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Shipping Act Antitrust Exemption Held for the First Time to Preempt State Antitrust Laws

U.S. Antitrust, Competition & Trade Regulation and Maritime Alert**By John Longstreth, Allen R. Bachman**

For the first time, a federal court has held that the Shipping Act of 1984, 46 U.S.C. §§ 40101–41309 (Shipping Act), preempts state-law antitrust claims. The federal district court in New Jersey applied conflict preemption principles to hold that a challenge to a price fixing and capacity reduction agreement among international shipping companies was within the exclusive jurisdiction of the Federal Maritime Commission (FMC), and that the Shipping Act preempts state law antitrust claims that would apply to such conduct. *In re Vehicle Carrier Services Antitrust Litigation*, No. 13-3306 (ES)(MDL No. 2471) (D.N.J. Aug. 28, 2015). The [decision](#) is important not only as the first case to address this issue under the Shipping Act, but also as a confirmation that federal preemption remains a viable defense to state-law antitrust claims, notwithstanding the Supreme Court's recent decision in *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015) declining to find state antitrust claims preempted by the Natural Gas Act.

The scope of the Shipping Act's antitrust exemption

Agreements that are filed with the FMC and become effective under the Shipping Act, or that are exempt from filing under the Act, are expressly exempted from federal antitrust laws. 46 U.S.C. §§ 40307(a)(1), (2). Conduct may also fall outside of the specific authority granted in an effective agreement but still be immune if there is a reasonable basis to believe it was authorized, and if the conduct falls within the scope of the Act. 46 U.S.C. § 40307(a)(3). “[A]ll activity permitted or *prohibited* by the Act enjoys immunity from antitrust coverage if undertaken with a reasonable belief that it was being done under an effective agreement filed with the FMC.” *A&E Pac. Constr. Co. v. Saipan Stevedore Co.*, 888 F.2d 68, 72 n.6 (9th Cir. 1989)(emphasis added).

The Shipping Act and its antitrust exemption apply to agreements among vessel-operating common carriers in the U.S.-foreign trades, or with or among one or more marine terminal operators serving such carriers. See 46 U.S.C. § 40102(6), (14), § 40301(a), (b). The Shipping Act and its exemption do not apply to the U.S. domestic or offshore trades, sometimes known as the “coastwise” or “Jones Act” trades. Nor do they apply to non-common carriers, such as many bulk or tanker operators, or to agreements between carriers and entities that are not marine terminal operators, such as shippers or non-vessel-operating carriers. *Id.* See generally *ABA Transportation Antitrust Handbook*, at 270–73 (2014).

At issue in *Vehicle Carrier Services* were alleged price fixing and capacity reduction agreements between carriers that had not been filed with the FMC. Because this activity was not undertaken pursuant to an effective agreement, or with reason to believe it was under an effective agreement, it was not immune from criminal enforcement by the Justice Department or civil penalties imposed by the FMC. Both agencies, in fact, took enforcement

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actions against the cartel. See, e.g., *United States v. Compania Sud Americana de Vapores S.A.*, No. 1:14-cr-100 (D. Md.) However, conduct that is prohibited by the Shipping Act cannot be the subject of a private civil antitrust suit under any circumstances. 46 U.S.C. § 40307(d).

The Court's rejection of Plaintiffs' arguments that the conduct at issue in *Vehicle Carrier Services* was not subject to the Shipping Act's antitrust exemption

Plaintiffs in the follow-on actions consolidated in the *Vehicle Carrier Services* litigation presented two arguments to try to avoid the Shipping Act's bar on private damages actions. First, they argued that agreements to reduce capacity are outside the scope of the Shipping Act and that operating under unfiled capacity reduction agreements is not conduct prohibited under the Shipping Act. The court easily concluded that agreements to restrict capacity are required to be filed under several provisions of the Act, slip op. at 9–12 (citing 46 U.S.C. §§ 40301(a)(3)–(6)), and that the Shipping Act prohibits operating under an unfiled agreement to reduce capacity. Slip op. at 12–17 (citing 46 U.S.C. § 41102(b)(1)).

Second, plaintiffs argued that state law claims are not subject to the exemption because the Act expressly exempts filed and effective agreements only from federal antitrust laws. See 46 U.S.C. § 40102(2) (listing all significant federal antitrust laws, both civil and criminal). The court correctly noted that the lack of express mention of state antitrust laws is not determinative. Slip op. at 18–20. Indeed, state laws have been held preempted even when the federal immunity itself is implied and not express. See *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) (state law preempted when it interfered with an implied federal antitrust exemption for baseball). The court also noted the “outsized federal role in the area of national and international maritime commerce,” and that Congress had expressed no awareness or recognition of state antitrust regulation in this area and, thus, could not be said to have intended to preserve any such regulation. *Id.* at 25–26. See *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994) (exceptions to the principle that maritime law should operate uniformly have been recognized when the state rule is procedural rather than substantive or application of a federal rule is unlikely to produce uniform results).

The *Vehicle Carrier Services* decision is based on conflict preemption, the issue left open in *Oneok*.

Last April in *Oneok*, the Supreme Court held that state antitrust claims are not within the field of matters preempted by the Natural Gas Act, even though the challenged conduct affected federally regulated wholesale gas prices. 135 S. Ct. at 1599-1602. *Oneok* noted the states' “long history of providing common-law and statutory remedies against monopolies and unfair business practices,” and held that state law claims addressing misconduct directed at retail rates, but also affecting wholesale rates, fell within this “well established state power.” 135 S. Ct. at 1601.

Oneok left open, however, the issue whether preemption could be found on a showing of specific conflicts “between state antitrust law proceedings and the federal rate-setting process.” *Id.* at 1602. Declining to address field preemption, and distinguishing *Oneok* on that basis, the *Vehicle Carrier Services* court held that state antitrust claims were barred by

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the Shipping Act under conflict preemption principles because they would “stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” under the Act. Slip op. at 20. The Court held that allowing state claims would be inconsistent with Congress’ decision to expressly exempt carriers and terminal operators subject to the Shipping Act from federal antitrust damages actions, to assign exclusive jurisdiction to the FMC, and to establish a “nondiscriminatory regulatory process ... with a minimum of government intervention and regulatory costs.” Slip op. at 13, 20–23 (quoting 46 U.S.C. § 40101(1)).

Implications

The *Vehicle Carrier Services* court noted that it had not been able to locate a prior case explicitly holding that the Shipping Act impliedly preempts state law claims; nor did plaintiffs cite any cases holding to the contrary. Slip op at 28. To vessel-operating common carriers in the U.S.-foreign trades, and marine terminal operators serving them, the decision offers welcome guidance as to the scope of exemption.

On a broader level, the decision provides some confirmation that implied conflict preemption remains alive and well after *Oneok*. Defendants proceeding under other statutes can take comfort from the fact that the court found preemption based in part on a broad statement of purpose to reduce governmental intervention and regulatory costs. Plaintiffs seeking to avoid preemption will likely point to the breadth of the express antitrust exemption at issue, the express provision of alternative remedies at the agency, and special status of maritime commerce in preemption analysis given the history of federal uniformity in its regulation.

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