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CLIENT ALERT

Supreme Court Brings Law on Predatory Buying into Line with Existing Rule on Predatory Selling

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On Tuesday February 20th, the Supreme Court delivered a unanimous decision making it more difficult for businesses to run afoul of the antitrust law for buying inputs at high prices. In the case, *Weyerhaueuser Co. v. Ross-Simmons Hardwood Lumber Co.,* the Court overturned a jury verdict awarding damages to the now-shuttered Ross-Simmons lumber company. Ross-Simmons had claimed it was driven out of business by Weyerhaeuser's practice of paying more than it needed to for logs, and of buying more logs than it needed, to feed its sawmills in the Pacific Northwest. This, alleged Ross-Simmons, drove up prices for logs and made it impossible for Ross-Simmons to make a profit.

The district court established relatively low standards for finding that Weyerhaeuser's purchasing was anticompetitive, instructing the jury that it could do so if it found that Weyerhaeuser had "purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent [Ross-Simmons] from obtaining the logs they needed at a fair price." The Ninth Circuit affirmed, holding that predatory buying need not be judged by the higher predatory pricing standards set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, because predatory buying does not always have the short run effect of lowering prices to consumers, as does predatory pricing.

The United States filed an amicus brief asking the Supreme Court to harmonize the law on predatory buying with that of *Brooke Group*, and the Court did so. The opinion, written by Justice Thomas, stressed the theoretical similarities between predatory pricing and buying, but noted that predatory buying may pose *less* risk for consumers, "because a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses." It went on to apply the *Brooke Group* standard to the *Weyerhaeuser* facts: to be held liable for monopolization or attempted monopolization on the basis of predatory buying, a company must be found to have (1) paid high enough prices for inputs that the prices it sets for its outputs fall below "an appropriate measure" of its costs, and (2) a dangerous probability of recouping the investment it makes in higher than necessary input prices after its rival purchaser is forced from the market.

By rejecting the lower court's loose definition of predatory buying, the *Weyerhaeuser* decision does, to some extent, simplify a company's analysis of its buying practices. However, case law descended from *Brooke Group* retains key ambiguities that make caution a good idea, including continuing controversy over the right way to measure cost as a minimum below which prices may be considered predatory.

Weyerhaeuser is only the first of a series of antitrust-related decisions expected from the Court in its current term. For more information on the *Bell Atlantic v. Twombly*, *Leegin Creative Leather v. PSKS*, and *Credit Suisse v. Billing* cases, please see: **Hot Bench For Antitrust Cases** (December 20, 2006).

Click for the Supreme Court's full opinion in *Weyerhaeuser*.

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

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