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CLIENT ALERT

Re: Oral Argument in *Weyerhaeuser Co. v. SS-Simmons Hardwood Lumber Co.*

Nov.29.2006

Weyerhaeuser poses the question of whether a lumber mills' alleged "buying more logs than it needed" or paying "a higher price for logs than necessary" in order to deprive its competitor of logs "at a fair price" can constitute predatory or exclusionary conduct for purposes of Section 2 of the Sherman Act. Based on this instruction, the jury returned a verdict for the competing log purchaser of actual and attempted monopolization of the northwestern log market and awarded $79 million in trebled damages. The jury rejected a claim of actual and attempted monopolization of the downstream market for lumber in which Weyerhaeuser had 3% market share. The Ninth Circuit affirmed, finding that the test for predatory pricing on the seller's side set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), did not apply to alleged buyer-side predatory bidding, and that the trial court's jury instructions were proper.

The Supreme Court heard oral argument in the case on November 28, 2006. The U.S. argued in favor of the defendant Weyerhaeuser that: "Aggressive bidding by the buyer of an input, no less than aggressive price-cutting by the seller of a finished product, is usually procompetitive. Because a claim of predatory bidding is simply the flip side of a claim of predatory pricing, the Brooke Group standard for predatory pricing claims should apply to predatory bidding claims as well." Accordingly, since the jury rejected the claim of monopolization in the downstream lumber market, the verdict must be reversed.

In addition to the strong support of the United States, the questions raised by the Court during oral argument suggest that reversal is likely. Several of the Justices seemed to believe that high bids for logs could have procompetitive justifications, especially where the downstream lumber market is competitive. *E.g.*, Tr. 10 (meet needs of more efficient producer), 30-32 (serve downstream market), 40 (useful stock piling). Chief Justice Roberts also pointed out that it may be rational for log growers either to sell logs to the other competitor for a lower price in order to retain two buyers in the market, or to take the extra money to increase their own log production. "[E]ither way it benefits the consumers." Tr. 33.

There was also strong support for the recoupment test from *Brooke Group* from Justices Breyer and Alito. Tr. 30-32, 36.

Finally, several of the Justices (Breyer, Alito, Souter) expressed deep concerns about the jury instruction even if they chose not to apply the test from *Brooke Group*. Tr. 36 ("How is a jury to, a lay jury, to decide whether a company like Weyerhaeuser bought more logs than it needed, or what is the fair price?"); 39 (the instruction given "basically left the jury on a , on a free float, didn't it?); 32 ("If . . . they can make money on the market, they are storing up nuts for winter. It's good. And if the answer is no it's bad.").

In the end, as Justice Souter put it, even if the plaintiff wins on the application of the *Brooke Group* test, "we still have got to face what the alternative to a Brooke Group kind of instruction is." Tr. 50.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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