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Credit Suisse First Boston LLC, et al. v. Billing, et al. – Supreme Court Sides with Investment Banks in Antitrust Suit over IPO Practices

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The Supreme Court held that antitrust claims against investment bank underwriters who engaged in practices known as "laddering," "tying" and "excess compensation" in connection with initial public offerings, led to a "plain repugnancy" between the antitrust laws and the federal securities laws. As a result, in a 7-1 decision, the Court held that the securities laws implicitly preclude the application of the antitrust laws to these practices and dismissed the action. This decision may have a significant impact for the securities industry and other industries with heavy regulatory oversight, including the following:

- It may be more difficult to bring antitrust suits challenging practices covered by the securities laws;
- Other underwriting practices not covered by the decision, but regulated by the SEC, may be immune from antitrust liability; and
- Based on the Court's rationale underlying this decision, industries with active regulatory oversight may be immune from antitrust liability.

The complaint in *Billing* was brought by a group of buyers of newly issued securities of technology-related companies against underwriting firms that marketed and distributed those securities. The buyers claimed that the underwriters unlawfully agreed with each other not to sell shares of a popular new issue to a buyer unless that buyer committed to: (1) buy additional shares of that security later at escalating prices, a practice called "laddering"; (2) pay unusually high commissions on subsequent security purchases from the underwriters; or (3) purchase from the underwriters other less desirable securities, a practice called "tying." The plaintiffs alleged that the underwriters abused the practice of combining into underwriting syndicates by agreeing among themselves to impose these conditions upon potential investors, thereby violating Section 1 of the Sherman Act and Section 2 of the Clayton Act.

The District Court granted the defendants' motion to dismiss, holding that the federal securities laws impliedly preclude application of the antitrust laws to the conduct in question. The Court of Appeals for the Second Circuit reversed, and reinstated the action. The Supreme Court granted *certiorari* and reversed the Court of Appeals.

The Court explained that regulatory statutes sometimes explicitly state whether they preclude application of the antitrust laws. But where, as here, the regulatory statutes are silent with respect to antitrust laws, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws.

Based on Supreme Court precedent on this issue, there are four conditions to finding there is "plain repugnancy" between the securities laws and the antitrust complaints sufficient to warrant implicit preclusion of the latter: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, or duties; and (4) the possible conflict affects practices that lie squarely within an area of financial market activity that the securities laws seek to regulate.

The Court found that the first condition (legal regulatory authority), the second condition (exercise of that authority), and the fourth condition (heartland securities activity) had been satisfied because: (1) the activities in question—the underwriters' efforts jointly to promote and to sell newly issued securities—is central to the proper functioning of well-regulated capital markets; (2) the law grants the SEC authority to supervise all of the activities in question; and (3) the SEC has continuously exercised its legal authority to regulate the conduct at issue.

The Court then turned to the third condition, asking whether there is a conflict between the securities laws and antitrust laws that rises to the level of incompatibility. The Court found that the antitrust claims for the alleged misconduct could not be pursued without undermining the securities laws: "where conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market." Op. at 17. The Court also found that any enforcement-related need for an antitrust lawsuit is small, given the fact that the SEC actively enforces the rules and regulations that forbid the conduct in question. Moreover, the SEC itself takes account of competitive considerations when creating securities-related policy. The SEC itself participated in argument before the Court, arguing for reversal and dismissal of the action.

The Court also noted that permitting antitrust claims to go forward could risk circumvention of the heightened pleading requirements imposed by the Private Securities Litigation Reform Act of 1995 as it would permit "plaintiffs to dress what is essentially a securities complaint in antitrust clothing." Op. at 18.

Justice Stevens filed a concurring opinion, in which he explained that he would have found that the underwriters' alleged conduct does not violate the antitrust laws, rather than holding that Congress has implicitly granted them immunity from those laws. Justice Thomas dissented. In his dissent, Justice Thomas found that both the Securities Act and the Securities Exchange Act contain broad savings clauses that preserve rights and remedies existing outside of the securities laws. According to Justice Thomas, a straightforward application of these savings clauses leads to the conclusion that the plaintiffs' antitrust suits can proceed without the need to reconcile any conflict between the securities laws and the antitrust laws. (Justice Kennedy recused himself from the case.)

The opinion is available at http://www.supremecourtus.gov/opinions/06pdf/05-1157.pdf.

[Note that parallel securities class actions were also filed against the investment banks and others. In that parallel securities litigation, Morrison & Foerster LLP represents more than 30 issuers of securities and their executives and serves as liaison counsel for all issuer defendants in that matter. These entities were not parties in the Credit Suisse case.]