GCR USA NEWS

Sixth Circuit requires recoupment for claim of collusion to lower prices

Pallavi Guniganti
19 August 2016

Credit: Wikimedia user AleSpa

An appellate court yesterday shot down a bankrupt US solar panel manufacturer's collusion claim against three Chinese rivals, after the company failed to argue its competitors planned to earn back losses that flowed from their below-cost pricing.

The plaintiff, the liquidation trust for defunct company Energy Conversion Devices, sued Yingli Green Energy, Trina Solar and Suntech in the District Court for the the Eastern District of Michigan less than two years after filing for bankruptcy.

ECD accused its Chinese rivals of violating section 1 of the Sherman Act by coordinating to sell solar panels in the US market at "unreasonably low prices". It had previously obtained anti-dumping sanctions against the three companies.

Judge Robert Cleland dismissed the lawsuit in October 2014, ruling that ECD lacked antitrust standing as it had claimed that its Chinese competitors had priced at predatory levels, but failed to allege a dangerous probability the companies would recoup losses caused by those below-cost prices. ECD sought to amend its lawsuit to include recoupment allegations, but Judge Cleland refused to allow the company to do so.

The lawsuit paralleled one that another bankrupt US solar company, Solyndra, brought against the same defendants with the assistance of the same law firm, Winston & Strawn. Solyndra had better luck in the Northern District of California, where Judge Saundra Brown Armstrong refused to dismiss its complaint.

ECD appealed to the US Court of Appeals for the Sixth Circuit, which yesterday agreed with Judge Cleland that ECD was accusing its competitors of predatory pricing. As there was no allegation that the Chinese companies planned to earn back losses from below-cost pricing with higher prices in a cornered market, the appellate court said, the lower court was right to reject the complaint.

In his opinion for the Sixth Circuit, Judge Jeffrey Sutton noted that ECD had conceded its complaint could not have survived had it been pleaded under section 2 of the Sherman Act, where the Supreme Court has held predatory pricing claims require plaintiffs to plead and prove below-cost prices and recoupment.

First published on the *Global Competition Review* website, 19 August 2016
www.globalcompetitionreview.com/usa

"The question at hand is whether a section 1 predatory pricing claim contains these same two requirements," he wrote. The Sixth Circuit held that it did.

The rationale for requiring plaintiffs to show recoupment as a way to avoid chilling consumer-friendly low prices applies just as strongly to a section 1 claim, Judge Sutton said, and plaintiffs would not bring predatory pricing claims under section 2 if they were suing multiple defendants and instead could avoid the recoupment requirement by suing under section 1.

The Supreme Court has never held that recoupment does not apply to section 1 claims, and Judge Sutton said it had implied in Matsushita that the need to show how defendants would make back the money lost to below-cost pricing applies even when plaintiffs sue under both sections.

The Sixth Circuit "followed these cues" from the Supreme Court, he wrote, in a 2015 summary judgment ruling that held it was best to require below-cost pricing and likelihood of recoupment to be shown in a section 1 predatory pricing claim. So have the Third, Fifth, Seventh, Ninth and Tenth Circuits, the judge said.

While Judge Cleland had ignored the *Solyndra* decision, the Sixth Circuit took the California court's conflicting view – that recoupment is not required for section 1 claims – head on. Judge Sutton insisted that the requirement "ensures that any claim bottomed on low prices involves an actual harm to consumers through an eventual increase in prices," and avoids having antitrust lawsuits impede low prices.

"The antitrust laws, as opposed to the statutory prohibition on dumping, do not pose an obstacle to the inept, the happy-go-lucky, indeed the generous, 'predator' who sells below cost, benefits consumers, and finds itself unable to recoup – or uninterested in recouping – its losses," Judge Sutton wrote. With such benefits to consumers and no threat of later price-gouging, he said, there could be no antitrust injury.

Counsel to the Energy Conversion Devices liquidation trust did not respond before press-time to a request for comment.

Counsel to the Energy Conversion Devices Liquidation Trust

Winston & Strawn

Partners W Gordon Dobie and William O'Neil in Chicago are assisted by Kathryn Bayer

Counsel to Trina Solar

Kirkland & Ellis

Partner Daniel Laytin, James Hileman and Leonid Feller in Chicago are assisted by Scott Lerner

Counsel to Yingli Green Energy

Simpson Thacher & Bartlett

Partner Matthew J Reilly in Washington, DC, is assisted by Karen Gift and Jonathan Sanders

Counsel to Suntech

Shearman & Sterling

Partner Jerome Fortinsky in New York is assisted by Mikael Abye

First published on the *Global Competition Review* website, 19 August 2016
www.globalcompetitionreview.com/usa