

Securities Laws Preclude Application Of Antitrust Laws

Tuesday, Jun 26, 2007 --- In *Credit Suisse Securities (USA) LLC v. Billing*, No. 05-1157 (June 18, 2007), the U.S. Supreme Court held that the securities laws implicitly precluded application of the antitrust laws to agreements among underwriting firms relating to initial public offerings (IPOs).

The plaintiffs in *Credit Suisse* were a class of investors who claimed that the nation's leading underwriting firms had conspired with one another when they formed syndicates to sell IPOs for several hundred companies by refusing to sell IPO shares unless a buyer committed to purchase additional shares of the same security later at escalating prices ("laddering"), to pay unusually high commissions on subsequent purchases, or to purchase other less-desirable securities from the underwriters ("tying" arrangements).

Plaintiffs argued the underwriters violated Section 1 of the Sherman Act, Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, and state antitrust laws. The district court granted the defendants' motion to dismiss, holding that the securities laws impliedly repealed federal antitrust laws and preempted state antitrust laws.

The Second Circuit reversed, finding no specific express or implied congressional intent to immunize the challenged conduct, and holding the securities laws were not sufficiently pervasive to immunize the alleged conduct.

In an opinion by Justice Breyer, the Supreme Court reversed the Second Circuit, holding there was a "plain repugnancy" between plaintiffs' antitrust claims and the securities laws such that the securities laws implicitly precluded application of the antitrust laws to the defendants' conduct.

The Court explained that its decision was based on principles outlined in three prior decisions analyzing the relationship between securities law and antitrust law: *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 Assn. of Securities Dealers Inc.*, 422 U.S. 694 (1975).

Those decisions made clear that securities law precludes antitrust claims when there is a "clear repugnancy" between the antitrust complaint and the securities laws—or whether the two are "clearly incompatible." In making that determination, four factors are critical:

(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, duties, privileges, or standards of conduct[;]...[and] (4)...the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.

In analyzing these four factors in *Credit Suisse*, the Court concluded there could be no reasonable dispute that the first, second, and fourth were present. The alleged activities related to joint efforts by underwriters to promote and sell newly issued securities, which the Court found to be "central to the proper functioning of well-regulated capital markets."

The IPO process assists new firms in raising capital, helps spread ownership among investors, and directs capital flows in ways that correspond to demands for goods and services. Additionally, financial experts, including securities regulators, consider joint activity like that challenged in *Credit Suisse* essential to market an IPO successfully, and the U.S. Securities and Exchange Commission (SEC) has the authority to supervise all of the activities alleged by plaintiffs.

Moreover, the SEC has, in fact, exercised its authority to regulate conduct of the type alleged by plaintiffs. For example, the Court noted that the SEC has defined what underwriters may do and say during IPO road shows, and it has brought actions against underwriters that violate these regulations.

The bulk of the Court's opinion focused on the third factor—whether there is a conflict between the antitrust claims alleged and the securities laws such that permitting the suit to proceed would "prove practically incompatible with the SEC's administration of the Nation's securities laws."

Plaintiffs argued that there was no incompatibility because the SEC had full regulatory authority over the practices alleged and had exercised that authority to disapprove of the alleged conduct. Thus, argued the plaintiffs, there was no incompatibility because the challenged conduct was inappropriate under both the securities and antitrust laws.

The Court rejected this argument. It reasoned that permitting the antitrust suit to proceed "would threaten serious harm to the efficient functioning of the securities markets."

The Court explained that determining what activity was or was not permitted by the SEC would frequently require drawing a "fine, complex, detailed line," and drawing that line required securities expertise.

Further, evidence tending to show lawful securities activity and evidence tending to show unlawful antitrust activity would likely overlap or be identical. According to the Court, there is a substantial risk of inconsistent results because antitrust plaintiffs could file suits in different courts with different levels of expertise. This risk was especially high in light of the "nuanced nature" of the evidentiary evaluations that would be needed to separate

permissible from impermissible conduct.

The Court concluded that taken together, these factors show there is no way to confine antitrust suits to challenging only activity that is unlawful, and will remain unlawful, under the securities laws. Instead, the factors demonstrate that antitrust courts are likely to make mistakes that will result in underwriters avoiding conduct that is permitted or encouraged by the securities laws for fear of an antitrust lawsuit.

The Court also noted in this context the "enforcement-related need for an antitrust lawsuit is unusually small." The SEC enforces its rules and regulations that forbid the conduct at issue, and investors harmed by underwriters' unlawful actions can bring lawsuits and seek damages under the securities laws.

Moreover, the SEC is required to take account of competitive considerations when it adopts securities rules and regulations. Thus, antitrust actions are "somewhat less necessary" for purposes of addressing anticompetitive behavior, and permitting a plaintiff to pursue an antitrust action risk circumventing the heightened pleading standards for securities actions by allowing them to "dress what is essentially a securities complaint in antitrust clothing."

The Court also expressly rejected a suggestion by the Solicitor General that the Court remand the case for a determination of whether the SEC-permitted and SEC-prohibited conduct could be separated or whether they were "inextricably intertwined."

The Court stated this proposal, a "compromise between the differing positions that the SEC and Antitrust Division of the Department of Justice took in the courts below," did not sufficiently address the concerns it had identified regarding the incompatibility of the antitrust laws with the securities laws in the IPO context.

Justice Thomas dissented. He noted the Securities Act of 1933 and the Securities Exchange Act of 1934 contain savings clauses that preserve rights and remedies outside the securities laws. He reasoned that these preserved rights and remedies include those under the antitrust laws.

The implication of *Credit Suisse* is that, at least where securities law plainly regulates conduct, the Supreme Court has directed traffic into that system and plaintiffs are not free to try to invoke antitrust rubric (or presumably any other federal statute) to get around the limitations on securities law claims.

--By Gregory S. Bruch, James T. McKeown, G. Michael Halfenger, Marc B. Dorfman and Rebecca Wickhem House, Foley & Lardner LLP