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Appeals Court Resoundingly Affirms Scope and Breadth of Shipping Act Antitrust Exemption

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In August 2015, a federal court held in an apparent case of first impression that the Shipping Act of 1984 (the "Shipping Act"),[1] preempts state law claims as well as federal antitrust claims.[2] Direct and indirect purchasers of shipping services pursued federal and state antitrust and related state law claims for damages allegedly suffered from a cartel to fix rates and limit available capacity for shipping motor vehicles between the United States and overseas. That conspiracy had been the subject of criminal enforcement actions by the Department of Justice and civil penalties assessed by the Federal Maritime Commission (FMC).[3]

The plaintiffs attempted to keep their follow-on damages actions in federal court, where they could recover treble damages if successful, as opposed to double damages (termed "reparations") at the FMC. However, the Third Circuit affirmed the district court's ruling that their claims were preempted in full under the Shipping Act.[4] The appeals court also rejected as unpersuasive the position taken in an amicus brief filed jointly by the Justice Department and the FMC that plaintiffs' state law claims should not be preempted despite preemption of their federal antitrust claims. The Third Circuit's decision confirms that in appropriate cases federal preemption remains a viable defense to state law antitrust claims, notwithstanding the Supreme Court's recent decision in *Oneok, Inc. v. Learjet, Inc.*,[5] declining to find state antitrust claims preempted by the Natural Gas Act.

The Third Circuit's Ruling

As set out in more detail in our article on the district court's decision,[6] the Shipping Act expressly exempts agreements between vessel-operating common carriers in the U.S. foreign trades from the federal antitrust laws if they are filed with the FMC and become effective under the Shipping Act or are exempt from filing under the Act.[7] Conduct pursuant to such a filed and effective agreement, or with a reasonable belief that it is undertaken pursuant to such an agreement, is fully exempt and cannot be the subject of either civil or

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[1] 46 U.S.C. §§ 40101–41309.

[2] *In re* Vehicle Carrier Services Antitrust Litigation, 2015 WL 5095134 (D.N.J. 2015).

[3] *See, e.g.,* United States v. Compania Sud Americana de Vapores S.A., No. 1:14-cr-100 (D. Md.).

[4] *In re* Vehicle Carrier Services Antitrust Litigation, 2017 WL 192704 (3d Cir. 2017).

[5] 135 S. Ct. 1591 (2015).

[6] *See* John Longstreth & Allen Bachman, *Shipping Act Preempts State Antitrust Law For 1st Time*, LAW360 (Sept. 16, 2015), https://www.law360.com/competition/articles/703613/shipping-act-preempts-state-antitrust-law-for-1st-time.

[7] 46 U.S.C. §§ 40307(a)(1), (2).

criminal enforcement.[8] The Shipping Act contains a separate provision prohibiting private antitrust actions under the Clayton Act for any conduct prohibited by the Shipping Act, even if it is not under a filed and effective agreement.[9] Private parties may seek recovery for such conduct only by filing an administrative complaint at the FMC.[10]

The Third Circuit held with little difficulty that the "Shipping Act specifically provides that operating under an unfiled, and hence ineffective, agreement is a prohibited act" and that therefore "those injured by such a prohibited act cannot obtain Clayton Act relief."[11] The court noted that agreements between ocean common carriers to fix prices or restrict capacity are required to be filed under the Shipping Act, and that the Shipping Act prohibits operating under an unfiled agreement to fix prices or reduce capacity. Such unfiled agreements are not exempt from criminal prosecution, but the provision that bars private damages suits for any conduct prohibited under the Shipping Act is a separate one. Operating under an unfiled agreement is prohibited by the Shipping Act and thus cannot be the subject of a private suit.

The court also rejected an argument that was not strictly before it because it had been presented too late to the district court. One of the large automobile manufacturers argued that the antitrust exemption did not apply to its claims because its contracts with carriers to ship its newly assembled vehicles were exempt from filing with the FMC under a statutory exemption for such agreements.[12] The court held that, even if that point had not been waived, it is incorrect because the "exemption from filing service contracts for newly assembled motor vehicles . . . does not relieve Defendants from their obligation to file the other agreements" under the Shipping Act.[13] The agreements between the carriers to fix prices and restrict capacity were subject to filing even though each carrier's contracts of carriage with its shippers were not, and operating under such unfiled agreements was a violation of the Shipping Act and thus not subject to a private antitrust suit.

The Third Circuit also affirmed the Shipping Act's preemption of state law. The court noted that the "Shipping Act's text, scheme, and legislative history demonstrate Congress's intent to create a comprehensive, predictable federal framework to ensure efficient and nondiscriminatory international shipping practices,"[14] and that the "presumption against preemption" does not apply "because our case concerns the regulation of international maritime commerce, an area uniquely in the federal domain."[15] The court held that Congress wanted to "put in place a regulator familiar with complex foreign commerce issues confronting ocean common carriers," with the expertise "to make informed decisions about whether conduct violates the Act and warrants punishment," and that "allowing juries to decide liability . . .would conflict with the scheme that vests the FMC with decision-making power."[16] "Put simply, to subject the carriers to potential state antitrust liability would

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[8] *See* A&E Pac. Constr. Co. v. Saipan Stevedore Co., 888 F.2d 68, 71–72 (9th Cir. 1989).

[9] *Id.* at 72 n.6; *see* 46 U.S.C. § 40307(d).

[10] *See generally* ABA Transportation Antitrust Handbook, at 270–73 (2014).

[11] *In re* Vehicle Carrier Services Antitrust Litigation, 2017 WL 192704 at * 5 (citations omitted).

[12] *See* 46 U.S.C. § 40502(b) (containing exemption).

[13] 2017 WL 192704 at *6 n.12.

[14] *Id.* at *5.

[15] *Id.* at *7.

[16] *Id.* at **8-9.

essentially undo Congress's work in expanding antitrust immunity and undermine its efforts to assist U.S.-flag ships avoid a competitive disadvantage."[17]

The Decision Makes Clear That Conflict Preemption Is Alive And Well -- Even When The Relevant Federal Agency Disagrees

Oneok, the Supreme Court's last foray into this area, held that state antitrust claims are not within the field of matters preempted by the Natural Gas Act (NGA), given the states' "long history of providing common-law and statutory remedies against monopolies and unfair business practices."[18] While holding that the NGA did not preempt the field of state antitrust regulation *Oneok* left open the issue of conflict preemption, that is whether the application of state law would interfere with the purposes of the federal law. The Third Circuit's decision confirms that conflict preemption remains a robust defense for firms operating in regulated industries. In holding that state law was preempted by the Shipping Act, the Third Circuit cited Congress's desire to create a "comprehensive, predictable federal framework," and noted the value of decision-making by an expert federal agency, particularly where international commerce is at issue.

Preemption decisions depend, of course, on the specific claims and statutory framework at issue, but the court's decision fits comfortably into a line of Supreme Court decisions that reflect considerable concern that state antitrust laws not be allowed to interfere with regulatory regimes established by Congress. These decisions include *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, *LLP*,[19] which rejected a monopolization claim against conduct subject to competitive access regulation by the Federal Communications Commission, and *Credit Suisse Securities v. Billing*,[20] which held that alleged anticompetitive activities in an initial public offering were impliedly immune from antitrust liability because the antitrust laws were "clearly incompatible" with the strict regulatory scheme set in place by the Securities Exchange Commission. As Justice Breyer noted in his concurrence rejecting the antitrust claims presented in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*,[21] "[w]hen a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits." This line of precedent can be of considerable use to market participants operating in heavily regulated environments.

The Third Circuit's decision is also noteworthy because the agency on whose expertise the court relied in finding preemption, the FMC, argued in a joint amicus brief that the Shipping Act should not be held to impliedly preempt state laws, even though its express preemption of the federal antitrust laws should be recognized and applied. The court found the FMC and Justice Department's position to be unpersuasive because the "position that the Shipping Act contemplates state law antitrust enforcement is inconsistent with the conclusion that the Shipping Act bars Clayton Act claims (with which amici agree)," and "also overlooks the

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[17] *Id.* at *7.

[18] 135 S. Ct. at 1601–03.

[19] 540 U.S. 398 (2004).

[20] 551 U.S. 264 (2007).

[21] 555 U.S. 438, 459 (2009).

purposes of the Act as set forth in the statute and legislative history as well as the comprehensive scheme for enforcement of Shipping Act violations before the FMC."[22]

Several observations on the FMC's somewhat surprising position are in order. First, while the FMC is the expert regulatory agency, it is required to litigate in the federal courts along with the Justice Department, whose Antitrust Division has long been hostile to the Shipping Act exemption. The court may thus have surmised that the position in the amicus brief reflected that hostility rather than a considered view by the FMC itself. Second, the amicus brief did not develop its argument as to state law preemption in any depth, but relied primarily on the fact that Congress did not address state law actions in the Shipping Act. However, there was little, if any, history of state law antitrust actions in this area when the Shipping Act was passed, and it was more than thirty years later before the issue first arose. Congress' failure to address the issue in this context is understandable, and would not have reflected a considered judgment that state law actions should be permitted. Finally, while the joint brief asserted that allowing state law actions would not negatively affect the FMC's enforcement or administration of the Shipping Act, it offered no explanation as to why that should be the case. As the court noted, it would be odd for Congress to have provided comprehensive antitrust immunity preventing federal juries from weighing in in this area, but to have nonetheless allowed state court juries to do so, especially in an area that has always been peculiarly a matter of federal law. And allowing state law actions would have been particularly odd given that one of the main concerns that led to passage of the Shipping Act was concern over U.S. laws interfering with carrier agreements allowed under foreign legal regimes. Indeed, some countries had gone so far as to pass discovery-blocking statutes to counter such efforts to apply U.S. law. The argument that Congress intended to preclude federal antitrust actions but not state actions in this environment is not plausible.

Next Steps

Perhaps anticipating this outcome, which requires customers of vessel and marine terminal operators to seek redress from the FMC for anticompetitive harm in commerce covered by the Shipping Act, a number of direct and indirect purchasers of vehicle shipping services have filed FMC complaints seeking damages for harm alleged from the carrier conspiracy.[23] Those actions were stayed pending resolution of the appeal. One has since been settled, and the others will now presumably move forward. The FMC has not handled litigation of a comparable scope since the Shipping Act was passed, and the litigation is likely to raise issues of first impression again, this time at the agency.

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[22] 2017 WL 192704 at *8 n.17.

[23] *See* FMC Docket Nos. 15-08, 16-01, 16-11.

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