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VIEWPOINT:

***Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.:*
Extending The Rule of *Brooke Group*, But How Far?**

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An eCCP Publication

February 2007

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.:

Extending The Rule of *Brooke Group*, But How Far?

By

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The general legal standard for determining whether unilateral conduct violates Section 2 of the Sherman Act¹ is murky, to say the least. Many courts have employed a “totality of the circumstances” approach, leaving it to the jury to decide whether, on balance, a particular business practice is anticompetitive, pro-competitive or otherwise has a valid business justification, while providing minimum guidance on how to resolve that issue. In *Brooke Group v. Brown & Williamson Tobacco Corp.*,² the U.S. Supreme Court somewhat ameliorated this confusion by adopting a bright-line test for claims alleging one particular type of anticompetitive unilateral conduct – predatory pricing. The Court held that predatory pricing claims turn on proof that a firm

- (1) lowered prices below some measure of its costs, and
- (2) had a dangerous probability of recouping its losses upon its rival’s exit from the market.³

The question for lower courts after *Brooke Group* was whether and to what extent its two-part test for predatory pricing should be applied to other forms of ostensibly anticompetitive

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¹ 15 U.S.C. § 2.

² 509 U.S. 209 (1993).

³ *Id.* at 222, 224. This test is also applied in cases alleging a predatory pricing conspiracy among multiple firms. See, e.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589-91 (1986); *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 695 (7th Cir. 2006).

unilateral conduct, such as bundled pricing or exclusive dealing. On February 20, 2007, the Supreme Court took an incremental step towards clarifying the reach of *Brooke Group* in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*⁴ In *Weyerhaeuser*, the Court applied the *Brooke Group* test to claims that a firm with market power in a buy-side market bid too high for inputs (“predatory bidding”) and bought too many inputs (“predatory overbuying”) in order to raise industry input costs and drive rivals out of business.

The facts of *Weyerhaeuser* were straightforward. Ross-Simmons and Weyerhaeuser owned hardwood-lumber sawmills in the Pacific Northwest.⁵ They competed in the open bidding market for the purchase of red alder sawlogs, which account for up to 75 percent of the cost for manufacturing finished hardwood lumber.⁶ From 1998 to 2001, the price for these logs increased while the price for the finished hardwood decreased.⁷ By 2001, Weyerhaeuser was acquiring 65% of the logs available in the open bidding market.⁸ Ross-Simmons, by contrast, suffered heavy losses, and shut down its lone saw mill in May 2001.⁹

Ross-Simmons filed a Section 2 suit in the federal district court in Oregon against Weyerhaeuser, alleging that Weyerhaeuser had forced up the price for logs and driven Ross-Simmons out of business by engaging in, among other things, predatory bidding (i.e., bidding up the price for logs too high) and predatory overbuying (i.e., buying more logs than it needed).¹⁰ Ross-Simmons did not allege that Weyerhaeuser sold its finished lumber below its costs, or that

⁴ 549 U.S. ____ (2007), No. 05-381 (hereinafter, “Slip op.”).

⁵ Slip op. at 2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 2-3.

Weyerhaeuser had a dangerous possibility of recouping the losses from overpaying for inputs after Ross-Simmons's exit from the market. At different phases of the trial, Weyerhaeuser argued to the district court that the court should apply the *Brooke Group* test, but the district court refused to dismiss the case or to instruct the jury to apply the *Brooke Group* test to the facts before it. The jury ultimately awarded Ross-Simmons a US\$26 million verdict, which was trebled to approximately US\$79 million. The U.S. Court of Appeals for the Ninth Circuit upheld the verdict on appeal, and also rejected the application of the *Brooke Group* test to predatory bidding and predatory overbuying claims.

The Supreme Court reversed. Writing for a unanimous Court, Justice Thomas noted that concerns of monopsony in the buy-side typically implicate the same concerns as monopoly on the sell-side.¹¹ He further noted that the same considerations for establishing a bright-line *Brooke Group* test for predatory pricing claims on the sell-side—the unlikelihood that firms will sacrifice short-term gains for the prospect of uncertain long-term returns, and the potential for chilling pro-competitive behavior—favored the adoption of a similar test for predatory bidding claims on the buy-side.¹² Justice Thomas thus held that plaintiffs claiming that firms engaged in predatory bidding (and by extension, predatory overbuying claims)¹³ must prove that

- (1) the defendant's predatory bidding for inputs must raise the cost of output above the revenues generated in sales of that output, and
- (2) the defendant had a dangerous probability of recouping its losses sustained during the period of predatory bidding.¹⁴

¹¹ Slip op. at 8-9.

¹² Slip op. at 9-12.

¹³ Slip op. at 9, n.3.

¹⁴ Slip op. at 12.

Weyerhaeuser answers the question of whether to apply the *Brooke Group* test to predatory bidding claims; but what of the other types of anticompetitive conduct that are similar to, but not quite the same as, predatory pricing? *Weyerhaeuser* does not say. It establishes, in case there was any question, that the *Brooke Group* test applies to Section 2 claims,¹⁵ although it does not explicitly reject the use of the “totality of the circumstances” approach to other claims of anticompetitive unilateral conduct (such as bundled pricing). *Weyerhaeuser* provides ammunition, however, for arguments that courts should seriously consider applying the *Brooke Group*’s bright line test for all claims of anticompetitive unilateral pricing (including bundled pricing).

The Court adopted the *Brooke Group* test in *Weyerhaeuser* because the concerns of chilling legitimate price competition were as strong (if not more so) on the buy-side as on the sell-side. Other courts considering novel claims of anticompetitive unilateral pricing should also consider whether adopting a bright-line test is necessary to prevent chilling pro-competitive unilateral pricing. If there is a threat that pro-competitive pricing will be deterred, then those courts should also adopt the bright-line *Brooke Group* test, or a similar test suitable to the circumstances of the case. *Weyerhaeuser*’s implications are less clear for cases involving non-price restraints (such as exclusive dealings), but the Court’s adoption of a generous bright-line test bodes well for defendants in those cases also.

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¹⁵ Slip op at 5, n.2 (“[T]he standard adopted in *Brooke Group* applies to predatory-pricing claims under §2 of the Sherman Act.”). *Weyerhaeuser* thus repudiates, for example, the U.S. Court of Appeals for the Third Circuit’s narrow reading of *Brooke Group* in *LePage’s Inc. v. 3M*, 324 F.3d 141, 150-51 (3d Cir. 2003) (en banc).