WEYERHAEUSER'S IMPLICATIONS FOR FUTURE ANTITRUST DISPUTES

NICKOLAI G. LEVIN*

In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,[1] the Supreme Court addressed the arcane claim of "predatory bidding." The flip side of "predatory pricing"—attempting to drive out competitors by selling a product for too low a price—"predatory bidding" entails the buy-side equivalent—attempting to drive out rivals by paying too high a price for an input. A unanimous *Weyerhaeuser* Court held that predatory-bidding claims should be evaluated under the same two-part test that the Court previously had applied to predatory-pricing claims in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[2] Thus, to prevail on a predatory-bidding claim, the plaintiff would have to prove that: (i) the alleged predatory bidding led to below-cost pricing in the output market; and (ii) the defendant had a dangerous probability of recouping its losses in the predatory scheme.[3]

The Supreme Court's ruling in *Weyerhaeuser* will have a significant effect on the American economy, at the very least by preventing the avalanche of predatory-bidding litigation that would have ensued had the Court not intervened. Both the district court and Ninth Circuit had held that the jury could find Weyerhaeuser's conduct anticompetitive if it determined that Weyerhaeuser "purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [the plaintiff] from obtaining the logs they needed at a fair price," in its subjective view.[4] One highly esteemed commentator called this instruction "an antitrust disaster of enormous

* Nickolai G. Levin is an associate in the Washington, DC, office of Mayer Brown LLP who helped represent Weyerhaeuser in the Supreme Court. The views expressed herein are his own and do not express those of Mayer Brown LLP or Weyerhaeuser.

1. 127 S. Ct. 1069 (2007).

2. 509 U.S. 209 (1993).

3. *Weyerhaeuser*, 127 S. Ct. at 1078.

4. Confederated Tribes of Siletz Indians v. Weyerhaeuser Co., 411 F.3d 1030, 1036 n.8 (9th Cir. 2005).

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proportions."[5] By holding that the two-part *Brooke Group* test applied to predatory-bidding claims, instead of this "disas[trous]" instruction upheld by the lower courts, the Supreme Court kept a sleeping giant in its bed.

The *Weyerhaeuser* ruling also supports the government's and business community's efforts to develop objective standards governing permissible and impermissible single-firm conduct. Courts and commentators have long recognized that predatory conduct by a single firm (whether buyer or seller) is "most difficult to differentiate [from] healthy competition on the merits."[6] Hence, the Antitrust Division has made the development of "objective standards for the evaluation of monopolization and other single firm conduct" a "priority."[7] By adopting the *Brooke Group* test for predatory-bidding claims, the Supreme Court has helped fill "the current vacuity of monopolization standards"[8] and decreased the likelihood that procompetitive buying behavior is not deterred by the prospect of treble damages attaching to a jury's whim. While the extent of the Supreme Court's receptiveness to objective standards in other types of monopolization claims remains to be seen, its decision in *Weyerhaeuser* is surely a good start.

I.
THE "ANTITRUST DISASTER" THE SUPREME COURT AVERTED IN *WEYERHAEUSER*

Historically, predatory-bidding claims have been extremely rare. The last one reaching an appellate decision before *Weyerhaeuser* was in 1990.[9] This history raises the ques-

5. Herbert Hovenkamp, *The Law of Exclusionary Pricing*, 2 COMPETITION POL'Y INT'L 21, 37 (2006).

6. R. Hewitt Pate, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the Fordham Corporate Law Institute: The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct 5 (Oct. 23, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/202724.pdf; *see also* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.).

7. Thomas O. Barnett, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Address Before the Section of Antitrust Law, American Bar Association: Antitrust Enforcement Priorities: A Year in Review 3 (Nov. 19, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/206455.pdf.

8. Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 268 (2003).

9. *In re* Beef Indus. Antitrust Litig., 907 F.2d 510 (5th Cir. 1990).

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tion why the Supreme Court chose to intervene in *Weyerhaeuser*, rather than waiting several years for more commentary and appellate decisions to surface. One suspects that the answer is the Court understood the severe economic consequences that would occur if it let the marshmallow jury instruction in *Weyerhaeuser* stand.

The facts in *Weyerhaeuser* are relatively straightforward: Both Weyerhaeuser and Ross-Simmons Hardwood Lumber Co. (Ross-Simmons) operated sawmills in the Pacific Northwest, at which they bought alder saw logs and processed them into alder lumber. From 1990 to 2000, Weyerhaeuser invested over $75 million to upgrade its production facilities in the Pacific Northwest and increase the amount of lumber recovered from each alder saw log. "By contrast, Ross-Simmons appears to have engaged in little efficiency-enhancing investment."[10] Not surprisingly, Weyerhaeuser's business grew—some evidence suggested that by 2001, it purchased approximately 65% of the alder logs available for sale in the region—while Ross-Simmons's business faltered (especially following the Asian economic crisis in 1997). Ross-Simmons went out of business in 2001.[11]

Though four other new mills opened around the time Ross-Simmons failed,[12] Ross-Simmons blamed Weyerhaeuser for driving it out of business by "bidding up" sawlog costs and sued Weyerhaeuser for monopolization and attempted monopolization under §2 of the Sherman Act.[13] In particular: "Ross-Simmons argued that Weyerhaeuser had overpaid for alder sawlogs to cause sawlog prices to rise to artificially high levels as part of a plan to drive Ross-Simmons out of business. As proof that this practice had occurred, Ross-Simmons pointed to Weyerhaeuser's large share of the alder purchasing market, rising alder sawlog prices during the alleged predation period [1996 to 2001], and Weyerhaeuser's declining profits during the same period."[14] Ross-Simmons also accused Weyer-

10. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069, 1072 (2007).

11. *Id.* at 1072-73.

12. Confederated Tribes of Siletz Indians v. Weyerhaeuser Co., 411 F.3d 1030, 1044 (9th Cir. 2005).

13. 15 U.S.C. § 2 (2000).

14. *Weyerhaeuser*, 127 S. Ct. at 1073.

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haeuser of other anticompetitive practices, including overbuying logs and entering into exclusive arrangements.

Prior to trial, Weyerhaeuser moved for summary judgment on the ground that judgment was warranted on the predatory-bidding claim, because *Brooke Group* applied to the claim, and it was undisputed that Weyerhaeuser had operated at a profit throughout the entire alleged predation period. The district court denied Weyerhaeuser's motion.[15]

At trial, the court instructed the jury that it could find Weyerhaeuser's conduct anticompetitive if it 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."[16] Following testimony suggesting Weyerhaeuser had the power to influence log prices, the jury found that Weyerhaeuser had monopolized or attempted to monopolize the upstream alder saw log market and returned a general verdict for over $26 million, which was later trebled to approximately $79 million.[17] The jury, however, also determined that Weyerhaeuser did not have any downstream market power because there was extensive competition between alder lumber and other forms of hardwood lumber (and thus no alder lumber market).

The Ninth Circuit affirmed. It acknowledged that, "to establish liability under *Brooke Group*, a plaintiff ha[s] to show that its competitor operated at a loss and was likely to recoup its losses."[18] However, it held the *Brooke Group* standard inapplicable to predatory buying claims, because "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing."[19] The court upheld the verdict, concluding that substantial evidence supported Ross-Simmons' predatory-bidding theory.[20]

The Supreme Court reversed in a unanimous opinion authored by Justice Thomas, holding that *Brooke Group* should

15. *Id.*
16. *Id.*
17. *Id.*; *see also Confederated Tribes*, 411 F.3d at 1042.
18. *Confederated Tribes*, 411 F.3d at 1036.
19. *Id.* at 1037.
20. *Id.* at 1045.

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apply to predatory-bidding claims.[21] As the Court explained, "predatory bidding mirrors predatory pricing in respects that we deemed significant to our analysis in *Brooke Group*." In both situations, the predator must suffer "losses today on the chance that it will reap supracompetitive profits in the future," making such schemes unlikely to succeed.[22] "And like the predatory conduct alleged in *Brooke Group*, actions taken in a predatory-bidding scheme are often the very essence of competition."[23] In fact, "[t]here are myriad legitimate reasons—ranging from benign to affirmatively procompetitive—why a buyer might bid up input prices," such as hedging against future input shortages or "as a response to increased consumer demand for its outputs."[24] Moreover, just as failed predatory pricing schemes benefit consumers through the low prices available during the predation period of such schemes, "a failed predatory-bidding scheme can be a 'boon to consumers' in the same way," because the increase in the acquisition of inputs could lead to additional outputs.[25]

The Court therefore "adapt[ed]" the "two-pronged *Brooke Group* test. . . to predatory-bidding claims."[26] First, "[a] plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator's outputs. That is, the predator's bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs."[27] Second, "[a] predatory-bidding plaintiff. . . must prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power [monopoly power on the buying-side of the market]," a "showing [that] require[s] 'a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant mar-

21. *Weyerhaeuser*, 127 S. Ct. at 1074.

22. *Id.* at 1077.

23. *Id.* (quoting Brooke Group Ltd. v Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993)) (internal quotation marks omitted).

24. *Id.*

25. *Id.* at 1077-78 (quoting *Brooke Group*, 509 U.S. at 224). The Court also pointed to "theoretical" similarities between predatory-pricing claims and predatory-bidding claims. *Id.* at 1076, 1078.

26. *Id.* at 1078.

27. *Id.*

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ket.'"[28] Because Ross-Simmons conceded that it had not satisfied the *Brooke Group* standard, its predatory-bidding theory of liability could not support the $79 million verdict.[29] The Court therefore vacated the Ninth Circuit's judgment and remanded for further proceedings.[30]

II.
THE EXPECTED EFFECT OF *WEYERHAEUSER* ON FUTURE ANTITRUST LITIGATION

Perhaps the most important effect of the *Weyerhaeuser* decision will be to return predatory-bidding claims to their rightful slumber. Following the Ninth Circuit's decision allowing liability for input payments that were higher than the jury thought "necessary," many business groups feared an explosion in predatory-bidding claims and filed amicus briefs urging the Supreme Court to grant certiorari.[31] The American Meat Institute, for instance, provided a chilling hypothetical from the perspective of a "lawyer counseling a beef processor":

> [Imagine t]he purchasing committee is anticipating significant demand growth (perhaps because of increasing exports to developing countries, or possibly a large customer has indicated it plans to run a number of beef features in the coming quarter), and your client would like to ensure that it is able to meet that demand. Your client is considering a significant increase in its spot market purchases of fed cattle, and plans to begin running Saturday shifts at its packing plant to accommodate the extra volume.
>
> The morning conference call of the purchasing committee is about to begin. The call will decide the price point at which the company's many buyers will seek to purchase fed cattle from hundreds of suppli-

28. *Id.* (quoting *Brooke Group*, 509 U.S. at 226).

29. *Id.*

30. *Id.*

31. *See, e.g.*, Brief for The Business Roundtable and the National Association of Manufacturers as Amici Curiae Supporting Petitioner, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 127 S. Ct. 1069 (2007) (No. 05-381), 2005 WL 2822908; Brief for the Chamber of Commerce of the United States of America and the American Forest and Paper Association as Amici Curiae Supporting Petitioner, *Weyerhaeuser*, 127 S. Ct. 1069 (No. 05-381), 2005 WL 2822909.

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> ers on the open market that morning and throughout the day. The committee knows that, to get increased volumes, it will have to offer higher prices. It also knows that a small independent beef processing plant has recently opened, having made its investment decisions at a time when demand was low. If livestock prices rise—especially if the small rival lacks the infrastructure to serve the new downstream markets—the new rival will be far less profitable than it had expected, and may even lose money.
>
> Is the committee free to make its decision purely on business grounds, or must it hold prices artificially low to avoid harming the rival? If it decides purely on the basis of business considerations, what will a jury make of the sudden jump in prices under a jury instruction that demands that prices be "fair" or "no higher than necessary"? And will the advice you offer for this morning's call still be good for this afternoon's call and the calls in the coming days and weeks? Or, with supply and demand conditions—and even business strategies—constantly changing, will you have to separately evaluate each bid, contract offer, or futures price to determine, based on constantly changing market conditions and competitive dynamics, the likelihood that a jury may at some point in the future conclude that the prices bid or paid were "higher than necessary"?[32]

The Supreme Court quelled these anxieties by adopting the *Brooke Group* standard, which does not hinge on a jury's subjective assessment as to which prices are "fair" or "necessary." Because both prongs of the *Brooke Group* standard are tough to satisfy, predatory-bidding claims are likely to remain rare.

The *Weyerhaeuser* ruling is also likely to stifle "overbuying" claims. Ross-Simmons argued that Weyerhaeuser's purchase of too many logs could be actionable, even if Weyerhaeuser's overbidding could not form the basis of antitrust liability. The Supreme Court firmly rejected this argument, stating that:

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32. Brief for American Meat Institute as Amicus Curiae Supporting Petitioner, *Weyerhaeuser*, 127 S. Ct. 1069 (No. 05-381), 2005 WL 2844935, at *2-*3.

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> Predatory bidding on inputs is not analytically different from predatory overbuying of inputs. . . . In a predatory-bidding scheme, the purchaser causes prices to rise by offering to pay more for inputs. In a predatory-overbuying scheme, the purchaser causes prices to rise by demanding more of the input. Either way, input prices increase. Our use of the term "predatory bidding" is not meant to suggest that different legal treatment is appropriate for the economically identical practice of "predatory overbuying."[33]

Thus, the two-part *Brooke Group* test will apply to overbuying claims too.

Finally, the *Weyerhaeuser* ruling may aid the development of objective standards governing other sorts of § 2 claims. The business groups supporting Weyerhaeuser repeatedly focused on the need for an objective standard for predatory bidding.[34] So did the government in its briefs.[35] Though the Court never expressly supports the need for "objective standards" in the abstract in the *Weyerhaeuser* opinion, it cannot be missed that the Court was faced with a choice between an objective standard (*Brooke Group*) and a subjective one (the jury instruction affirmed by the Ninth Circuit) and ultimately adopted the objective standard.

Indeed, in adopting the *Brooke Group* standard, the Court reiterated its concern from prior cases that "too lax a liability standard" would court a "serious" "risk of chilling procompetitive behavior."[36] And the Court stressed the importance of

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33. *Weyerhaeuser*, 127 S. Ct. at 1076 n.3.

34. *See, e.g.*, Brief for the Business Roundtable and the National Association of Manufacturers as Amici Curiae Supporting Petitioner, *Weyerhaeuser*, 127 S. Ct. 1069 (No. 05-381), 2006 WL 2459523, at *4-*20; Brief for AT&T Inc. et al. as Amici Curiae Supporting Petitioner, *Weyerhaeuser*, 127 S. Ct. 1069 (No. 05-381), 2006 WL 2506635, at *12-*20; Brief for the Chamber of Commerce of the United States of America and the American Forest and Paper Association as Amici Curiae Supporting Petitioner, *Weyerhaeuser*, 127 S. Ct. 1069 (No. 05-381), 2006 WL 2474081, at *17-*20.

35. Brief for the United States as Amicus Curiae Supporting Petitioner, *Weyerhaeuser*, 127 S. Ct. 1069 (No. 05-381), 2006 WL 2452373, at *27-*30.

36. *Weyerhaeuser*, 127 S. Ct. at 1078 (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993)); *see also* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) ("The cost of false positives counsels against an undue expansion of § 2 liability.").

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protecting "competition and innovation on the buy side of the market."[37] Because objective standards tend to support these goals better than subjective ones, it is quite possible that *Weyerhaeuser* will facilitate the adoption of objective standards in other antitrust contexts as well.

III.
OPEN ISSUES FOLLOWING *WEYERHAEUSER*

Because Ross-Simmons conceded that Weyerhaeuser operated at a profit throughout the entire alleged predation period and that it therefore could not satisfy the *Brooke Group* standard, the Supreme Court saw no need to do more than announce that the two-part *Brooke Group* standard applies to predatory-bidding claims and sketch the broad contours of its application.[38] While *Weyerhaeuser* is expected to thwart future predatory-bidding litigation, several issues remain open should plaintiffs bring overbidding or overbuying claims.

First, lower courts will have to determine what constitutes "below-cost pricing."[39] Courts have struggled with this issue for many years in the predatory-pricing context.[40] The buying-side is just as complicated, if not more so. In fact, in many situations, several inputs may combine to make an output, or a single input could be used to make more than one output. It will be up to the lower courts to decide how the first *Brooke Group* prong applies in these circumstances.[41]

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37. *Weyerhaeuser*, 127 S. Ct. at 1077.

38. *Id.* at 1078.

39. *Id.*

40. *See, e.g.*, United States v. AMR Corp., 335 F.3d 1109, 1118-19 (10th Cir. 2003).

41. The Ninth Circuit recently addressed the subject in a related context in *Cascade Health Solutions v. PeaceHealth*, Nos. 05-35627, 05-35640, 05-36202, 2007 WL 2473229 (9th Cir. Sept. 4, 2007). In *PeaceHealth*, a hospital alleged that a rival engaged in exclusionary "bundled discounting." *Id.* at *2. Following *Brooke Group* and *Weyerhaeuser*, the Ninth Circuit held that an antitrust plaintiff cannot establish that a bundled discount is exclusionary "unless the discounts result in prices that are below an appropriate measure of the defendant's costs." *Id.* at *11. The court recognized, however, that "[d]efining the appropriate measure of costs in a bundled discounting case [with several products] is more complex than in a single product" because a defendant offering a bundle, "without pricing below cost either the individual products in the bundle or the bundle as a whole, can, in some cases, exclude a rival who produces one of the products in the bundle equally or more efficiently

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Second, lower courts will have to determine what constitutes a dangerous probability of recoupment. Though the Supreme Court emphasized that "a showing on the recoupment prong will require 'a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market,'"[42] the Court did not specify what that "close analysis" entails. Obvious components of the "close analysis" will include the alleged predator's market share, possible barriers to entry, and historical evidence of exit and entry in the industry, but there are still many issues for the lower courts to work out.[43] Indeed, while the *Weyerhaeuser* opinion focused solely on the possibility of recoupment in the upstream market (because the jury determined that Weyerhaeuser had no downstream market power), the Court recognized that recoupment could also occur in the downstream market "under certain market conditions" that were not present in *Weyerhaeuser* itself.[44] The lower courts will have to decide what comprises a dangerous probability of recoupment when an alleged predator has both upstream and downstream market power.

Finally, there remains a big issue regarding whose interests the antitrust laws should protect. Older precedents indicate that the answer is everyone: "[The Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated."[45] But more recent precedents have tended to focus on *consumers* as the primary, if not exclusive, benefactors of the antitrust laws. In *Reiter v. Sonotone Corp.*, for instance the Court stated

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than the defendant." *Id.* at *12. The court ultimately adopted a "discount attribution" standard under which "the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products. If the resulting price of the competitive product or products is below the defendant's [average variable cost] to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of § 2." *Id.* at *14, *17.

42. *Weyerhaeuser*, 127 S. Ct. at 1078 (quoting Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993)).

43. *See, e.g.*, 2 HERBERT HOVENKAMP & PHILLIP AREEDA, FUNDAMENTALS OF ANTITRUST LAW § 17.05 (2002).

44. *Weyerhaeuser*, 127 S. Ct. at 1076 n.2.

45. Mandeville Island Farms Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948).

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that the legislative record "suggest[ed] that Congress designed the Sherman Act as a 'consumer welfare prescription.'"[46]

This issue loomed large at the certiorari stage. Weyerhaeuser, the government, and other amici argued that the antitrust laws protect suppliers' rights to receive high prices for their wares,[47] while Ross-Simmons and others argued that antitrust laws protect only consumers.[48] But the Supreme Court elided the issue in the *Weyerhaeuser* opinion by focusing on the need to protect "competition and innovation on the buy side of the market" more generally.[49] While the Court did state in a footnote that "[h]igher prices for inputs obviously benefit existing sellers of inputs and encourage new firms to enter the market for input sales as well,"[50] it thereafter explained that "predatory bidding presents less of a direct threat of consumer harm than predatory pricing."[51] Thus, the Supreme Court found consumers' and suppliers' interests aligned and, therefore, no need to weigh in on the broader jurisprudential dispute.

In sum, *Weyerhaeuser* is clearly a significant victory for antitrust defendants. At the very least, it will make overbidding and overbuying claims more difficult for plaintiffs to pursue than would have been the case if the Ninth Circuit's decision had been permitted to stand. It hopefully also will facilitate the adoption of objective standards in other § 2 contexts, bringing the Antitrust Division's "priority" to fruition.

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46. 442 U.S. 330, 343 (1979) (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978)).

47. *See, e.g.*, Petition for Writ of Certiorari, *Weyerhaeuser*, 127 S. Ct. 1069 (No. 05-381), 2005 WL 4142931, at *13-*14; Brief for the United States as Amicus Curiae, *Weyerhaeuser*, 127 S. Ct. 1069 (U.S. No. 05-381), 2006 WL 1491286, at *12 & n.3; Brief for The Campbell Group et al., as Amici Curiae Supporting Petitioner, *Weyerhaeuser*, 127 S. Ct. 1069 (No. 05-381), 2005 WL 2844939, at *15-*18.

48. *See, e.g.*, Opposition to Petition for a Writ of Certiorari, *Weyerhaeuser*, 127 S. Ct. 1069 (No. 05-381), 2005 WL 2844967, at *23-*25; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Address Before the National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar: Perspectives on Three Recent Votes: The Closing of the Adelphia Communications Investigation, The Issuance of the Valassis Complaint & The Weyerhaeuser Amicus Brief 13-16 (July 6, 2006), *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf.

49. *Weyerhaeuser*, 127 S. Ct. at 1077.

50. *Id.* at 1077 n.4.

51. *Id.* at 1078.

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