you find that price value cigarettes are not a well-defined sub-market of the cigarette market, then you must not apply the average variable cost test since there is no evidence that Brown and Williamson priced its full line of cigarettes, branded and price value, below reasonably anticipated average variable cost.

Now I still intend to send a typewritten copy of

the entire charge in to you - hopefully this afternoon; if not, first thing in the morning - along with the verdict sheet.

But I am going to ask you now to go in your jury room and begin your deliberations. If anything occurs, please don't leave the jury room but contact the Marshal.

And we will be asking you to come back in at 5:00 o'clock today, assuming you are still deliberating. And we'll be dismissed until 9:30 tomorrow morning.

If you are at a particular point and don't want to come in right on the minute, you can say so.

But, as I said, you are going to be able to go back to your hotels or homes and go about your business.

Just remember, of course, the instructions I've given you about not discussing the case except when the nine of you are together there in the jury room and after you have been checked in court after 9:30 in the morning.

All right, Marshal.

(Jury out at 2:30 p.m.)

THE COURT: All right. I think we had some question about some exhibits. I just want to, you know, point out one more time, in light of the instruction about the market and the sub-market, the reason for it.

You know, throughout this case Liggett and Myers has claimed that Brown and Williamson's conduct had a