Client Alert

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ONEOK, Inc. v. Learjet, Inc.: The Supreme Court Holds that Natural Gas Jurisdictional Sellers are Subject to State Antitrust Claims

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On April 21, 2015, the Supreme Court issued its much-anticipated decision in *ONEOK Inc. v. Learjet, Inc.* addressing the extent to which the Natural Gas Act ("NGA") preempts state antitrust claims brought against jurisdictional sellers.[1] In a 7-2 ruling, the Court held that the NGA does not preempt state law antitrust damages claims that are "directed at practices affecting *retail* rates." The Court's decision allows companies that purchased natural gas pegged to price indices to move forward with their damages claims against gas marketers for allegedly manipulating the reported price of natural gas. In doing so, the Supreme Court has opened the door to expanded antitrust liability for FERC jurisdictional entities in the natural gas industry.

BACKGROUND

Natural gas makes it way to end users through the sequential process of production, sale, interstate transportation, and retail distribution. The NGA authorized the federal government to exercise rate-setting authority over the sales for resale in interstate commerce, interstate transportation and natural gas companies engaged in such sales or transportation, while leaving regulation over "retail" rates, among other things, to state authorities. In prior decisions, the Supreme Court had ruled that state law claims were invalid under the doctrine of "field preemption" if they challenged conduct covered by the NGA. Simply put, if the conduct at issue was subject to FERC's jurisdiction, it could not also be subject to state law. In 2003, after the well-publicized cases of market participants reporting false information to natural gas price indices, FERC adopted new regulations designed to prohibit this form of "market manipulation." *See generally* FERC, Final Report on Price Manipulation in Western Markets (Mar. 2003); *see also* Energy Policy Act of 2005, Pub. L. 109-58 (authorizing FERC to issue rules to prevent market manipulation in jurisdictional wholesale gas markets).

As a result of FERC's rules and policies regarding restructuring and unbundling of wholesale gas markets, many large end-users purchase natural gas directly from producers and marketers at market-based rates, independently arranging for interstate transportation. In this regime, the purchase price of the natural gas is often based on price indices compiled from reports of wholesale gas transactions provided by FERC jurisdictional sellers. According to the *ONEOK* plaintiffs, these jurisdictional sellers artificially raised the reported price of gas by providing false information to the indices. Thus, while the alleged manipulation was directed at the wholesale

1 The Court refers to the defendants in the case as "interstate pipelines," but uses this terminology interchangeably with FERC "jurisdictional sellers." Slip Op. at 4. The defendants in the action included companies involved in both the interstate transportation and sale of natural gas.

price of gas (and therefore a matter within the jurisdiction of FERC), it also allegedly inflated the retail price paid by these end-users.

DECISION

In *ONEOK*, plaintiffs were large end-users who brought lawsuits against natural gas marketing companies under a variety of state antitrust laws. Plaintiffs alleged that they had been overcharged when they purchased gas tied to the prices reported in the indices, and they sought damages from the defendants they alleged were responsible for artificially raising the reported price. The District Court granted summary judgment to the defendants (who were FERC jurisdictional sellers), reasoning that the damages actions were an attempt to regulate conduct in the wholesale gas market and therefore preempted by the NGA. On appeal, however, the Ninth Circuit reversed. The Ninth Circuit held that the state law claims at issue were not preempted because the effects of the alleged price manipulation went beyond the wholesale market and had the effect of raising prices in the retail market for natural gas.

The Supreme Court, in a 7-2 decision, affirmed the Ninth Circuit. The Supreme Court held that state antitrust claims to recover overcharges paid at the retail level could proceed even when those overcharges arose out of practices occurring in the federally regulated wholesale market. Justice Breyer, writing for the Court, emphasized that the NGA was drafted "with meticulous regard for the continued exercise of state power." Slip Op. at 10. The Court then drew a distinction "between 'measures *aimed directly at* interstate purchasers and wholesales for resale, and those aimed at' subjects left to the States to regulate." *Id*. at 11 (emphasis in original). The former were preempted, the latter were not. The Court went on to distinguish its prior cases finding preemption by explaining that those cases dealt with state laws that attempted to "directly" regulate entities and activities within FERC's jurisdiction. Here, in contrast, the Court found that the state antitrust laws were aimed at protecting consumers in "retail" markets, a matter left to the states to regulate.[2]

EFFECTS

The immediate effect of the Court's decision is to send the case back to the lower courts for further litigation on the merits of plaintiffs' allegations. For companies under FERC's jurisdiction, however, the Court's opinion has a number of important implications:

- *Increased uncertainty in the regulation of, and enforcement in, wholesale natural gas markets*. As pointed out in the Court's dissenting opinion (Scalia, J.), participants in the interstate natural gas market will now be subject to the laws of multiple states in addition to the regulatory and enforcement framework of FERC. Jurisdictional sellers engage in multiple operations that can have downstream effects in retail markets – and following the logic of the *ONEOK* decision, those operations may simultaneously be subject to FERC regulations and state antitrust laws. And these state laws are not uniform. Most states have antitrust or consumer protection statutes that vary widely, not only in the scope of prohibited

2 The Supreme Court was careful to note, however, that its decision dealt only with "field preemption," leaving open the possibility that state antitrust actions could still be invalid under the doctrine of "conflict preemption" "[t]o the extent any conflicts arise between state antitrust law proceedings and the federal rate-setting process." Slip. Op. at 15.

conduct, but also in the different types of enforcement actions that may be brought (e.g., private actions or enforcement actions brought by state officials), as well the different remedies and sanctions for violations. Industry participants need to be particularly mindful of state laws that may potentially supplement or augment FERC's regulations and enforcement authority.

- *Risk of increased private litigation and related strategic considerations*. Although the NGA and FERC regulations do not create a private right of action for "market manipulation," many state antitrust laws do. Thus, the most likely effect of the decision will be an increase in litigation by private parties seeking damages for allegedly manipulative practices in the natural gas market. Thus, companies subject to FERC's jurisdiction not only must be cognizant of the agency's aggressive enforcement program, but also must recognize the increased potential for follow-on civil litigation under state antitrust laws. For example, in deciding whether to contest or settle FERC investigations and enforcement actions, companies must take into account the potential risk of civil litigation that flows from agency investigations and carefully consider whether public statements admitting certain facts or wrongdoing could be used by private plaintiffs in aid of an action for damages under state antitrust law.

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