Supreme Court Requires Predatory Buying Claim to Include Showing of Sales Below Cost and Ability to Recoup Losses

Since its 1993 decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the United States Supreme Court has required a successful predatory pricing plaintiff to prove (1) that the alleged monopolist was pricing “below an appropriate measure of [the monopolist’s] cost” and (2) that the alleged monopolist “had a dangerous probability of recouping its investment in below-cost prices.” In its decision this week in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. Inc.*, the Supreme Court ruled that a claimant alleging that a monopolist had engaged in predatory purchasing of a key input would similarly have to show (1) that the predatory bidding led to the predator’s selling its output at prices below its costs and (2) that the predator had a dangerous probability of recouping the losses it incurred by bidding up input prices. Thus, just as a successful predatory pricing claim requires a showing that consumers will eventually suffer higher prices, a successful predatory bidding claim will require a showing that suppliers of the relevant product will eventually suffer lower prices because the predatory bidder is able to discourage entry by new customers for the relevant product. By establishing below-cost output sales and likelihood of future recoupment of such losses as specific elements of a predatory bidding cause of action the Supreme Court’s decision provides companies significantly greater flexibility to make buying decisions free from antitrust risk than was the case under the less specific standards for liability applied in this case by the district court and the court of appeals.

The Trial Court Decision

In *Weyerhaeuser*, the plaintiff Ross-Simmons and the defendant Weyerhaeuser operated lumber mills in the Pacific Northwest that produced finished hardwood lumber. The critical input for these competing mills was red alder sawlogs. Ross-Simmons operated one mill, while Weyerhaeuser eventually expanded its operations to include six mills in the region, which by 2001 were acquiring 65% of the available alder sawlogs. Ross-Simmons and Weyerhaeuser each bid in the open market for the acquisition of red alder sawlogs. Ross-Simmons claimed that Weyerhaeuser used its buying power in the sawlog market predatorily to bid up the prices to a level which Ross-Simmons could not afford to pay, thereby putting it out of business. Ross-Simmons offered the following proof: (1) “Weyerhaeuser’s large share of the alder purchasing market,” (2) “rising alder sawlog prices during the alleged predation period,” and (3) “Weyerhaeuser’s declining profits during that same period.”

The district court rejected Weyerhaeuser’s argument that the “predatory bidding” claim must meet the *Brooke Group* test of sales by the defendant below cost and a dangerous probability that the defendant will, in the future, be able to recoup its resulting losses if it forces the plaintiff out of business. Instead, the district court instructed the jury that they could find Weyerhaeuser’s bidding practices anticompetitive if they concluded that Weyerhaeuser “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.” Based on this more lenient standard for liability, the jury returned a verdict of more than $26 million against Weyerhaeuser, which was trebled to approximately $79 million.
The Court of Appeals Rejects the Brooke Group Standards

The Ninth Circuit affirmed the judgment, rejecting Weyerhaeuser’s Brooke Group argument. The Ninth Circuit based its reasoning on what it perceived to be the economic differences between predatory buying in the input market and predatory pricing in the output market. According to that court, “an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing.” Based on this rationale, according to the Court of Appeals, the same concerns for chilling procompetitive conduct that informed the Supreme Court’s Brooke Group test do not apply to predatory buying.

The Supreme Court Likens the Economics of Predatory Bidding to Those of Predatory Pricing

The Supreme Court reversed the Ninth Circuit decision, concluding that “predatory bidding” claims were “analytically similar” to predatory pricing claims and thus should be subject to the Brooke Group test. Citing the symmetry in the economics of monopsony (buy-side power) and monopoly (sell-side power), the Court stated that “[b]oth claims involve the deliberate use of unilateral pricing measures for anticompetitive purposes” and “logically require firms to incur short-term losses on the chance that they might reap supracompetitive profits in the future.” In addition, according to the Court, rational businesses will be no more likely to make this sacrifice for “predatory bidding” schemes than they would be for predatory pricing schemes. Such schemes are “rarely tried, and even more rarely successful.” Also, just as in predatory pricing, “predatory bidding” actions are often procompetitive. The Court cited a variety of legitimate procompetitive justifications for a buyer to bid up input prices, such as attempting to gain market share based on increased efficiency, changing to a more input-intensive production process, and hedging against future supply fluctuations. Further, a failed predatory bidding scheme, like a failed predatory pricing scheme, may be beneficial to consumers, according to the Court. The initial high prices are likely to lead to the acquisition of a higher volume of inputs and, therefore, result in a higher volume of output and lower output prices.

Accordingly, the Court held that to establish a predatory bidding claim, a plaintiff must prove that the buy-side bidding resulted in below-cost pricing of the defendant’s output. If plaintiffs were permitted to impose antitrust liability for predatory purchasing where the alleged predator had not engaged in below-cost pricing, the Court reasoned, the risks of deterring legitimate procompetitive behavior would outweigh the economic benefits. Secondly, the claimant must prove there is a dangerous probability that, if the predator is successful in forcing out its rival purchaser, entry into the market will be so restrained the predator will be able to recoup its earlier losses by paying less-than-competitive market prices for its future purchases in the relevant input market.

Conclusion

Just as few plaintiffs have been able to overcome the courts’ skeptical attitude toward predatory pricing cases since Brooke Group, few claimants will likely be able to sustain a predatory purchasing claim, either at trial or on a motion for summary judgment.

1 Ross-Simmons Hardwood Lumber Co. Inc. v. Weyerhaeuser Co., 411 F.3d 1030, 1037 (9th Cir. 2005).