Supreme Court Finds SEC Regulation of IPOs Implicitly Precludes Antitrust Claims: *Credit Suisse Securities (USA) LLC v. Billing*, ___ U.S. ___, No. 05-1157 (2007).

The United States Supreme Court recently directed the dismissal of antitrust claims brought by purchasers of securities in a series of initial public offerings ("IPOs") against underwriting firms that had jointly marketed and distributed those securities. The Court held that because of the SEC's extensive and active regulation of conduct in connection with IPOs, the securities laws must be interpreted to implicitly preclude the application of the antitrust laws to the conduct at issue there. In so doing, the Court rejected a compromise standard proposed jointly by the SEC and Department of Justice ("DOJ") that potentially would have preserved at least some of the claims.

Background

Certain concerted conduct among potential competitors has long been accepted practice in the world of IPOs. A group of underwriters, for example, will typically form a syndicate to market the shares in an IPO, will investigate and estimate likely demand for the shares, and ultimately will agree upon a selling price.

In *Billing*, however, the plaintiff purchasers alleged that the underwriting firms participating in the IPOs in question engaged in joint conduct outside this realm of generally accepted behavior. Specifically, the antitrust plaintiffs attacked what they alleged to be the unlawful agreement among the IPO underwriters not to sell shares of popular new securities to any buyer unless that buyer committed to (1) buy additional shares of that security later at escalated prices (a practice called "laddering"), (2) pay excessive commissions on securities purchased later from those same underwriters, and/or (3) purchase other, less desirable securities from the same underwriters (a practice called "tying"). The parties and the Court agreed that the conduct attacked by the antitrust plaintiffs had been consistently disapproved by the SEC, and likely would continue to be disapproved for the foreseeable future. Nevertheless, the Court held the securities laws impliedly precluded application of the antitrust laws.

The New "Clear Incompatibility" Standard

Citing its prior opinions in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States v. NASD, Inc.*, 422 U.S. 694 (1970), among others, the Court identified the overarching question governing implied preclusion to be whether there is "plain repugnancy" between the proposed antitrust claims and the federal securities regulatory system – a label and inquiry that the Court later recharacterized as whether the antitrust claims are "clearly incompatible" with the existing securities regime. The Court identified four criteria for answering that question: (1) whether regulatory authority exists under the securities laws to supervise the activities in question; (2) whether the responsible regulatory entities actively exercise that authority; (3) whether there is a risk of conflicting guidance, requirements, duties, and results if both the securities laws and antitrust laws were applied to the conduct in question; and (4) whether possible conflict between the securities and antitrust laws would affect "practices that lie squarely within an area of financial market activity that the securities law seeks to regulate."

Three of these four criteria presented little challenge to the Court. Without doubt, the securities laws grant the SEC authority to regulate the conduct at issue, in connection with IPOs, and the SEC had actively exercised that authority by, among other things, disapproving the very practices targeted by the plaintiffs in this case. Relying on the *amicus* brief filed by the SEC in the *trial court*, the Supreme Court also had little difficulty finding that the defendants' joint efforts to promote and sell newly issued securities in IPOs were "central to the proper functioning of well-regulated capital markets," and therefore "squarely within the heartland of securities regulations."

Concerns about Inconsistency and Conflict Doom Plaintiffs' Claims

The only significant battleground in the Supreme Court's view, therefore, was whether allowing both the securities and antitrust laws to apply to the conduct in question would likely produce conflicting guidance, requirements, duties, or results – *i.e.*, "is there a conflict that rises to the level of incompatibility?" Here again, the Supreme Court answered in the affirmative. Even though the conduct in question was not allowed under existing securities laws and regulations – it had

been disapproved by the SEC, and would continue to be disapproved for the foreseeable future – the Court found that allowing the antitrust claims to proceed on the basis of that conduct would present too great a danger of conflict with the efficient application of the securities laws. In so doing, the Court relied heavily upon what it characterized as the "unusually high risk" that "different nonexpert judges" and "different nonexpert juries" would be incapable of the "fine, complex, detailed line[-drawing]" that the securities experts at the SEC engage in to efficiently govern the nation's securities markets, with the resultant risk "that antitrust courts are likely to make unusually serious mistakes" or issue inconsistent results. This, the Court cautioned, undoubtedly would lead those participating in the securities industry to "act in ways that will avoid not simply conduct that the securities law forbids . . . but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages)."

In reaching its decision, the Court also took note of other prudential considerations. For example, the Court found that there was little or no enforcement-related need for antitrust supervision, on top of the extant securities regulation. The oversight and deterrence embodied in SEC regulation and in private securities lawsuits provided adequate means to rein in errant conduct, without the need for private litigants brandishing treble damages antitrust claims. Further, the Court observed that allowing antitrust claims to proceed in this arena could potentially undermine measures that Congress recently has put in place to discourage non-meritorious securities claims – for example, the various provisions of the Private Securities Litigation Reform Act ("PSLRA"). Authorizing antitrust claims like those here could provide an avenue for strike plaintiffs to attempt an end-run around the protections erected in the PSLRA and subsequent legislation.

One remarkable aspect of the Court's decision, noted above, was its rejection of the advice of those who administer the Nation's securities and antitrust laws. In the lower courts, the SEC and the DOJ's Antitrust Division had found themselves on opposite sides of the case. In the Second Circuit, in fact, the two agencies filed dueling letter briefs, with the SEC favoring implied preclusion and the DOJ advocating retained application of the antitrust laws. Before the Supreme Court, however, the Solicitor General had forged a compromise; in a unified presentation the Government urged the Court to hold that application of the antitrust laws would be deemed to have been impliedly precluded only if the conduct at issue was "inextricably intertwined" with SEC-*permitted* activity. That is, the DOJ and the SEC would have allowed antitrust claims to proceed if the trial court determined that the challenged conduct was not "inextricably intertwined" with conduct allowed by the SEC and the securities laws, even if that particular conduct itself was not permitted by the securities laws. In little more than a paragraph, however, the Supreme Court brushed aside this proposed compromise, finding that the suggested standard would not adequately eliminate the potential for conflict and inconsistency.

Looking Ahead

Billing continues the recent trend of United States Supreme Court opinions in which antitrust plaintiffs have met with defeat. The Court was quick to point out that it was not foreclosing application of the antitrust laws to *all* conduct that relates in any way to IPOs or the operation of the securities markets generally – saying, for example, that an overt agreement among underwriters to divide markets would not meet with the same fate as the antitrust claims at issue in *Billing* itself. But it seems clear that antitrust claims predicated upon any conduct that is "close to the line" of the "heartland of activities related to the underwriting process" or securities markets overall likely will be found to be implicitly precluded under the Court's reasoning in *Billing*.

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