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Antitrust Suits for Gas Price Manipulation Not Barred by Federal Law, High Court Says

Retail purchasers of natural gas will be able to continue their state antitrust lawsuits against interstate pipelines, after an April 21 decision of the U.S. Supreme Court holding that the Natural Gas Act doesn't field-preempt such claims (*Oneok, Inc. v. Learjet, Inc.*, 2015 BL 112594, U.S., No. 13-271, 4/21/15).

The 7-2 decision written by Justice Stephen G. Breyer emphasized ''the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted.''

Dissenting, Justice Antonin Scalia argued that this test ''does not make for a stable background against which to carry on the natural gas trade.'' Scalia was joined by Chief Justice John G. Roberts Jr.

Cory Andrews, senior litigation counsel of the Washington Legal Foundation, which submitted an amicus brief on behalf of the pipelines, emphasized in an April 21 e-mail to Bloomberg BNA that the purpose of the NGA was to ''unify regulation in the natural gas wholesale market,'' and said that ''[t]he Court's decision today undermines that important goal.''

Richard Brunell, vice president and general counsel of the American Antitrust Institute, told Bloomberg BNA in an April 21 telephone interview that he believes this fear is ''overblown,'' and that he was ''very pleased'' with the position the court adopted. The AAI submitted an amicus brief on behalf of the retail purchasers.

Brunell also suggested that this decision might have ramifications for federal antitrust claims in the natural gas and electric power fields.

''The court has recognized that FERC jurisdiction can coexist with antitrust law,'' he said. Some federal antitrust claims based on allegations of anticompetitive behavior in natural gas and electricity have ''run into issues'' because FERC jurisdiction over rates is exclusive. ''But this says it's not totally exclusive, and may open the door a little bit'' to such claims, he said.

Gap-Filling Statute. The suit arose when several purchasers of natural gas at retail sued interstate pipelines under various state antitrust laws, asserting that the companies had manipulated natural gas prices by, among other things, reporting false sales to indexes of natural gas prices. Such indexes routinely serve as the basis of gas prices, both at wholesale and retail.

The pipelines argued that state suits were preempted because ''Congress has forbidden the State to take action in the *field* that the federal statute pre-empts,'' the court said.

According to the pipelines, the suits ''target anticompetetive activity that affected wholesale (as well as retail) rates''; that under the NGA, the Federal Energy Regulatory Commission has express authority to ''keep wholesale rates at reasonable levels''; and that ''letting these actions proceed will permit state antitrust courts to reach conclusions about that conduct that differ from those that FERC might reach,'' and are therefore in the preempted field, the court said.

''Petitioners' arguments are forceful, but we cannot accept their conclusion,'' the court said.

The court emphasized that the NGA is a gap-filling provision, intended to replace the traditional state regulation of interstate natural gas commerce that the court had found unconstitutional in the early 20th century, and that the act wasn't intended to diminish the exercise of state power in those areas they still did have the power to regulate—production and retail sales. The court said that ''we must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents.''

On the States' Side. The court said that it has '' 'consistently recognized' '' the '' 'significant distinction' '' between '' 'measures *aimed directly at* interstate purchasers and wholesales for resale, and those aimed at' subjects left to the States to regulate,'' quoting its decision in *N. Natural Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84 (1963).

Here, ''the lawsuits are directed at practices affecting *retail* rates—which are 'firmly on the States' side of that dividing line.' ''

The court rejected arguments that other precedents undermined this decision. It distinguished *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), on the basis that the state law at issue there aimed to lower wholesale rates, in FERC's jurisdiction. The court distinguished other cases on which the pipelines attempted to rely as conflict-preemption decisions, not applicable to the field-preemption argument.

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Scalia criticized this approach, saying that the NGA didn't give FERC the power to aim at particular effects, but to regulate particular activities, and that in doing so it may focus on all parts of the gas trade, not just wholesale sales. He also emphasized that the NGA has competing aims, and that the court's decision impairs the aim of promoting uniformity of regulation.

The court responded that FERC regulation of certain activities for purposes of wholesale rates can't foreclose every other state regulation that affects those rates. Regarding the desirability of clarity regarding the division between state and federal regulatory spheres, the court said ''that Platonic ideal does not describe the natural gas regulatory world.''

''I fear that by subjecting the natural gas industry to state antitrust liability for practices that affect both retail and wholesale rates, the Court's decision today will disrupt the Natural Gas Act's goal of uniformity and allow attorneys motivated by large jury awards to create potentially 50 different state regulatory regimes for the natural gas industry,'' Andrews said. This will ''lead to industry-wide chaos and serve as an unnecessary drag on the economy,'' he added.

Brunell said that most state antitrust laws follow the Sherman Act, so that there was likely to be ''little divergence'' among the states. He also said that ''you don't often see'' state antitrust cases ''unless the activity is blatant.''

He did note, however, that state antitrust remedies are sometimes different than federal remedies, and that some states allow indirect purchasers to file antitrust suits. ''This could be an issue,'' he said, but he also said that even if that were so, that would just mean that ''defendants would be facing more damages,'' and that this is the kind of regime that already exists outside of regulated industries.

Future Conflict? The court said that none of the parties ''argued at any length'' that the suits conflicted with federal law. It therefore limited its decision to the issue of field preemption, leaving the question of whether the laws are preempted because they conflict with the NGA or other federal law ''for the lower courts to resolve in the first instance.''

Andrews said that it was unclear whether the pipelines would be able to avail themselves of conflict preemption, because the record ''is insufficiently developed on this point.'' He added, however, that one of the advantages of the ''uniformity provided by field preemption'' is that it eliminates regulatory discrepancies among the states themselves.

''Conflict preemption, even if applicable here, will not provide that level of uniformity and certainty that the industry so desperately needs,'' he said.

Justice Clarence Thomas joined in all but Part I-A of the court's opinion, and concurred in the judgment. He wrote separately to object to the court's series of implied preemption precedents, but noted that ''[n]either party . . . has asked us to overrule these longstanding precedents,'' and that ''even under these precedents, the challenged state antitrust laws fall outside the preempted field.''

All other justices joined the court's opinion in full.

Neal K. Katyal of Hogan Lovells LLP, Washington, argued for the pipeline companies. Anthony A. Yang of the Office of the U.S. Solicitor General, Washington, argued for the United States in favor of the pipeline companies. Jeffrey L. Fisher of Stanford Law School, Stanford, Calif., argued for the purchasers. Kansas Solicitor General Stephen R. McAllister argued on behalf of Kansas and 20 other states in favor of the purchasers.

BY NICHOLAS DATLOWE

Full text at http://www.bloomberglaw.com/public/document/Oneok_Inc_v_Learjet_Inc_No_13271_US_Apr_21_2015_Court_Opinion and 83 U.S.L.W. 4249.

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