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Divided Supreme Court Allows State Law Antitrust Claims to Proceed Against Pipelines, Rejects Field Preemption Argument

Jeffrey May (Wolters Kluwer) · Saturday, April 25th, 2015

In a decision that's received relatively little attention, a divided U.S. Supreme Court earlier this week held that the Natural Gas Act (NGA) did not "field" preempt state law antitrust claims raised by large retail buyers of natural gas seeking damages from pipelines for their purported price manipulation. Rejected was the pipelines' argument that the claims fell within the field preempted by the NGA—"the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." The decision could encourage antitrust lawsuits in areas where preemption concerns might have made antitrust plaintiffs otherwise reluctant.

While the Court's seven-to-two decision—another win in a recent string for antitrust plaintiffs—resolves issues of field preemption, the pipelines can still argue before the lower courts that conflict preemption bars the claims. The buyers alleged that the pipelines had engaged in practices that inflated "index" rates for natural gas. They claimed that the pipelines manipulated the price of natural gas by, among other things, reporting false information to price indices published by trade publications.

The district court granted summary judgment in favor of the pipelines on preemption grounds, but the claims were revived by the U.S. Court of Appeals in San Francisco. The pipelines then sought Supreme Court review. They asked the Court whether the NGA preempts retail customers' state antitrust law challenges to practices that also affect wholesale rates.

The Court explained that Congress may implicitly preempt a state law, rule, or other state action either through "field" preemption or "conflict" preemption. Because the parties argued the case almost exclusively in terms of field preemption, the Court focused on that issue and left issues of conflict preemption for the lower courts in the first instance. The Court had distinguished some of the precedents raised by the pipelines as conflict preemption cases.

The pipelines contended that the state law claims were subject to field preemption. They argued that allowing these claims to proceed would "permit state antitrust courts to reach conclusions about that conduct that differ from those that FERC might reach or has already reached."

Justice Breyer, writing for the majority, found that the pipelines' arguments, while "forceful," could not carry the day. Section 5(a) of the NGA did indeed give rate-setting authority to the Federal Energy Regulatory Commission (FERC), according to the Court. However, the FERC's

jurisdiction was limited. Its regulation did not foreclose every other form of state regulation that affects those rates.

Reiterating that the NGA "was drawn with meticulous regard for the continued exercise of state power," the majority stated: "where (as here) a state law can be applied to nonjurisdictional as well as jurisdictional sales, 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." The Court went on to say that the "broad applicability of state antitrust law supports a finding of no pre-emption."

Pointing to the FERC's promulgation of detailed rules governing manipulation of price indices, the pipelines and the U.S. Solicitor General had called for deference to the FERC's determination that field preemption barred the claims. However, the pipelines and the Solicitor General did not identify a specific determination by the FERC that its regulation preempted the field into which the state law antitrust suits fell. The Court went on to note that, at least here, detailed federal regulations did not offset other considerations that weighed against a finding of preemption.

Dissent. In a strongly-worded dissent, Justice Antonin Scalia, joined by Chief Justice John Roberts, took the side of the federal government and contended that the Act does preempt state antitrust laws. "The Court's make-it-up-as-you-go-along approach to preemption has no basis in the Act, contradicts our cases, and will prove unworkable in practice." The dissent warned that the Court's decision will "invite state antitrust courts to engage in targeted regulation of the natural-gas industry."

"Before today, interstate pipelines knew that their practices relating to price indices had to comply with one set of regulations promulgated by the Commission," the dissent continued. "From now on, however, pipelines will have to ensure that their behavior conforms to the discordant regulations of 50 States—or more accurately, to the discordant verdicts of untold state antitrust juries."

Concurrence. In a separate opinion, Justice Clarence Thomas expressed his concern with the "Court's precedents concerning the pre-emptive scope of the Natural Gas Act." However, he concurred in the Court's judgment, "[b]ecause the Court today avoids extending its earlier questionable precedents."

American Antitrust Institute statement. The American Antitrust Institute (AAI) issued a statement after the decision was handed down, noting that the AAI developed the legal theory on which the Court's decision rested. The rationale used by the Court was first raised by the AAI in its 2011 amicus brief before the Ninth Circuit, which found no preemption on different grounds, the AAI noted.

Kansas Attorney General reaction. At oral argument in January, Kansas Solicitor General Stephen R. McAllister argued on behalf of 21 states in support of the complaining customers' position and against the U.S. Department of Justice, which supported the petitioning gas traders. The Kansas Attorney General's Office praised the decision.

"This is a major victory for Kansas consumers and all purchasers of natural gas," Kansas Attorney General Derek Schmidt said in response to the Court's holding. "The Supreme Court has sided with our view that those who illegally fix the price of natural gas cannot hide behind federal law to avoid state liability."

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