



Supreme Court Rules That Federal and State Antitrust Claims Brought in Connection With Certain IPOs Are Preempted by Federal Securities Laws

In a decision announced earlier today, the United States Supreme Court held that federal securities laws implicitly preclude the application of antitrust laws to claims filed against ten leading investment banks over alleged conduct on initial public offerings during the technology boom of the late 1990s. In its 7-1 opinion in *Credit Suisse Securities (USA) LLC v. Billing*, No. 05-1157 (June 18, 2007), the Court reversed a decision by the Second Circuit Court of Appeals that allowed claims to proceed against investment banks accused of illegally pumping up prices and profit margins on IPOs.

Background

In 2002, investors filed antitrust class-action lawsuits against ten leading investment banks, alleging that the investment banks had “abused the ... practice of combining into underwriting syndicates” by requiring that investors pay “additional anticompetitive charges” in excess of the agreed-upon IPO share price and underwriting commission. According to the investors, these additional charges consisted of (1) “laddering” agreements (in which the investor promises to place bids in the aftermarket at prices above the IPO price), (2) “tying” agreements (in which the investor commits to purchase other, less attractive securities as a condition to purchasing the desired securities), and (3) payment of excessive commissions. The investors sought relief under both federal and state antitrust laws.

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The district court dismissed the complaint, finding that federal securities laws implicitly preclude application of antitrust laws to the conduct at issue. *See In re Initial Public Offering Antitrust Litigation*, 287 F. Supp. 2d 497, 524-35 (S.D.N.Y. 2003). The Second Circuit vacated this opinion, rejecting the investment banks' argument that antitrust laws were implicitly preempted based on a conflict between the antitrust and securities laws, and concluding that there was no indication of congressional intent to repeal the antitrust laws and immunize IPO tie-in agreements from antitrust regulation. *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 170, 172 (2d Cir. 2005).

Today's Ruling by the Supreme Court

In today's decision, the Supreme Court held that antitrust claims of the type brought by the investors were implicitly precluded by the securities laws. The Court, citing its earlier decisions in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975); and *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975), considered whether there was: (1) authority under the securities laws for regulation of the activities at issue; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both were applied, would produce conflicting requirements, duties or standards of conduct.

Applying these factors, the Court found that the investors' claims concerned practices lying at "the very heart of the securities marketing enterprise"; the law grants the SEC authority to supervise all of the activities at issue; and the SEC has in fact continuously exercised its authority to regulate conduct of the type in question. Thus, the sole issue to be determined was whether application of the antitrust and securities laws would be incompatible.

Considering this question, the Court concluded that applying both the securities laws and antitrust laws would clearly be incompatible. The SEC often needs to draw very fine lines between activities that it permits and those that it forbids. Securities

regulators have unique expertise to distinguish the permissible from the forbidden. Overlapping evidence of activity that may be unlawful under the antitrust statutes but lawful under the securities regulations can give rise to reasonable but contradictory inferences. Thus, there is a serious risk that courts with non-expert judges and juries will arrive at results inconsistent with those of the SEC. Consequently, the Court concluded that the securities laws are “clearly incompatible” with an antitrust lawsuit of the type brought by the investors.

Today’s decision by the Supreme Court is likely to make it less difficult for defendants to secure dismissal of antitrust cases involving the purchase or sale of securities. Although the Court recognized that not all antitrust lawsuits involving securities transactions are impliedly preempted by the securities laws, judges may now be more inclined to defer to the SEC and more cognizant of the need to avoid potential conflicts when deciding motions to dismiss an antitrust claim in the context of the securities industry.

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