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COURT AGREES TO HEAR ANTITRUST CASE IMPOSING PREDATORY BUYING LIABILITY

***(Weyerhaeuser v. Ross-Simmons*, No. 05-381)**

The U.S. Supreme Court today agreed to review a lower-court decision that imposed substantial antitrust liability on a large company for engaging in "predatory buying" (*i.e.*, buying supplies at too *high* a price), even though the uncontested evidence demonstrated that the company at all times sold its products at prices that exceeded its costs.

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief urging that review be granted in the case, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co*. The parties will now file a new round of briefing, with oral arguments scheduled for either December or January. WLF has pledged to file another brief in support of the petitioner, urging that the Court reverse the lower court decision.

WLF's brief urging that review be granted argued that consumers, as well as the economy as a whole, benefit when companies bid up the prices of goods they seek and that companies should not be punished for engaging in buying competition that is good for consumers. WLF argued that the lower court decision, unless reversed on appeal, will chill pro-consumer activity by companies that seek to avoid potential antitrust liability.

"The point of the antitrust laws is to protect competition, not competitors," said WLF Chief Counsel Richard A. Samp after the Supreme Court agreed to grant review. "Some companies may suffer severe losses when a rival competes by bidding up prices of inputs, but antitrust law is not intended to stop such competition, which benefits the economy as a whole," Samp said.

The case involves an antitrust suit filed against Weyerhaeuser, the dominant firm in the market for the purchase of alder sawlogs in the Pacific Northwest. Weyerhaeuser and its competitors use the logs to produce finished hardwood lumber. One of its competitors, Ross-Simmons (which went out of business in 2001), filed suit against Weyerhaeuser, claiming that Weyerhaeuser sought unfairly to monopolize the purchase market for alder sawlogs by unfairly bidding up the price of sawlogs in order to drive its competitors out of business. It alleged that once other buyers had been driven out of the market, Weyerhaeuser planned to recoup its losses by using its "monopsony" power to

drive down future prices paid to log suppliers. It was nonetheless uncontested at trial that at no point did Weyerhaeuser sell its finished lumber at below-cost prices.

The U.S. Court of Appeals for the Ninth Circuit in San Francisco upheld a nearly $79 million judgment imposed on Weyerhaeuser for attempted monopolization in violation of § 2 of the Sherman Act. The appeals court held that even when a dominant firm sells its products at or above cost, it can be found to have violated the antitrust laws when it pays more than "necessary" for its inputs, with the result that competing firms are unable to purchase those same inputs at a "fair" price.

In its brief urging the Supreme Court to grant review, WLF argued that the Court should reaffirm its bright-line rule that even dominant firms may not be found liable for "predatory" practices so long as they sell their products above cost. The Supreme Court established that rule in its 1993 *Brooke Group* decision; WLF argued that the Ninth Circuit's efforts to distinguish *Brooke Group* were unpersuasive. WLF stated that *Brooke Group* was based on the Supreme Court's conclusion that predatory pricing schemes are very rarely tried because they are so unlikely to succeed (they require firms to incur substantial losses in the short term in the hope that they might be able to recoup those losses in the long term) and thus that antitrust laws should not condemn practices that clearly help consumers (*e.g.*, price cuts) unless the evidence is clear that the defendant is acting in a way (*e.g.*, selling below costs) that can only be explained by a desire to obtain a monopoly. WLF argued that the Court's rationale in *Brooke Group* is equally applicable to predatory buying claims.

WLF also argued that the Ninth Circuit's decision, by condemning price competition in cases involving above-cost sales, will discourage vigorous competition by firms that fear incurring antitrust liability. WLF argued that bright-line rules are particularly important in this area, because leaving open the possibility that companies engaged in pro-competitive input bidding will be found liable for "predatory buying" will chill the very conduct that the antitrust laws are designed to protect.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus curiae* in the federal courts to address the proper scope of the antitrust laws.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its web site, www.wlf.org.