

Client Alert

U.S. Supreme Court Holds That *Brooke Group* Legal Predatory Pricing Test Also Applies to Predatory Bidding Claims

On February 20, 2007, the United States Supreme Court held in the case of *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.* (No. 05-381) that the legal test applied to predatory pricing in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) also applies to claims of predatory bidding. In throwing out the \$79 million damage award against Weyerhaeuser, the ruling could also potentially help shield companies from claims that they are acting illegally in trying to drive a competitor out of business, as well as provide leeway to bid aggressively for raw materials and other supplies without the risk of violating federal antitrust laws.

Predatory pricing is a scheme in which the predator reduces the sale price of the selling product with the hope of driving competitors out of business, and, once the competition from those market participants has been eliminated, then raises output prices to supracompetitive levels. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* 475 U.S. 574, 584-585, n.8 (1986)(describing predatory pricing).

Brooke Group established a two-part test to recover under a predatory pricing claim: "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Brooke Group*, 509 U.S. at 222. Second, a plaintiff must demonstrate that the alleged predator had "a dangerous probability of recouping its investment in below-cost pricing," because without such a probability it is highly unlikely that a firm would engage in predatory pricing. *Id.* at 224.

In a predatory bidding scheme, a purchaser of inputs bids up the market price of a critical input to such high levels that competitive buyers cannot survive economically or compete as vigorously. As a result of this conduct, the predating buyer maintains or increases its monopsony power, i.e., its market power from the buying side of the market. Once the other competing buyers exit the market for purchasing needed inputs, the predatory bidder then restricts its purchases and reduces the pricing for any remaining inputs that are purchased. The reduction in input prices leads to a cost savings that more than offsets the profits that would have been earned on the output.

The Weyerhaeuser Case

Ross-Simmons, a sawmill and competitive purchaser of alder, a hardwood used in furniture, sued Weyerhaeuser, alleging that Weyerhaeuser drove it out of business by bidding up the price of alder sawlogs to a level that prevented Ross-Simmons from being profitable. It filed a lawsuit against Weyerhaeuser for monopolization and attempted monopolization under § 2 of the Sherman Act, 15 U.S.C. § 2. "Ross-Simmons alleged that, among other anti-competitive acts, Weyerhaeuser used 'its dominant position in the alder sawlog market to drive up the prices for alder sawlogs to levels that severely reduced or eliminated the profit margins of Weyerhaeuser's alder sawmill competition.'" *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 2007 U.S. LEXIS 1333, at *8 (2007). In supporting its predatory bidding theory, Ross-Simmons argued that Weyerhaeuser overpaid for alder sawlogs to cause prices to rise artificially. Ross-Simmons pointed to Weyerhaeuser's large share of the alder purchasing market, rising alder sawlog prices, and

Weyerhaeuser's declining profits during the alleged period of predation. The jury found in favor of Ross-Simmons on its monopolization claim.

On appeal, Weyerhaeuser argued that the *Brooke Group* standard for predatory pricing should apply to Ross-Simmons' claims of predatory bidding. The Ninth Circuit disagreed and affirmed.

Confederated Tribes of Siletz Indians of Ore. v. Weyerhaeuser Co., 411 F.3d 1030, 1035-1036. It reasoned that "buy side predatory bidding" and "sell-side predatory pricing," though similar, are materially different in that predatory bidding does not necessarily benefit consumers or stimulate competition in the way that predatory pricing does. *Id.* The court concluded that the *Brooke Group* high standard of liability in the predatory pricing context did not apply to predatory bidding, it declined to apply this standard to Ross-Simmons' claims, and further found that substantial evidence supported a finding of liability on the predatory-bidding theory. *Id.* at 1045.

On certiorari, the Supreme Court vacated the judgment of the Ninth Circuit, determining that the *Brooke Group* standard applies to claims of predatory bidding. See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 2007 U.S. LEXIS 1333 (2007). The Court reasoned that the "close theoretical connection between monopoly and monopsony" justified application of the two-part, *Brooke Group* test to predatory bidding complaints. *Id.* at *8. The Court also identified the analytic and economic similarities between predatory pricing and predatory bidding, including: 1) the infrequency of both practices; 2) in both practices, the predator must incur short-term loss to secure supracompetitive profits in the future; 3) in both contexts, it is difficult to distinguish the alleged predation from legitimate competition on the merits, and; 4) in either context, a failed scheme is likely to benefit consumers. Finally, the Court noted that predatory bidding is less likely to injure consumers as the predator will not necessarily have to increase output prices to recover short-term losses from predation. *Id.* at *23. Instead, the predator can simply use its monopsony power to constrain the price of inputs. Based on this analysis, the Court concluded that "only higher bidding that leads to below-cost pricing in the relevant output market will suffice as a basis for liability for predatory bidding." *Id.* at *24.

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