



**VIEWPOINT:**

***Weyerhaeuser v. Ross-Simmons: The U.S. Supreme Court Rules That The Brooke Group Predatory-Pricing Test Applies to Predatory Bidding***

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***Weyerhaeuser v. Ross-Simmons:***  
**The U.S. Supreme Court Rules That The *Brooke Group***  
**Predatory-Pricing Test Applies to Predatory Bidding**

By

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On February 20, 2007, a unanimous U.S. Supreme Court in *Weyerhaeuser Co. v. Ross-Simmons* (No. 05-381) held that the *Brooke Group* predatory-pricing test applies to predatory bidding.

### **Procedural History**

After trial, a jury was instructed that it could find the defendant, Weyerhaeuser Co. (“Weyerhaeuser”), liable for monopolistic practices under Section 2 of the U.S. Sherman Act if it concluded that Weyerhaeuser “purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent [plaintiff Ross-Simmons] from obtaining the logs they needed at a fair price.”<sup>1</sup> The jury found for the plaintiff. On appeal, the U.S. Court of Appeals for the Ninth Circuit affirmed the judgment and approved the jury instructions, distinguishing

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<sup>1</sup> *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, No. 05-381, slip op. at 3-4 (Feb. 20, 2007).

predatory bidding from predatory pricing, on the ground that “predatory bidding does not necessarily benefit consumers or stimulate competition in the way that predatory pricing does.”<sup>2</sup>

The Supreme Court granted certiorari to “decide whether *Brooke Group* applies to claims of predatory bidding.”<sup>3</sup>

### The U.S. Supreme Court’s Decision

The Supreme Court vacated the Ninth Circuit’s opinion and effectively dismissed the lawsuit on the ground that the plaintiff had conceded that it failed to produce evidence sufficient to meet the *Brooke Group* standard for liability. The Court first revisited the *Brooke Group* test, explaining that it required a plaintiff to demonstrate both that “the prices complained of are below an appropriate measure of its rival’s costs” and that the defendant had “a dangerous probabilit[y]” of recoupment through supracompetitive prices.<sup>4</sup> Quoting extensively from *Brooke Group*, the Court acknowledged that those requirements are “not easy to establish,” but added that they were “essential components of *real market injury*” and were necessary to prevent the chilling effects of “erroneous findings of predatory-pricing liability.”<sup>5</sup> The Court recognized that such “false positives,” as they have become known in the antitrust economics literature,<sup>6</sup> would deter vigorous competition—“the very conduct the antitrust laws are designed to protect.”<sup>7</sup>

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<sup>2</sup> *Id.* at 4.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 5 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993)).

<sup>5</sup> *Id.* at 6-7 (quoting *Brooke Group*, 509 U.S. at 226) (emphasis added).

<sup>6</sup> See, e.g., David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules For Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 83-85 (Winter 2005).

<sup>7</sup> *Weyerhaeuser*, slip op. at 7 (quoting *Brooke Group*, 509 U.S. at 226).

The Court found that the means and objectives of a predatory bidder mirror those of a firm engaged in predatory pricing. Both seek to acquire or maintain monopoly/monopsony power by pricing goods/bids at noncompetitive levels to eliminate rivals. After their intermediate objectives have been met, the predators exercise their newly acquired market power by raising the prices of goods to customers above a competitive price (in the case of predatory pricing) or lowering the prices of inputs below competitive prices (in the case of predatory bidding). Under both schemes, the predator aims to recoup its initial losses through noncompetitive prices.<sup>8</sup>

The Court further found that, like the predatory conduct alleged in *Brooke Group*, “actions taken in a predatory-bidding scheme are often ‘the very essence of competition.’”<sup>9</sup> In that regard, the Court reviewed a number of ways in which “high bidding is essential to competition and innovation on the buy side of the market.”<sup>10</sup> For example, the Court found that “buyers use bid prices to compete for scarce inputs” and that high input prices “encourage new firms to enter the market for input sales[,]” thereby allocating resources to their most efficient uses.<sup>11</sup> The Court further noted that high bidding may also be “a response to increased consumer demand for [...] outputs,” thereby advancing allocative efficiency in the output market.<sup>12</sup> In addition, a drive for larger market share, a transition to input-intensive production processes, and a desire to hedge against future volatility are all “legitimate reasons” to bid up input prices.<sup>13</sup>

The Court thus found that the conduct involved in predatory bidding was similar to conduct involved in predatory pricing both in its pro-competitive potential and in the likely

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<sup>8</sup> *Id.* at 7-10.

<sup>9</sup> *Id.* at 10 (quoting *Brooke Group*, 509 U.S. at 226).

<sup>10</sup> *Id.* at 10-11.

<sup>11</sup> *Id.* at 10 and 11, n.4.

<sup>12</sup> *Id.* at 10.

<sup>13</sup> *Id.*

infrequency with which it produces “real market injury.” *Weyerhaeuser* concluded: “The general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding convince us that our two-pronged *Brooke Group* test should apply to predatory-bidding claims.”<sup>14</sup>

The first prong of the *Brooke Group* test in the predatory bidding context requires a plaintiff to demonstrate that “the predator’s bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs.”<sup>15</sup> The Court linked the below-cost standard to the alleged predatory bidder’s output price because high bids that do not cause below-cost output prices are “beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate procompetitive conduct.”<sup>16</sup> The second *Brooke Group* prong requires a plaintiff to show that the defendant bidder has a “dangerous probability” of recouping its investment “through the exercise of *monopsony power*.”<sup>17</sup> By identifying monopsony power as the required source of recoupment, the Court implied that a predatory bidder must recoup its below-cost output losses through subcompetitive prices for inputs after eliminating competing bidders from the relevant purchasing market.

## Analysis

*Weyerhaeuser* is a significant decision despite the rarity with which predatory bidding cases have been brought. The Court has continued in the style of *Volvo Trucks* and *Dagher*, issuing short opinions that articulate a relatively clear antitrust rule. Although the predatory

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<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Id.* at 12.

<sup>16</sup> *Id.* (internal citations omitted).

<sup>17</sup> *Id.* (emphasis added).

bidding context presented complex questions of antitrust economics, the Court distilled those issues into a 13-page slip opinion that applied the *Brooke Group* test effectively without modification. Despite commentary that the application of an unmodified *Brooke Group* rule to the predatory-bidding context has numerous analytical infirmities,<sup>18</sup> the Supreme Court decided *Weyerhaeuser* with a rule that is simple, is relatively easily applied, and will likely not invite antitrust challenges to bidding behavior in the absence of acute circumstances. The Court also continued to preserve a wide berth for pricing discretion and competition and to avoid intruding upon the operation of market forces unless those forces have been distorted in a meaningfully anticompetitive manner.

During the pendency of *Weyerhaeuser* before the Supreme Court, many in the antitrust bar debated whether low consumer prices specifically, or allocative efficiency more generally, would emerge as the primary goal of the antitrust laws. Although *Weyerhaeuser* did not directly address that question, the Court noted favorably a number of allocative efficiencies that result from price competition among purchasers, including competing for scarce inputs, encouraging entry by input producers, and responding to increased consumer demand for the output.<sup>19</sup> The Court acknowledged, but rejected the significance of, the Ninth Circuit's observation that not all predatory bidding would lead to lower consumer prices.<sup>20</sup> The Court thus impliedly found that protecting low consumer prices is not the sole objective of the antitrust laws. In addition, by holding that recoupment must occur through the exercise of monopsony power (subcompetitive

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<sup>18</sup> See, e.g., The Antitrust Practice Group, Sullivan & Cromwell LLP, *Brooke Group and Predatory Buying by a Monopsonist*, THE ANTITRUST REVIEW OF THE AMERICAS 2007 ch. 4 (2007).

<sup>19</sup> *Weyerhaeuser*, slip op. at 10-11.

<sup>20</sup> *Id.* at 11, n.5.

pricing), the Court recognized that an antitrust injury may flow from an allocative inefficiency even in the absence of supracompetitive output prices.

In conclusion, the Court continued its course of limiting judicial interference with market forces to situations where a distinct and anticompetitive distortion is evident and in a manner that will not likely discourage pro-competitive innovation and an efficient allocation of resources.

The Court also implied that preserving low consumer prices is not the sole objective of the antitrust laws and that an allocative inefficiency may support an antitrust injury in the absence of a direct impact on consumer prices.