



CASE NOTE:

WEYERHAEUSER V. ROSS-SIMMONS

William H. Rooney and David K. Park

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Weyerhaeuser v. Ross-Simmons:**An Opportunity for the U.S. Supreme Court to Clarify Whether the Antitrust Laws****Protect Price Competition on the Buy Side As Much As on the Sell Side**

By

William Rooney and David Park*

The U.S. Supreme Court has granted certiorari in a relatively rare “predatory bidding” case, *Weyerhaeuser Co. v. Ross-Simmons*, apparently to clarify whether the antitrust laws protect price competition on the buy side to the same extent that they protect price competition on the sell side.¹ That question will likely be answered by resolving, in turn, the issue of whether buy-side competition is valued as an important mechanism for allocating input resources among competitors and markets or only insofar as buy-side competition directly causes low consumer prices.

BACKGROUND

Respondent-Plaintiff Ross-Simmons Hardwood Lumber Company (Ross-Simmons) brought suit in federal district court alleging that Petitioner-Defendant Weyerhaeuser Company (Weyerhaeuser), a competitor in the northwest lumber industry,

* William H. Rooney is a partner in the law firm of Willkie Farr & Gallagher LLP. His practice focuses on civil and criminal antitrust matters. David K. Park, Esq. also practices law at Willkie Farr where he specializes in antitrust matters. The authors thank Raymond M. Sarola, Esq. of Willkie Farr for his assistance in preparing this article.

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¹ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 126 S. Ct. 2965 (U.S. Jun. 26, 2006).

drove Ross-Simmons and other competitors out of business, by, among other means, predatory overbidding.² The jury found for Ross-Simmons on both its monopolization and attempted monopolization claims based on alleged overbidding and over-buying and awarded damages of approximately US\$26 million, which were trebled to nearly US\$79 million. Weyerhaeuser appealed, in part, on the grounds that the jury instructions misstated the law of predatory overbidding.

THE NINTH CIRCUIT'S OPINION

On appeal, the U.S. Court of Appeals for the Ninth Circuit defined “predatory overbidding” as a scheme in which “a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases.”³ It began its analysis by acknowledging that buy-side and sell-side competition both “affect” allocative efficiency and that the antitrust laws are as concerned with competition on the buy side as with competition on the sell side:

Monopoly power exercised on the buy-side of the market is called “monopsony” power, and can violate § 2 of the Sherman Act. Both sides of the market affect allocative efficiency, and hence consumer welfare. Antitrust laws are thus concerned with competition on the buy-side of the market *as much as* on the sell-side of the market.⁴ (emphasis added)

Despite that recognition, the Ninth Circuit proceeded to equate “consumer welfare” with low consumer prices, not unfettered price competition for inputs or the allocation input resources among competitors and markets:

² *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1034 (9th Cir. 2005).

³ *Weyerhaeuser*, 411 F.3d at 1037.

⁴ *Id.* at 1036.

We recognize that in buy-side predatory bidding cases, as in sell-side pricing cases, the price level itself is the anticompetitive weapon. However, an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing.⁵

The Ninth Circuit thus took an “instrumentalist” view of pricing competition on the buy side: such buy-side competition is beneficial not as an end in itself—as a way of allocating inputs among competitors and markets—but only insofar as it facilitates low prices on the sell side.⁶ The Ninth Circuit found that that no such sell-side, consumer benefit would result from Weyerhaeuser’s bidding conduct because “alder sawlogs are ‘a natural resource of limited annual supply in a relatively inelastic market.’”⁷

In a predatory bidding scheme, the Ninth Circuit reasoned, a firm pays more for materials in the short term and no consumer benefits during that predation term ensue. In the long run, a firm would have to recoup the higher costs it had paid for materials, and, while paying less for materials, it would have no incentive to charge consumers less. Thus, the Ninth Circuit concluded, “the overall effect of a predatory bidding scheme would result in harm to consumers.”⁸

The Ninth Circuit thus rejected Weyerhaeuser’s argument that the standard of liability for buy-side predatory bidding should be the same as that which applies to sell-side predatory pricing.⁹ Indeed, instead of applying the rigorous *Brooke Group* test, the

⁵ *Id.* at 1037.

⁶ *Id.* at 1038.

⁷ *Id.*

⁸ *Id.* at 1037-38.

⁹ *See, e.g., the Brooke Group test in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)). *Weyerhaeuser*, *supra* note 1, at 1037.

Ninth Circuit sustained a jury instruction that permitted a finding of liability based on Weyerhaeuser's having paid "more than necessary" for the relevant product.¹⁰

WEYERHAEUSER'S ARGUMENT ON APPEAL

Weyerhaeuser argued in its application for certiorari that:

the Ninth Circuit erred both in failing to apply *Brooke Group* and by adopting an extraordinarily vague standard that is inconsistent with the decisions of [the Supreme Court] and of other courts of appeals, which have emphasized the importance of objective standards in determining antitrust liability.¹¹

Weyerhaeuser argues that the "Ninth Circuit plainly was wrong" to conclude that there is no competitive benefit from aggressive bidding on the buy side and therefore no need for a "high liability standard" in monopsony cases:

From the seller's perspective, the 'lower' liability standard applied by the Ninth Circuit here threatens to discourage just as much desirable competitive behavior on the buyer side—the willingness of buyers to compete hard to acquire goods—as the low standard eschewed by the Court in *Brooke Group* would have discouraged in the predatory selling context.¹²

Weyerhaeuser also argues that, even if *Brooke Group* does not apply here, the standard adopted by the Ninth Circuit is subjective and consequently not administrable.¹³

¹⁰ *Weyerhaeuser*, *supra* note 1, at 1035.

¹¹ Petitioner's Br., *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, Civ. No. 05-381, 2005 WL 4142931 at *3 (9th Cir. Sept. 23, 2005).

¹² *Id.* at *14.

¹³ *Id.* at *22-26.

ROSS-SIMMONS'S ARGUMENT ON APPEAL

According to Ross-Simmons, “[t]he Ninth Circuit concluded that this conduct can cause consumer harm and does not necessarily or invariably benefit consumers or producers, unlike the aggressive price-cutting that directly benefited consumers in *Brooke Group*.”¹⁴ Ross-Simmons argues that “the Ninth Circuit concluded that Weyerhaeuser’s anticompetitive strategy not only was feasible but was likely to succeed, given the unique characteristics of the inelastic market for the limited supply of alder sawlogs.”¹⁵ Thus, plaintiff argues:

neither the holding nor the underlying reasoning of *Brooke Group* applies to the quite different factual and economic circumstances present here, and the Ninth Circuit’s decision cannot be said to be inconsistent (much less to conflict), even ‘in principle,’ with *Brooke Group*.¹⁶

Ross-Simmons also highlights documents and testimony that it claims support an anticompetitive intent by Weyerhaeuser to disadvantage competitors and to recoup the investment in high bids in future low prices for inputs.¹⁷ Ross-Simmons did not argue, however, that Weyerhaeuser in fact incurred a loss in the sale of the lumber from the alder logs obtained at predatory bidding prices or that future low prices for logs (or a high price for output lumber) would be at non-competitive levels and offset any losses during the predation period.

¹⁴ Opp. Br., *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, Civ. No. 05-381, 2005 WL 2844967 at *2 (U.S. Oct. 26, 2005).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at *9.

U.S.’ ARGUMENT ON APPEAL

The United States argues, like defendant, that the:

[C]ourt of [A]ppeals mistakenly held that a plaintiff can establish ‘predatory bidding’ in violation of Section 2 of the Sherman Act simply by persuading a jury that the defendant purchased an input at a price that was ‘higher * * * than necessary’ for the purpose of preventing competitors from obtaining that input at a ‘fair’ price’¹⁸

According to the United States, “[b]ecause a claim of predatory bidding by a buyer is closely analogous to a claim of predatory pricing by a seller, the *Brooke Group* standard should be applied to a claim of predatory bidding as well.”¹⁹ The United States further argues that the Ninth Circuit also erred by failing to consider that buyers paying increased prices for inputs is as much a part of the competitive process as sellers charging lower prices: “Application of the *Brooke Group* standard is warranted to avoid prohibiting (or deterring) such procompetitive conduct.”²⁰

In addition, the United States argues that the standard approved by the Ninth Circuit would permit the imposition of liability for predatory bidding based on a subjective determination of whether the price paid for the relevant input was “‘higher * * * than necessary’ or not ‘fair.’”²¹ Such a subjective standard will have the effect of deterring procompetitive conduct, argues the United States.²²

¹⁸ Brief for the United States as Amicus Curiae at *7, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, Civ. No. 05-381, 2005 WL 2452373 (9th Cir. Aug. 24, 2006).

¹⁹ *Id.* at 8.

²⁰ *Id.*

²¹ *Id.* at 9.

²² *Id.*

COMMENT

The Supreme Court could resolve the case by holding that the standard approved by the Ninth Circuit for attaching liability to bidding practices is unduly ambiguous and subjective. To the extent, however, that the Court provides direction as to the proper standard for “predatory bidding,” the Court will likely clarify whether buy-side competition is valued under the antitrust laws as itself a component of allocative efficiency or only insofar as buy-side competition causes low consumer prices.

In substance, the Ninth Circuit and *Ross-Simmons* identify low consumer prices as the objective of the Sherman Act and assess the lawfulness of Weyerhaeuser’s bidding practices on the basis of whether, and to what extent, they would cause those prices to decrease. In contrast, Weyerhaeuser and the U.S. Department of Justice and U.S. Federal Trade Commission argue effectively that buy-side competition is, itself, an end, as such competition promotes the efficient allocation of input resources among competitors and markets, and should be protected by the strict *Brooke Group* test.