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US Court of Appeal affirms antitrust recoupment requirement

The United States Court of Appeal of the Sixth Circuit has, in *Energy Conversion Devices v Trina Solar* (2016), held that a predatory pricing antitrust claim cannot advance without allegations of recoupment, marking a significant win for US firm Kirkland & Ellis

The claimant, US-based Energy Conversion Devices (ECD), had brought proceedings at the District Court in Detroit, claiming that three China-based solar panel producers, **Trina Solar**, **Yingli Green Energy** and **Suntech Power**, had conspired to decrease their prices to below-cost levels, forcing ECD into bankruptcy.

In June, **Justice Siler**, **Justice Rogers** and **Justice Sutton** of the Court of Appeal considered arguments put forward by **W. Gordon Dobie**, a Chicago-based partner at **Winston & Strawn**, acting for ECD, and those by **Kirkland & Ellis** partner **Dan Laytin**, also based in Chicago, for Trina.

The defendants had lowered their prices by an average of 60% between 2008 and 2011, at which time the conduct was supported by a host of entities, the court said. They included suppliers which provided discounts on certain solar components like silicon, a trade association which facilitated cooperation and the Chinese government which provided below-cost financing.

However, the conduct was not without scrutiny, particularly by the US Department of Commerce and the **International Trade Commission** which found that Chinese companies, including the defendants, had harmed US industry through "illegal dumping", which resulted in over 20 US solar-panel manufacturers, including ECD, filing for bankruptcy.

ECD brought claims at District Court under The Sherman Antitrust Act and local Michigan competition laws, that the three defendants had unlawfully conspired "to sell Chinese manufactured solar panels at unreasonably low or below cost prices… in order to destroy an American industry".

As ECD did not allege that the defendants had planned to then recoup the money they had lost in decreasing their prices by charging anti-competitive prices in a cornered market, a process known as 'recoupment', the District Court rejected the claim and a further request for ECD to amend its complaint to include the recoupment allegation.

An appeal was submitted by ECD on the basis that the district court had erred in its decision.

Appeal judgment

In a judgment, handed down on 18 August, Sutton J emphasised that antitrust law protects "competition, not competitors" and said that, at their core, antitrust laws are a consumer welfare prescription.

As such, courts have "carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low".

It was not enough for a plaintiff to suggest a defendant had knocked them out of the market, it had to show that the defendant first lowered its price to below-cost and proof of an intention to recoup the loss in the future. The Supreme Court had previously confirmed that these two components of a cognizable predatory pricing claim had to be proved in one setting.

On the matter of recoupment, ECD had admitted it felt that the defendants "had little interest in making a profit". Instead, it alleged they would stand to gain by maintaining full employment in Chinese factories by eliminating American competition. This, ECD said, was economically rational and worthy of prohibiting the defendants actions.

However, the court failed to see the reasoning, noting that all three defendants were listed on the **New York Stock Exchange** and one had itself filed for bankruptcy under US law. Even if that was the intention of the defendants, that is not recoupment, the court said, adding:

"It shows only that the Chinese companies, impervious to the profit motive, are happy to maintain low prices. That's a form of charity, not a use of monopoly power to lower production and raise prices."

In the absence of such an allegation, or any willingness by ECD to prove a reasonable prospect of recoupment by the defendants, the Court of Appeal upheld the decision of the District Court to reject the claim.

In a statement, Kirkland & Ellis said the decision, a first for the court of appeal deciding on the matter, is important because it establishes that recoupment is a necessary element of antitrust claims brought under both Sections one and two of the Sherman Act. It also clarifies that recoupment cannot be sidestepped on the basis of reduced consumer choice or reduced innovation.

While it appears to be the end of the road for ECD to pursue a recoupment claim, other bankrupted US solar-panel manufacturers could potentially bring claims if they could identify that recoupment was likely by the defendants.

Antitrust cases around new technologies or conspiracy allegations are areas of which US government agencies like the **Federal Trade Commission** and the **Department of Justice** have some familiarity with. In addition, the Department of Energy has investigated failed US solar panel manufacturer Solyndra which filed for bankruptcy in 2011. ■