

The FTAIA In State Court: A Defense Perspective

Law360, New York (February 24, 2010) -- As federal courts tighten the reins on private antitrust actions, some antitrust plaintiffs are focusing their attention on litigating in state court. And they are being creative about how to avoid removal to federal court.[1] Yet, as antitrust plaintiffs turn to state court and state law, they are likely to face some of the same federal doctrines they would prefer to avoid.

One federal doctrine sure to arise in state court antitrust actions when there are allegations or damages based on cross-border conduct is the Foreign Trade Antitrust Improvements Act ("FTAIA").[2] The FTAIA defines the limits on the reach of the Sherman Act in cases involving foreign trade and commerce.

The FTAIA's parameters continue to evolve as litigants and the courts wrestle with new variations of the basic allegation that international price-fixing or overseas monopolistic conduct "caused" domestic injury on which a Sherman Act claim is based.

Congress enacted the FTAIA in 1982, some 92 years after the enactment of the Sherman Act. The FTAIA operates by "removing" anticompetitive conduct in foreign trade or commerce (other than import trade or import commerce) "from the Sherman Act's reach," unless that same conduct also causes direct, foreseeable and substantial injury to domestic trade or commerce within the United States, U.S. import commerce, or exporting activities of American exporters.[3]

A threshold question is whether these limitations similarly restrict the extraterritorial application of state antitrust laws. Defendants will argue that the state antitrust laws cannot permissibly extend to reach conduct or give rise to damages that Congress has placed beyond the reach of federal antitrust law under the FTAIA.

The defendants' argument goes like this. First, under the Supremacy Clause of the U.S. Constitution,[4] federal law preempts state law even in the absence of an express preemption provision when, "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [5]

Second, the FTAIA's legislative history establishes that Congress had multiple objectives when enacting the statute. One objective was to ensure that the risk of Sherman Act liability did not prevent American exporters and other firms doing business abroad from entering into advantageous "business arrangements (such as joint selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets." [6]

Another objective was to eliminate "ambiguity in the precise legal standard to be employed in determining whether American antitrust law is to be applied to a particular transaction." [7]

Congress sought to adopt a “clear benchmark ... for businessmen, attorneys and judges as well as [U.S.] trading partners”[8] with the “ultimate purpose” of “promot[ing] certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions.”[9]

A third objective was to promote international comity by acknowledging and respecting the prerogatives of other nations to establish and apply their own standards for regulating and remediating alleged restraints of trade in their own markets.[10]

Congress believed that respecting such foreign sovereign regulatory prerogatives would ultimately best serve U.S. interests by “encourag[ing] our trading partners to take more effective steps to protect competition in their markets.”[11]

Applying state antitrust laws to regulate foreign trade or commerce excluded from federal antitrust jurisdiction by the FTAIA arguably would frustrate every one of these objectives.

American exporters and other businesses engaged in foreign trade or commerce could have no confidence that restraints exempted from federal antitrust attack would not be subject to alternative antitrust attack under the laws of one or more U.S. states. Businesses, therefore, would be deterred from entering into arrangements that Congress intended to enable.

Likewise, ambiguity in the “standard to be employed” for assessing the extraterritorial application of “American antitrust law” would not only persist, but would be multiplied fifty times.

And the imposition of as many as 50 states’ antitrust laws on foreign trade or commerce clearly would negate the federal objectives of international comity and respect for foreign regulation of foreign markets.

At every level then, the application of state antitrust laws to foreign trade or commerce exempted by the FTAIA from federal antitrust regulation would “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in enacting the FTAIA.[12]

Plaintiffs likely will counter these preemption arguments by pointing out that there is a presumption against preemption and that Congress did not expressly overrule any state antitrust law when enacting the FTAIA.

True, Congress did not address the reach of state antitrust laws, one way or the other, when it enacted the FTAIA. However, the Sherman Act has always extended to “commerce with foreign nations,”[13] and was subject to a large body of pre-FTAIA case law addressing the limitations on its extraterritorial reach.[14]

By contrast, state antitrust laws such as California’s Cartwright Act do not expressly reference foreign commerce and have no comparable history of being applied to it.

Congress, therefore, had no cause to be concerned that states would attempt to apply state antitrust laws to foreign trade or commerce exempted from federal regulation by the FTAIA.

Even if there had been such a concern, Congress would have been amply justified in anticipating that the doctrine of implied obstacle preemption — well established when the FTAIA was enacted in 1982[15] — would resolve any conflict.[16]

Take California as a specific example. There is a “strong presumption” against preemption, particularly in fields that have been the subject of California’s “historic police powers.”[17] Antitrust plaintiffs would argue that California’s “historic police powers” include the authority to regulate competition in California.

On the other hand, the U.S. Supreme Court has consistently held that the power of states to regulate commercial activity outside their borders is necessarily circumscribed.[18] That principle applies a fortiori when states attempt to regulate foreign trade or commerce.[19]

Even in cases involving traditional regulation of conduct within state borders, the California Supreme Court has declined to apply a presumption against preemption where the regulation in question also implicates foreign affairs.[20]

When the area of regulation encompasses not only foreign trade and commerce but also international relations — that is to say, areas in which federal rather than state interests traditionally predominate — the case for preemption is even stronger.[21]

Extending the foreign extraterritorial reach of state antitrust laws beyond the limits of the Sherman Act would infringe not only the Supremacy Clause but several additional constitutional provisions establishing federal primacy in the areas of foreign trade, foreign commerce and international relations.[22]

This allocation of power is intended to ensure that only one entity — the federal government — represents American interests in foreign trade and commerce and foreign affairs.[23]

In recognition of these principles, courts have repeatedly invalidated state laws that undermine, or threaten to undermine, federal policies and prerogatives in the areas of foreign trade and commerce or foreign affairs.[24]

These decisions support a conclusion that states cannot constitutionally apply state antitrust laws such as the Cartwright Act to remediate alleged harm from restraints of trade in foreign markets having no direct, substantial and foreseeable anti-competitive effects on trade or commerce in the United States (as would be required for federal antitrust jurisdiction under the FTAIA).

There are policy reasons for this result as well. Claims arising from international cartel conduct or overseas monopolistic behavior arguably seek to apply state antitrust law to decide the legality of foreign conduct (e.g., communications between English and Japanese manufacturers about industry standards, or discussions between Chinese and Korean buyers, or joint ventures in Singapore investing in South America) regardless of whether such conduct was legal when and where it occurred.

Such claims threaten much more than an “incidental or indirect effect” on foreign trade and the internal affairs of foreign countries exercising their sovereign rights to regulate their own markets.[25]

To assert a state’s antitrust law as an all-encompassing international antitrust statute available to police alleged restraints of trade in every country would contravene the federal policy, reflected in the FTAIA, of promoting international comity in this area.[26]

And allowing one state to apply its antitrust laws to foreign transactions paves the way for every other state to apply its antitrust statutes beyond the limits of the FTAIA.[27]

Exposure to a thicket of state antitrust regimes would drive foreign companies to avoid doing business that even tangentially affects U.S. commerce.

Finally, such an outcome would conflict with the reported decisions considering this specific issue. One federal court, in *In re Intel Corp. Microprocessor Antitrust Litig.* (“Intel II”),[28] held that California Cartwright Act claims are “limited by the reach of their applicable federal counterparts.”[29]

Intel II analyzed the question as follows:

“Plaintiffs have ... not demonstrated that their state law claims should be applied beyond the boundaries set by the FTAIA ... As the Supreme Court has recognized, ‘[f]oreign commerce is pre-eminently a matter of national concern,’ and therefore, it is important for the Federal Government to speak with a single, unified voice.

“Here, Congress has spoken under the FTAIA with the ‘direct, substantial and reasonably foreseeable effects’ test, and the Court is persuaded that Congress’ intent would be subverted if state antitrust laws were interpreted to reach conduct which the federal law could not.”[30]

The only published California appellate decision on the issue, *Amarel v. Connell*, similarly holds that the Cartwright Act should not be construed to allow prosecution of extraterritorial antitrust claims that the FTAIA would not.[31]

The *Amarel* court observed that “[t]he legislative history of [the FTAIA] discloses it was intended to establish a uniform standard, in the face of conflicting judicial formulations, of the domestic effects necessary to trigger the jurisdiction of American antitrust laws,”[32] and that “the proper approach to a preemption analysis is to reconcile ‘the operation of both statutory schemes with one another rather than holding one completely ousted.’”[33]

The court concluded that the plaintiffs’ state law antitrust claims were “not preempted” because, as pleaded, the claims did not seek to apply state antitrust laws in a manner inconsistent with the FTAIA.

Rather, they sought damages for anti-competitive practices “alleged to have had an adverse effect on the relevant markets in this state ...”[34]

According to the court:

“So long as the anticompetitive conduct in question has a direct, substantial and reasonably foreseeable effect within the state, prosecution of the conduct under state law is not precluded.”[35]

In sum, there are strong reasons for a state court evaluating a state law antitrust claim involving foreign trade or commerce to limit the reach of that state law co-extensively with the reach of the Sherman Act as defined by the FTAIA.

To do otherwise contravenes constitutional clauses, rules of statutory construction and federal policies.

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The views expressed are those of the authors and not necessarily those of their clients, the firm, or Portfolio Media, publisher of Law360.

[1] E.g., *City of Los Angeles, et al. v. Infineon Tech., et al.*, Case No. 08-480561 (San Francisco County Super. Ct. filed Oct. 3, 2008), available at: www.sfsuperiorcourt.org/ (complaint filed on behalf of 99 governmental entities; jurisdictional provisions of Class Action Fairness Act not applicable where total number of class members is less than 100).

[2] 15 U.S.C. § 6a (2006).

[3] 15 U.S.C. § 6a (2006); *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155, 161 (2004) (“Empagran I”).

[4] u.s. const., art. VI, cl. 2.

[5] *Viva! Int’l Voice for Animals v. Adidas Promotional Retail Ops.*, 41 Cal. 4th 929, 936 (2007) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000), and *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The doctrine is known as implied obstacle preemption.

[6] *Empagran I*, 542 U.S. at 161 (citing h.r. rep. no. 97-686, at 1-3 & 9-10 (1982), as reprinted in 1982 U.S.C.C.A.N. 2487, 2487-88, 2494-95 (“House Report”)).

[7] *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702, 714 (D. Md. 2001) (quoting House Report at 2490).

[8] House Report at 2487-88.

[9] *Id.* at 2494.

[10] See *Empagran I*, 542 U.S. at 166-68 (discussing presumption of comity underlying FTAIA). The bill’s sponsor noted that “the domestic-effects standard being proposed” would alleviate “foreign animosity toward U.S. antitrust enforcement” by “limit[ing] the reach of our antitrust laws in a manner consistent with our major trading partners.” *Foreign Trade Antitrust Improvements Act: Hearing on H.R. 2326 Before the Subcomm. on Monopolies & Commercial Law of the H. Comm. on the Judiciary, 97th Cong. (1981)* (statement of Rep. Rodino, sponsor of H.R. 2326).

[11] House Report at 2499.

[12] See *Viva!*, 41 Cal. 4th at 936.

[13] 15 U.S.C. § 1 (2006).

[14] E.g., *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945).

[15] See *Hines*, 312 U.S. at 67.

[16] See *Crosby*, 530 U.S. at 387-88 (“A failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of a conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict.”).

[17] See, e.g., *Farm Raised Salmon Cases*, 42 Cal. 4th 1077, 1088 (2008) (consumer protection laws are subject to presumption against preemption because they are within the states’ historic police powers); see also *Paduano v. American Honda Motor Co.*, 169 Cal. App. 4th 1453, 1474 (2009) (same).

[18] See, e.g., *BMW of North America Inc. v. Gore*, 517 U.S. 559, 571-73 & nn.15-16 (1996) (citing cases).

[19] E.g., *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979).

[20] See *Viva!*, 41 Cal. 4th at 938-40.

[21] E.g., *Hines*, 312 U.S. at 68 (“[a]ny concurrent state power that may exist is restricted to the narrowest of limits; the state’s power [in these contexts] is not bottomed on the same broad base as is its power to tax”); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988) (“[in] an area of uniquely federal interest ... the conflict with federal policy need not be as sharp as that which must exist for ordinary pre-emption ...”).

[22] u.s. const. art I, § 8, cls. 1, 3, 4 & 10; see also id. § 10, cls. 1, 2 & 3 (Constitution limits the powers of the states in this arena, prohibiting them, for example, from entering into treaties or taxing imports or exports).

[23] See, e.g., the federalist no. 80 (Alexander Hamilton) (“[T]he peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members.”); *Japan Line*, 441 U.S. at 449 (nation must “speak with one voice” in regulating foreign commerce); *Hines*, 312 U.S. at 63 (“[The national government is] entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties.”); *Bd. of Trs. v. United States*, 289 U.S. 48, 56-57 (1933) (Congress’s power to regulate foreign commerce “may not be limited, qualified, or impeded to any extent by state action”).

[24] E.g., *Zschernig v. Miller*, 389 U.S. 429 (1968) (invalidating Oregon statute that conditioned inheritance rights of nonresident aliens on state court determinations that the aliens’ home countries extended reciprocal rights to U.S. citizens); *Bethlehem Steel Corp. v. Bd. of Comm’rs*, 276 Cal. App. 2d 221, 225-26 (1969) (invalidating California statute requiring the state government to contract only with persons who used or supplied U.S. goods, holding that “[o]nly the federal government can fix the rules of fair competition when such competition is on an international basis” and explaining that the state law is a “usurpation ... of the power of the federal government to conduct foreign trade policy”).

[25] *Zschernig*, 389 U.S. at 441; *Bethlehem*, 175 Cal. App. 2d at 226.

[26] *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421 (2003); *Int’l Com’n on Holocaust Era Ins. Claims v. Steinberg*, 133 Cal. App. 4th 689, 699 (2005).

[27] *Zschernig*, 389 U.S. at 441.

[28] 476 F. Supp. 2d 452 (D. Del. 2007).

[29] *Id.* at 457.

[30] *Id.*; see also *The ‘In’ Porters, S.A. v. Hanes Printables Inc.*, 663 F. Supp. 494, 502 n.8 (M.D.N.C. 1987) (noting “the anomaly [sic] that would be created if [North Carolina’s Unfair Trade Practices Act] were construed to have a greater extraterritorial reach than the Sherman Act”); *In re Potash Antitrust Litig.*, No. 08-C-6910, 2009 WL 3583107, at *23 (N.D. Ill. Nov. 3, 2009) (“Defendants are correct in noting that there could potentially be conflict with certain constitutional provisions if state antitrust laws reached foreign commercial activity that federal laws did not.”)

[31] 202 Cal. App. 3d 137, 146-50 (1988).

[32] *Id.* at 149.

[33] *Id.* at 149 (quoting *Crown Oil Corp. v. Superior Court*, 177 Cal. App. 3d 604, 610-11 (1986)).

[34] *Id.* at 150.

[35] *Id.*