U.S. Supreme Court Reconciles Antitrust Law and Securities Regulation

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On June 18, 2007, in *Credit Suisse Securities (USA) LLC v. Billing*, the U. S. Supreme Court issued an important decision about the relationship between the federal antitrust laws and the federal securities laws. The issue before the Court arose from the fact that the securities regulatory framework authorizes—and in some cases even *encourages*—certain underwriting activities that nominally conflict with the competitive principles of antitrust law. To bolster capital formation, the SEC allows competing IPO underwriters to join together in underwriting syndicates and, within certain limits, to discuss prices and allocation both among themselves and with prospective customers in order to determine a fair initial offering price. Such activities would be clear violations of the antitrust laws if undertaken by competitors in unregulated industries. The question before the Court was whether the antitrust laws should apply at all in certain areas regulated by the SEC. In an opinion that will be important in other regulated industries, the Court held that the extensive regulation in this area of securities law precluded the application of the antitrust laws, at least for the conduct challenged in this case.

I. Factual and Procedural Background

The consolidated plaintiff class represents thousands of direct IPO purchasers and aftermarket purchasers of technology stocks issued during the late 1990s. Defendants include some of the country's largest underwriters and institutional investors. Plaintiffs accused the defendants of conspiring to manipulate the aftermarket prices of the stocks in violation of the Sherman Act, the Robinson-Patman Act, and state antitrust laws. Specifically, plaintiffs allege that defendants' conspiratorial abuse of the syndicate underwriting system precluded direct purchasers from obtaining stocks in initial public offerings (IPOs) unless the purchasers agreed to aftermarket "tying" and "laddering" arrangements or to pay excessively high commissions.[1] Plaintiffs contend this conduct artificially inflated the aftermarket price of the securities at the expense of the purchasing public. Significantly, the plaintiffs did not allege that all concerted conduct of the underwriting syndicates necessarily violated the antitrust laws. Rather, plaintiffs contended that the defendants had exceeded the bounds of permissible conduct under *both* the securities laws and the antitrust laws. Defendants moved to dismiss the complaints under Rule 12(b)(6), arguing that the SEC's comprehensive regulation of IPOs impliedly precluded the federal antitrust laws and preempted state antitrust laws.

A. District Court

Relying on the Supreme Court's decision in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975)[2], the district court granted defendants' motion to dismiss. The test for implied immunity, according to the district court, should not depend on whether *current* SEC regulations permit the conduct (a test the court believed would improperly rest on "the fortuity of timing"). Instead, the touchstone for implied immunity should be whether application of antitrust laws would conflict with a regulatory scheme that empowers the SEC to allow the conduct at any point in the future. That test accounts for the possibility that the SEC may change its rules at some point in the future, thus placing defendants under conflicting regulatory mandates. Applying this immunity standard to the plaintiffs' claim, the district court reasoned that even if parts of the alleged conduct violated securities laws, such a finding did not necessarily preclude a finding of antitrust immunity.

B. Second Circuit

The United States Court of Appeals for the Second Circuit reversed, concluding that defendants should not receive antitrust immunity. The appellate court agreed that

[1] A tying agreement in the securities offering context generally refers to requiring either implicitly or explicitly that customers commit to purchase other, less attractive securities in order to obtain an allocation of the offered shares. Laddering has been defined as "inducing investors to give orders to purchase shares in the aftermarket at pre-arranged, *escalating prices* in exchange for receiving IPO allocations." The SEC has identified laddering agreements, which stimulate demand and facilitate upward pricing of the aftermarket, as a serious and harmful form of pricing manipulation that "violates the antifraud and anti-manipulation provisions of the federal securities laws." *Report of the SEC Concerning the Hot Issues Markets* 37-38 (Aug. 1984).

application of antitrust scrutiny to conduct *permitted* by the SEC creates potential regulatory conflicts warranting immunity. However, the appellate court held that the existence of a potential regulatory conflict does not by itself imply a repeal of antitrust law. Articulating a much narrower standard for implied immunity than the district court, the Second Circuit held that "the touchstone of our analysis is …whether there is any evidence of an implicit congressional intent to repeal the antitrust laws." Applying the intent test to this case, the appellate court found no evidence that Congress intended to repeal the applicability of antitrust laws to the challenged conduct. This narrow immunity standard would have made it easier to bring class action antitrust suits seeking treble damages against underwriters involved in IPOs.

The Supreme Court granted *certiorari* to review this important issue.

Plaintiffs stressed that they were not challenging the legitimate activities of underwriting syndicates, but only conduct that violated both antitrust and securities laws. Allowing such claims, they argued, would make the Securities Exchange Act work better and therefore achieve Congress' purposes. The defendants responded that the fact that the alleged conduct is currently unlawful under securities laws does not rule out a finding of implied immunity. Defendants pointed out that in *Gordon*, the Court granted antitrust immunity for commission rate-fixing even though such behavior was prohibited under securities laws at the time the case was decided. Application of antitrust law, defendants argued, could thwart the SEC's meticulous regulation of IPO activities.

In an unusual jurisdictional battle between two federal agencies, the DOJ and SEC took opposing stances in the lower courts on whether to find preemption, with the Antitrust Division of the DOJ arguing for a broad application of the antitrust laws (which it enforces) and the SEC arguing for broad deference to its regulatory authority over IPOs. In the Supreme Court, the Solicitor General (SG) submitted an amicus brief that tried to bridge this divide. It rejected the Second Circuit's narrow preclusion test but also rejected what might be seen as the district court's "blanket immunity" for all IPO-related conduct. The SG's approach was to preclude the antitrust laws where conduct was authorized by the SEC and where activities were "inextricably intertwined" with such conduct. The SG also suggested a heightened pleading standard to ensure that antitrust claims are not illegitimately grounded in conduct authorized by the SEC or activities "inextricably intertwined" with such conduct.

II. Supreme Court's Opinion

In a 7-1 decision in which Justice Kennedy recused himself, the Supreme Court reversed the Second Circuit, holding that plaintiffs' antitrust claims were precluded. The court observed that out of the four factors previously deemed crucial to a finding of implied antitrust immunity, three are clearly present in this case: the alleged underwriting activities lie "at the very heart" of the securities marketing enterprise; the SEC has the legal *authority* to supervise the alleged conduct; and the SEC has continuously *exercised* its authority to regulate such conduct.

The rest of the court's analysis focused on the fourth factor—whether the application of antitrust and securities laws to the alleged conduct poses a risk of conflicting standards. The Court concluded that even under the assumption that the SEC forbids the alleged conduct and will continue to forbid it in the future, the application of antitrust law to this conduct is nevertheless incompatible with securities law. In the context of IPO underwritings, there exists a particularly fine line between price-stabilization activities *permitted* by the SEC and conduct *forbidden* by the SEC as impermissible market manipulation. The Court reasoned that because the line between permissible and impermissible often hinges on complex securities-related issues, such decisions are best entrusted to SEC expertise. The majority cautioned that submitting such decisions to non-expert judges and juries in dozens of different antitrust courts would likely produce inconsistent results, and the threat of treble damages liability for an antitrust violation would likely deter even those types of underwriting activities that are *encouraged* by the SEC as part of the important capital formation process. For these reasons, the Court rejected the SG's suggested approach. In a separate

[2] In *Gordon*, plaintiffs filed suit against the NYSE and ASE claiming that the Exchanges' system of fixed commission rates violated the Sherman Act. The Court concluded the fixed commission rates were immunized from antitrust attack because of the SEC's authority under the Securities and Exchange Act of 1934 to approve or disapprove exchange commission rates and Congress's demonstrated support for the SEC's continuing exercise of that power. *Gordon v. New York Stock Exchange*, 422 U.S. 659, 683-691.

concurrence, Justice Stevens objected to the idea that antitrust courts' potential "mistakes" should play a role in deciding this legal issue.

Although the Court found implied antitrust immunity with respect to the particular conduct alleged in this case, the opinion stopped short of endorsing the district court's view that *all* conduct in the IPO context is implicitly immune from antitrust liability simply because the SEC exercises pervasive regulatory authority over it. The Court explicitly reserved the issue of market division, suggesting that such conduct is outside the "heartland of activities related to the underwriting process" and therefore not analogous to the behavior at issue in this case.

The decision in *Credit Suisse* fits fairly easily within the Court's prior decisions dealing with overlap between antitrust and securities law. Whatever one thinks about the lines that the SEC has drawn between permissible and impermissible conduct, the Court was correct that it is often not easy to decide if particular conduct falls on one side or the other. Given the inherent uncertainty in jury trials, inconsistent results would be inevitable. However, the threat of crippling treble damage awards would therefore be likely to deter socially beneficial conduct. The decision was fact specific, and it is unclear how many other situations in regulated industries are comparable. Nevertheless, *Credit Suisse* will certainly be invoked in defense of antitrust claims for conduct in a regulated environment for years to come.

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