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# Keeping Current: Antitrust

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## Supreme Court confirms viability of predatory bidding claims

Where a dominant buyer bids up the price of a product so high that competitive buyers are driven from the market, the "power buyer" may be subject to antitrust liability for "predatory bidding." After causing competing buyers to exit the market by first driving prices way up, a predatory bidder with "monopsony" power—market power on the buy-side of the market—can then drive prices way down (and below competitive levels), so that it can recoup long-run profits that more than offset its initial losses, to the detriment of competition. This term, the U.S. Supreme Court confirmed the viability of antitrust claims for predatory bidding, and reconciled the elements of such claims with those applicable to claims for "predatory pricing." ***See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co***., No. 05-381, 549 U.S. ___, slip op. (Feb. 20, 2007).

***Weyerhaeuser*** concerned the market for the purchase of a certain type of timber by competitive sawmills. Defendant Weyerhaeuser had as much as a 65 percent market share in the purchase of such timber for processing and resale. Plaintiff Ross-Simmons, a smaller competitor of Weyerhaeuser, went out of business after sustaining years of losses due to being squeezed by the ever increasing costs of such timber and the ever decreasing price that its finished products could fetch in the downstream market. Blaming its demise on the conduct of its larger competitor, Ross-Simmons sued Weyerhaeuser under Section 2 of the Sherman Antitrust Act on a theory of predatory bidding. Ross-Simmons prevailed at trial and was awarded a $26 million verdict, which was trebled to $79 million.

On appeal, the Ninth Circuit upheld the verdict, holding that a defendant engages in illegal predatory bidding if it pays "a higher price than necessary" in order to prevent a plaintiff from obtaining necessary supplies "at a fair price." However, in accord with the views of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission, the Supreme Court reversed the Ninth Circuit, holding that the standard applied by the appeals court was too lax and amorphous, and instead should closely resemble the more rigorous test applicable to predatory pricing claims. The standard for evaluating predatory pricing was settled by the Supreme Court over a decade ago in ***Brooke Group Ltd. v. Brown & Williamson Tobacco Corp***., 509 U.S. 209 (1993), in which the Court held that a plaintiff alleging predatory pricing must prove that the defendant (1) sold its product at a price level too low to cover its costs and (2) had a dangerous probability of recouping its losses once the scheme of predation succeeded.

In ***Weyerhaeuser***, the Court explained that because monopsony is the "flipside" of monopoly, predatory bidding is "analytically similar" to predatory pricing, and so the elements of a predatory bidding claim should be similar to those of predatory pricing. Thus, the Court held that to be liable for predatory bidding, a defendant must (1) buy the relevant product at a cost above the revenue it could earn in reselling the product, and (2) have a dangerous probability of recouping any losses resulting from such overpayment, once its competition is driven from the marketplace.

While the ruling eliminates the Ninth Circuit's "fairness" test, making predatory bidding claims more difficult to bring, it may be prudent for counsel to power buyers to advise their clients that predatory bidding is an actionable offense and gives rise to antitrust exposure where market facts demonstrate that the power buyer could recoup any short-term loss after driving its competitors out of business. Counsel to smaller firms faced with large power buyer competitors should realize that predatory bidding claims are difficult to make, but not impossible, and thus should keep in mind the fact that antitrust law forbids dominant buyers, with the power and ability to withstand short-term losses due to overpaying, from engaging in predatory bidding.

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