

Supreme Court Rules that IPO Litigation is Immune from Antitrust Scrutiny

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Today, the Supreme Court ruled in *Credit Suisse First Boston v. Glen Billing* (“IPO Antitrust Litigation”) that certain long-standing securities industry practices in the issuance of initial public offerings (“IPOs”) are impliedly immune from antitrust challenges on the ground that the regulation of such conduct is within the sole purview of the securities laws and the Securities & Exchange Commission (“SEC”). The Court ruled that no antitrust liability could arise from: (1) “laddering” agreements whereby investors were required to promise to place bids in the aftermarket at prices above the IPO price; (2) “tying” arrangements whereby investors commit to purchase other, less attractive securities; and (3) other allegedly excessive commissions, including for the purchase of an issuer’s shares in follow-up or secondary public offerings (for which the underwriters would earn underwriting discounts). The Court held that the securities laws impliedly preclude the application of the antitrust laws to such conduct.

BACKGROUND

During the dot-com boom of the 1990s, the stock of many technology and telecommunications companies were publicly launched in high-stakes IPOs. Typically, these IPOs were underwritten by groups of investment banks that undertook the risk that the stocks would fail or plummet in price after the initial wave of interest. Underwriters have been permitted under the securities laws to enter into syndicates and reach agreements on many aspects of an IPO, including agreements on initial prices and allocation of shares. They are also permitted by the SEC to make inquiry of those interested in purchasing allocations of an IPO as to their general future plans for holding, selling, or purchasing in the aftermarket as part of the IPO “bookbuilding” process.

The *Billing* complaint was filed in the U.S. District Court for the Southern District of New York by a putative class of individuals who purchased shares of stock in certain technology related companies through IPOs or in the aftermarket immediately following IPOs during the late 1990s. More specifically, the complaint charged ten investment banks, including Morgan Stanley, Goldman Sachs, Lehman Brothers, Credit Suisse First Boston, and JPMorgan Chase (“the Underwriter Defendants”), along with a number of institutional investors, with conspiring to artificially inflate the aftermarket prices of some 900 internet and technology stocks sold in those IPOs. The complaint alleged that the Defendants jointly agreed to require purchasers in IPOs to engage in laddering and tying agreements, as well as other allegedly excessive commission arrangements, all of which artificially inflated the share prices of the securities in question. At the same time, putative class action complaints were filed in the Southern District of New York alleging violations of the securities laws under Section 10(b) of the Securities Exchange Act of 1934 and Section 11 of the Securities Act of 1933, covering the very same alleged conduct.

Defendants moved to dismiss the IPO Antitrust Litigation and argued that the conduct alleged was impliedly immune from attack under federal and state antitrust laws because the underwriting activities were actively and pervasively within the regulatory authority of the SEC and there was a potential for conflict between the application of the antitrust and securities laws. The district court granted the motion to dismiss, with Judge Pauley noting that certain of the challenged conduct was expressly permitted under the securities laws and other challenged conduct fell directly within the ambit of the SEC's regulatory authority. However, on appeal, the Second Circuit reversed the district court's decision, finding no convincing evidence that Congress intended expressly to immunize the alleged conduct from the antitrust laws. The Second Circuit held that, because the SEC had never used its authority to authorize tie-ins, such as alleged here, there is no potential conflict between the securities laws and the antitrust laws that would compel use of the implied immunity doctrine. The court concluded that application of implied immunity requires a determination that Congress both contemplated the specific potential conflict and intended for the antitrust laws to be repealed. Highlighting the conflict between the two areas of law, at both the district court and Second Circuit levels, the SEC submitted an amicus brief in favor of implied immunity, while the Antitrust Division of the Department of Justice submitted an amicus brief in opposition to use of the doctrine.

The Supreme Court granted the Underwriter Defendants' petition for certiorari to resolve whether, in a private treble damages action under the antitrust laws challenging underwriter conduct related to IPOs, the standard for implying immunity is the "potential for conflict with the securities laws," or whether "a specific expression of congressional intent to immunize such conduct and a showing that the SEC has power to permit the specific practices at issue" is required.

In a joint brief contributed to by the SEC, Federal Trade Commission, and Department of Justice, the United States argued in support of a reversal and remand based on implied immunity, but with a narrower scope for immunity than that proposed by the Defendants. The United States urged that the case be remanded with direction to limit immunity to joint conduct specifically authorized under the securities laws and to activities that are "inextricably intertwined" with such permitted collaboration.

SUMMARY OF THE DECISION

The *Billing* case was decided by an eight-member Court, as Associate Justice Anthony Kennedy recused himself. In a decision written by Justice Breyer, the Court reversed the Second Circuit in a 7-1 decision. Justice Thomas dissented.

In a sweeping but carefully articulated decision, the Supreme Court held that the securities laws impliedly preclude the antitrust claims at issue. The Court held that the implied immunity doctrine requires the courts to determine whether antitrust suits such as this are likely to prove practically incompatible with the SEC's administration of the securities laws in matters for which the SEC has regulatory authority and has been exercising that authority. Under that standard, the Court concluded that the two areas of the law are incompatible because allowing the antitrust claims to

stand creates the risk that underwriters' "bookbuilding" conduct that is allowed or encouraged by the SEC could be found by a court or jury to violate the antitrust laws. That risk, the Court reasoned, could have a "chilling effect" on IPO "bookbuilding" conduct that is important to the capital raising function of the financial markets. Specifically, the Court observed that the "line drawing" between conduct that is found to be legal and that which is illegal likely would be different for the courts deciding antitrust claims, which are focused on competition only, than it would be for the SEC, which is charged with regulating and ensuring efficient operation of capital markets. Unless implied immunity from application of the antitrust laws is granted, the courts dealing with such antitrust actions could be called upon to interpret evidence of conduct affirmatively encouraged by the SEC—such as underwriting syndicates seeking information on customer IPO aftermarket intentions—as supporting an antitrust violation. Therefore, the Court concluded that allowing antitrust lawsuits, in the IPO underwriting context presented, would threaten serious harm to the efficient functioning of the securities markets and, as such, is "clearly incompatible" with the securities laws. Moreover, the Court noted that, because the SEC itself is required to take account of competitive considerations, sufficient protection of competition should be provided for in the SEC regulatory process.

The Firm represents JP Morgan Securities Inc. in these cases.

IMPLICATIONS

This ruling clarifies the scope of antitrust immunity with concrete standards. The decision acknowledges that collaboration among competitors regarding pricing and bookbuilding is an important part of the underwriting process and that permission of treble damage antitrust claims to such activity could interfere with the regulatory authority that Congress delegated to the SEC, thereby chilling capital-raising activities critical to the economy. In addition, the decision confirms that the SEC is well-equipped to make nuanced determinations as to whether alleged conduct exceeds the boundaries of lawful activities and serves the regulatory goal of efficient financial markets, without the additional overlay of the antitrust laws. Consequently, the ruling will make it difficult for plaintiffs to convert alleged securities violations into treble damages antitrust suits. Also, even outside of the securities areas, this ruling will have applicability to antitrust lawsuits challenging conduct regulated by other regulatory regimes with no explicit immunity.

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