"Clear Incompatibility" Between Antitrust and Securities Laws Implies Antitrust Immunity: *Credit Suisse Securities v. Billing*

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Summary

In *Credit Suisse Securities v. Billing*, the Supreme Court examined whether entities in a heavily regulated industry are necessarily entitled to immunity from prosecution under the federal antitrust laws simply by virtue of their regulated status. The Court had previously ruled that, absent a specific congressional mandate, such immunity may be granted only by findings either of "clear repugnance" between the regulatory scheme and enforcement of the antitrust laws, or sufficiently pervasive regulation of an industry as would be disrupted by application of the antitrust laws; the *Credit Suisse* opinion reaffirms that reasoning. A class of securities investors alleged that they had paid artificially inflated prices for certain securities because of purportedly antitrust-violative actions taken by the underwriters of some initial public offerings (IPOs). The challenged practices included the formation of syndicates; requiring purchasers of IPOs to make future purchases ("laddering"); and requiring purchasers to buy other, less desirable securities ("tying"). In response, defendants/appellants asserted that they were immune to prosecution under the antitrust laws because of the pervasive regulation of the securities industry by the Securities and Exchange Commission (SEC), which administers a comprehensive system of regulation including major parts of the Securities Act of 1933 and the Securities Exchange Act of 1934. The SEC, they argued, should be the sole arbiter of the validity of their actions, notwithstanding that Congress had not expressly so provided in the applicable legislation. Although the district court, which agreed with the underwriters, dismissed the case, the United States Court of Appeals for the Second Circuit reversed after a lengthy discussion of Supreme Court case law in the area. The Supreme Court reversed the court of appeals, accepting the "pervasive regulation of the securities industry" argument. Specifically, it found that the conduct at issue was "at the core of marketing new securities," noted that "securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden," and concluded, therefore, "that the securities laws are 'clearly incompatible with the application of the antitrust laws in this context." This report will not be updated.

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Background

From an Antitrust Perspective

The basic antitrust law is § 1 of the Sherman Act (15 U.S.C. § 1), which prohibits contracts and conspiracies in restraint of trade. Although most alleged restraints are analyzed pursuant to the rule of reason,[1] some categories of anticompetitive activity (e.g., price fixing, joint refusals to deal, tying the purchase of a desired commodity to the purchase of a less-desired commodity) have, over the years, been deemed automatically to violate § 1 as *per se* offenses because "the effect and ... purpose of the practice are to threaten the proper operation of a predominantly free-market economy."[2] As the antitrust laws are not industry-specific, whether an entity is subject to the strictures of the antitrust laws depends on whether, and under what circumstances, Congress has specifically exempted an industry or activity.[3] Where Congress has been silent, however, the courts have created the doctrine of "implied immunity" to cover situations in which the application of the antitrust laws would be contrary to an expressed public policy or could subject entities to possibly conflicting mandates.

The Supreme Court has been generally unreceptive to arguments in favor of implied antitrust immunity (i.e., that inferred, with respect to a member of a regulated industry, from the mere fact that Congress has given regulatory jurisdiction over an industry to a federal agency;[4] or, with respect to those acting in purported furtherance of a congressional statute, from the mere existence of the legislative pronouncement), except in instances where "there is a plain repugnance" between the antitrust laws and the regulatory scheme or statutorily expressed preference. As the Court put it in *Silver v. New York Stock Exchange*,

> the problem arises from the need to reconcile pursuit of the antitrust aim of eliminating restraints on competition with the effective operation of a public policy contemplating [certain activity] which may well have anti-competitive effects in general and in specific applications. 373 U.S. 341, 349 (1963).

Distillation of the Court's previous jurisprudence on implied immunity from the antitrust laws—especially that concerning the securities industry—has yielded several still-valid guidelines for determining whether a particular practice will be protected.

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[1] Under the rule of reason, the anticompetitive results of an activity are balanced against the procompetitive benefits of that activity. In other words, it is possible for a court to deem an action that technically violates the antitrust laws as "reasonable."

[2] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1,2 (1979), *citing*, United States v. United States Gypsum Co., 438 U.S. 422, 441 note 14 (1978).

[3] *E.g*., the antitrust laws are applicable to the "business of insurance" only to the extent "such business is not regulated by State law" (15 U.S.C. § 1012(b)); the making or carrying out of certain joint rate agreements would be considered price fixing without the immunity from the antitrust laws granted in 49 U.S.C. § 10706 (rail carriers) and 49 U.S.C. § 13703 (motor carriers); joint agreements by members of "organized" professional sports leagues to sell the rights to "sponsored" telecasts of team activity are specifically permitted by 15 U.S.C. § 1291.

[4] "The Court has never held ... that the antitrust laws are inapplicable to anticompetitive conduct simply because a federal agency has jurisdiction over the activities of one or more of the defendants." Gordon v. New York Stock Exchange, 422 U.S. 659, 692 (1975), (Justice Stewart, concurring).

In *Silver*, *supra*, the practice at issue was the Exchange's disconnection of a broker's private wire service, which service he alleged was critical to his ability to profitably do business. Because the Court found the manner in which the Exchange and its members carried out their collective refusal to deal to be "fundamentally unfair,"[5] it decided that "the Exchange ha[d] plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation and ha[d] not even reached the threshold of justification under that statute for what would otherwise be an antitrust violation."[6] Moreover, since the SEC could exercise no regulatory supervision over the application of the Exchange rules that permitted or required wire-service termination, there was no potential for conflict between the securities regulatory scheme and enforcement of the antitrust laws. Therefore, implied immunity was not available, and the actions were amenable to prosecution under § 1 of the Sherman Act (15 U.S.C. § 1).

Gordon v. New York Stock Exchange[7] involved an antitrust challenge to the system of fixed commission rates for securities transactions of less than $500,000. There, because there had been a time when "[t]he antitrust law had forbidden the very thing that the securities law had then permitted, namely an anticompetitive rate setting process,"[8] the Court determined that immunity was required in order to make the securities market scheme (and the SEC's specifically authorized supervision of stock exchange commission rates) work. As the Court explained:

> [T]o deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. 422 U.S. at 689.

The third major Supreme Court securities/antitrust decision was *U.S. v. National Association of Securities Dealers* (*NASD*).[9] In that instance, the Court looked at challenged price restrictions imposed on the sale and transfer of mutual fund shares in the secondary market (i.e., the market for transactions occurring after the initial sale of the shares). It concluded that because the purpose of the Investment Company Act was to "restrict most of secondary market trading,"[10] it had to reject the Government's too-literal reading of the applicable section of the act and find instead that the agreements in question were immune as "among the kinds of restrictions Congress contemplated when it enacted that section."[11] Moreover, even though the SEC had not prescribed any rules or regulations concerning the restrictions, it had the power to do so:

> [Although t]he Government also urges that the SEC's unexercised power ... is insufficient to create repugnancy between its regulatory authority and the antitrust laws ... we see no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws. 422 U.S. at 721, 722.

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[5] Silver had been denied either prior notice of the action or a hearing to review it.

[6] 373 U.S. at 365.

[7] 422 U.S. 659 (1975).

[8] *Credit Suisse Securities v. Billing*, 551 U.S. ____ , 127 S.Ct. 2383, 2391 (2007).

[9] 422 U.S. 694 (1975).

[10] *Id.* at 700.

[11] *Id.* at 721.

From a Securities Law Perspective

The Securities and Exchange Commission administers a comprehensive body of securities regulation statutes, including the Securities Act of 1933 (15 U.S.C. §§ 77a *et seq.*), and the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a *et seq.*). The typical manner in which investment securities are offered to the public first involves underwriting services offered by an underwriting firm to an issuer of securities. The most common delivery of those services has been said to be by "firm-commitment agreements."[12] In such an agreement the underwriter agrees that on a fixed date the issuer will be given a certain amount of money for a certain amount of its securities. Such an agreement removes the uncertainty of an early cash infusion for the issuer and transfers the risk of selling the issue to the underwriter.

In the first half of the twentieth century, syndicates, consisting of a few to many underwriting firms, emerged to manage many of the risks that underwriters assume. A syndicate often buys the entire new issue of the securities at a fixed price and then reoffers it to the public at a somewhat higher predetermined price. The price difference is in effect a kind of commission for the syndicate. These principal underwriters often contact other brokers or underwriters who act as wholesalers of the securities. The issuer and the underwriters often agree on the size and the pricing of the offering.

Credit Suisse Securities v. Billing[13]

Credit Suisse gave the Court the opportunity—not exercised since 1981[14]—to reiterate and apply its previously stated standards for granting implied antitrust immunity. An antitrust suit (originally a class action) was filed by a group of IPO purchasers against the underwriters of those issues (10 major investment banks) alleging conspiracy, price fixing-related, and tying violations of § 1 of the Sherman Act. The particular, allegedly harmful practices included (1) required investor promises to place bids in the aftermarket at prices above the initial public offering price, referred to as "laddering"; (2) required investor commitments to purchase other, less attractive securities, a kind of tying arrangement; and (3) investor payment of excessive commissions. These requirements, according to the investors, artificially inflated the share prices of the securities and constituted *per se* price fixing.

At first glance, this system of agreement by the issuer and all of the major underwriters of size and pricing of the offering does appear, in fact, to be antitrust-violative price manipulation. However, not all underwriter manipulations have been prohibited. A "little price manipulation" has been permitted in order to further appropriate market goals.[15] The Securities and Exchange Commission has traditionally recognized certain types of manipulative activities, considered

[12] 1 Thomas Lee Hazen, THE LAW OF SECURITIES REGULATION § 2.1[2][B], at 156 (5th ed. 2005).

[13] 551 U.S. ____ , 127 S.Ct. 2383 (2007), 2007 WL 1730141. The case was decided, 7-1, on June 18, 2007, Justice Kennedy not participating.

[14] National Gerimedical Hospital & Gerontology Center v. Blue Cross, 452 U.S. 378, 391 (1981). There, the exclusion by Blue Cross from its insurance plan of a hospital that had been constructed in apparent violation of a local health care planning scheme was found amenable to antitrust scrutiny even though Blue Cross had made its decision in furtherance of the policies expressed in the National Health Planning and Resources Development Act of 1974 (P.L. 93-641, 42 U.S.C. § 201 note).

[15] *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 28 (2d Cir. 1985).

"stabilizing" activities, as permissible under § 9(a)(6) of the Securities Exchange Act[16] and SEC Rule 10b-1.[17] In fact, the Court itself indicated that the complaint was an attack not on the *existence* of the SEC-approved joint IPO activity, but rather, the *abuse* of that activity.[18]

The Court, in an opinion authored by Justice Breyer, began its analysis of the availability of implied antitrust immunity in this instance by noting that all of the challenged activities meet the basic prerequisite for implied antitrust immunity in the regulated securities industry: they are "central to the proper functioning of well-regulated capital markets." Further, the SEC has, and has exercised, its specific authority to supervise those activities. Moreover, injured investors are specifically authorized to recover damages, and have successfully sued under the securities statutes, for violation of applicable SEC regulations "for conduct virtually identical to the conduct at issue here."[19] Further, the Court observed, the challenged practices all seemed to describe "conditions that the investors apparently were willing to accept in order to obtain an allocation of new shares that were in high demand."[20]

Continuing, the opinion noted the variously nuanced SEC decisions concerning, for example, commissions and future sales, and "laddering," the Court observing that it would "often be difficult for someone who is not familiar with accepted syndicate practices to ... distinguish what is forbidden from what is allowed"—the more so because "evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap."[21] Further, since antitrust challenges to securities-marketing activities could be brought "throughout the Nation in dozens of different courts with different nonexpert judges,"[22] the decision to defer to the SEC's expertise seemed only logical.

> We believe it fair to conclude that, where conduct at the core or the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat to antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets. 127 S.Ct. at 2396.

Given (1) Congress's expressed concern that securities markets become and remain stable, (2) the continued oversight and actions of a single expert regulatory agency versus the probability of diverse and possibly conflicting decisions by nonexpert judges in the event of securities/antitrust lawsuits, and (3) the likelihood of conflict between the mandates of antitrust law and allowable activities under the securities laws, the Court found that "the securities laws are 'clearly incompatible' with the application of the antitrust laws."[23] Accordingly, implied immunity from prosecution under the antitrust laws is accorded to participants in securities markets.

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[16] 15 U.S.C. § 78i(a)(6).

[17] 17 C.F.R. § 240.10b-1.

[18] 551 U.S. at ____ , 127 S.Ct. at 2393.

[19] *Id*. at 2392, 2393.

[20] *Id*. at 2388. A similar sentiment was expressed in 1977 when the Court examined allegations of tying in the extension of credit to homebuyers: the scenario, noted the Court, "prove[d] nothing more than a willingness to provide cheap credit in order to sell expensive houses." U.S. Steel Corp. v. Fortner Enterprises (*Fortner II*), 429 U.S. 610, 622 (1977).

[21] 551 U.S. at ____ , 127 S.Ct. at 2394, 2395.

[22] *Id*. at 2395.

[23] *Id*. at 2397.

Justice Stevens concurred separately to emphasize that, in his opinion, neither the incompatibility between the antitrust and securities laws, nor the question of implied antitrust immunity for regulated entities should have been the issue.

> In my view, agreements among underwriters on how best to market IPOs, including agreements on price and other terms of sale to initial investors, should be treated as procompetitive joint ventures for purposes of antitrust analysis. In all but the rarest of cases, they cannot be conspiracies in restraint of trade within the meaning of § 1 of the Sherman Act .... 127 S.Ct. at 2398.

Justice Thomas's dissent found fault with the Court's assertion that the securities acts were silent on whether the antitrust laws should be applicable to entities in the securities industry. He noted that both the Securities Act of 1933 and the Securities and Exchange Act of 1934 state, in "savings clauses," that their remedies "shall be in addition to any and all other rights and remedies that may exist at law or in equity":[24]

> Therefore, both statutes explicitly save the very remedies the Court holds to be impliedly precluded. 127 S.Ct. at 2399.[25]

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[24] 15 U.S.C. §§ 77p(a), 78bb(a); noted at *Id.* at 2399.

[25] Taken together, Justice Thomas's emphasis on the "savings clauses" in the applicable securities acts, and Justice Stevens's belief that there was not any real possibility of an antitrust offense, produce a *Trinko*-like result (*Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004), is a controversial decision in which the Court found that the existence of an antitrust "savings clause" in the Telecommunications Act of 1996 did not serve to create an antitrust action where *no* cause of action would have existed but for a breach of obligation under the 1996 Telecommunications Act): *i.e., even if* the "savings clauses" were found to allow for antitrust actions and remedies (a proposition the Court notes was unsuccessfully argued by the United States as *amicus* in *Gordon* (*id.* at 2392)), there is no antitrust offense described in the complaint that would trigger the use of the antitrust statutes.

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