GCR USA NEWS

Litigator of the Week: Daniel Laytin

Pallavi Guniganti
22 August 2016

Kirkland & Ellis partner Daniel Laytin

Lawyers defending a trio of Chinese solar panel makers had good news and bad news: they got a bankrupt US competitor's lawsuit, claiming that the companies had colluded on "unreasonably low prices", kicked out of Michigan federal court, even though a similar complaint in California federal court had survived their motion to dismiss. Next up: the Michigan plaintiff appealed against its loss, and cited the contrary California decision.

The District Court for the Eastern District of Michigan had ignored the prior ruling from the Northern District of California, even though the plaintiff Energy Conversion Devices had quite literally made the decision Exhibit A in its opposition to the motion to dismiss. The two district courts, dealing with complaints written by the same lawyers and brought against the same defendants – Trina Solar, Yingli Green Energy and Suntech – had reached different conclusions.

Judge Saundra Brown Armstrong in California had said the plaintiff, Solyndra, could accuse the defendants of colluding to set low prices to drive it out of the market, without necessarily having to accuse them of the specific antitrust misconduct of predatory pricing and allege that they had a plan to recoup losses from below-cost pricing. Those were section 2 monopolisation concerns, she said, and not relevant to a section 1 claim.

Solyndra originally had pleaded recoupment, but later amended its complaint to remove that claim. Having beaten the motion to dismiss, Solyndra settled with the defendants, as is typical in antitrust cases due to the risks of treble damages.

ECD asked the Sixth Circuit to reverse the Michigan court's grant of dismissal to the Chinese solar companies. At oral argument, Trina's counsel Daniel Laytin at Kirkland & Ellis opted to cut through the issues of predatory price conspiracy claims under section 1, antitrust injury and the plausibility requirement, to talk about whether it would ever make sense for companies to conspire to charge customers less money unless they had a plan to make the losses back by charging high prices later.

Efforts by ECD's counsel to point the court toward the Californian *Solyndra* judgment had little effect. While the Sixth Circuit panel focused on what could be inferred about "unreasonably low" pricing claims under section 1 from treatises, its own prior cases and the Supreme Court, the judges showed little interest in the district court rulings.

Instead, the opinion for the appellate court by Judge Jeffrey Sutton said the Supreme Court's rationale for requiring recoupment under section 2 applied just as well, if not more so, to section 1; and that the Sixth Circuit itself in a 2015 decision had said plaintiffs in section 1 predatory pricing cases must "grapple" with recoupment, which Judge Sutton clarified to mandate that plaintiffs must plausibly plead it.

While client concerns prevented discussion of the specifics of Trina's defence, Laytin spoke to *GCR USA* generally about how to litigate antitrust cases.

First published on the *Global Competition Review* website, 22 August 2016
www.globalcompetitionreview.com/usa

"A lot of people think antitrust law is a very specialised idiosyncratic technical practice, and that's great that people think that way, because it allows those of us who call ourselves antitrust people to think of ourselves as specialists," he said.

But antitrust actually breaks down to common sense concepts that can be expressed in everyday language, Laytin said, and he tries to approach it that way, particularly in dealing with generalist judges.

In addition to the hard work needed to win for clients, he said, attorneys also have to be team players.

"If you'd told me when I was in law school that practising law is a team sport, I probably would have quit law school because it wasn't what I was looking for at the time," Laytin said. However, he has found that the tough problems require "the humility and strength to take the best ideas from anyone on the team."

"That and making things very simple are sort of the core tenets, in my view," he said.

For leading a team that broke the complexities of predatory pricing down well enough for the Sixth Circuit to establish a clear rule for pleading section 1 claims, Daniel Laytin is our Litigator of the Week.

First published on the *Global Competition Review* website, 22 August 2016
www.globalcompetitionreview.com/usa