

Federal Appeals Court affirms dismissal of \$3 Billion antitrust predatory-pricing claim



Jennifer Dowdell Armstrong | Friday, August 19, 2016

Yesterday the Sixth Circuit in *Energy Conversion Devices v. Trina Solar, Ltd.*, No. 15-2130, rejected the claims of a plaintiff American solar panel manufacturer that alleged three Chinese solar-panel producers agreed to decrease prices to below-cost levels and drove the American company into bankruptcy. In affirming the district court, the Sixth Circuit first explained that the plaintiff's complaint was devoid of any allegation that the competitors agreed not only to lower prices but also planned to earn back what they lost, i.e., "to recoup the losses by charging anti-competitive prices in a cornered market." The Sixth Circuit held that this "recoupment" element was required in both a Section 1 and a Section 2 antitrust predatory-pricing claim under the Sherman Act and observed that "unless low prices today will come with higher prices tomorrow, only good things happen for consumers." This is because consumers "receive the boon of lower prices, consumer welfare is enhanced, and no antitrust concerns arise."

And even if the plaintiff had cleared the "recoupment" hurdle, the Sixth Circuit held that it still would have faced another, related pleading obstacle – antitrust injury. Antitrust injury is a threshold requirement to any private antitrust action and compels a plaintiff to allege harm to overall competition, not individual competitors. The Sixth Circuit, in rejecting plaintiff's argument that competition would be harmed by hurting the American solar-panel industry and leading to reduced consumer choice and loss of innovation, observed that "recoupment is not one item on a menu of ways to show that low prices hurt consumers. It is the only way." The Sixth Circuit stated that "newer, cheaper, better technology frequently makes old technology unavailable," observing that "the Pony Express could not have competed with Federal Express," and that "Netflix made Blockbuster less relevant."



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