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Client Alert

U.S. Supreme Court Holds that Federal Securities Regulations Immunize IPO Underwriters from Antitrust Liability

On June 18, 2007, in a 7-1 decision, the U.S. Supreme Court in *Credit Suisse Securities (USA) LLC v. Billing*, U.S., No. 05-1157 127 S.Ct. 2383, 2007 U.S. LEXIS 7724 (Jun. 18, 2007) held that securities laws implicitly preclude the application of antitrust law to investment bank underwriters of initial public offerings of securities because they face active regulation by the U.S. Securities and Exchange Commission. While it further limits the application of the antitrust laws, the ruling is a significant victory for the securities industry and reaffirms the SEC's role in regulating competition in the financial markets.

Background

Between March 1997 and December 2000, a group of buyers of newly issued securities filed a lawsuit against 10 major investment banks that acted as underwriters of initial public offerings (IPOs) of technology-related stocks. These underwriters, during the course of the IPOs, would form a syndicate to help market the shares. The syndicates would engage in a series of activities to help market the shares: probing the market, arriving at an offering price, buying all the shares from the issuer at a discount (its commission), conducting "road show" activities to market the shares to potential buyers, and then reselling the shares to the public at an offering price.

The plaintiffs charged that the investment bank underwriters unlawfully agreed that they would not sell newly issued securities to a buyer unless the buyer committed (1) to buy additional shares of that security later at escalating prices (known as "laddering"), (2) to pay excessive commissions on later security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable securities (known as "tying"). The underwriters moved to dismiss the claims, claiming that federal securities laws impliedly precluded the application of antitrust laws to the underwriters' conduct. The District Court dismissed the complaints, but its decision was reversed by the Second Circuit.

The Supreme Court's analysis focused principally on whether the application of both antitrust and securities laws would risk "conflicting guidance, requirements, duties, privileges, or standards of conduct." The Court assessed whether the underwriting transactions in question qualified for implicit antitrust immunity under a "clear incompatibility" standard that applies when Congress, in the securities laws context, has been silent about whether conduct regulated by another body of federal law should receive antitrust immunity. The Court stressed the complexity of the SEC's existing underwriting regulations governing laddering activities and tying of securities, deferring to its expertise in regulating activities in these areas. The majority therefore concluded that, in light of the SEC's extensive regulation of underwriters, the substantial risk that dual regulation could produce conflicting guidance to underwriters, and that antitrust courts could likely make "unusually serious mistakes," antitrust immunity applied.

Implications of the Ruling

The holding in Credit Suisse is certainly a victory for the securities industry, one already subject to extensive regulation. The Court has determined that because the SEC actively regulates the markets and is required to take into account competitive considerations in doing so, permitting antitrust lawsuits in this area would circumvent Congress's efforts to regulate the industry through existing securities laws. As a result of this holding, which narrows the application of antitrust law, participants in other regulated industries are likely to seek "regulatory shelter" from the treble damages that flow from a showing of antitrust liability that arises from potentially anticompetitive conduct.

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