SUPREME COURT ADDRESSES IMPLIED PRECLUSION OF THE ANTITRUST LAWS IN DISMISSING COMPLAINT AGAINST INVESTMENT BANKS

The Supreme Court's decision in *Credit Suisse First Boston v. Billing*, issued on June 18th, affirmed the dismissal of antitrust claims against ten investment banks that had underwritten IPOs on the ground that the federal securities laws and the SEC's regulatory regime "implicitly preclude" application of the antitrust laws to defendants' alleged misconduct. The doctrine of implied preclusion (also called "implied immunity") prevents application of the antitrust laws to conduct that is subject to a separate regulatory regime when that application would be "clearly incompatible" with the regulatory regime, in this case the federal securities laws and regulations.

The Supreme Court relied on four factors in finding implied preclusion in *Billing*: "(1) [the defendants'] conduct [was] squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes." 2007 WL 1730141, at *14.

Decision in detail

In *Billing*, buyers of IPO securities brought antitrust lawsuits against investment banks that formed syndicates to underwrite IPOs of hundreds of technology-related companies between 1997 and 2000. *Id.* at *5. The complaint alleged that the banks engaged in the following anticompetitive activity, requiring purchasers: (1) to place additional bids for the same IPO securities in the aftermarket at prices higher than the IPO price (so-called "laddering" arrangements); (2) to buy other, "less attractive" securities from the banks (so-called "tying" arrangements); and (3) to pay "excessive" commissions to the banks on future securities issues. *Id.*

The U.S. District Court for the Southern District of New York granted defendants' motion to dismiss the complaint, holding that the conduct alleged was impliedly immune from the antitrust laws on account of the federal securities laws. *Id.* The U.S. Court of Appeals for the Second Circuit reversed the dismissal and the Supreme Court granted certiorari to address the question "whether there is a plain repugnancy between these antitrust claims and the federal securities law." *Id.* at *4, 5 (internal quotation marks omitted).

Where regulatory statutes are silent as to whether application of the antitrust laws is precluded, *Billing* directs lower courts to assess implied preclusion based on the statutes and facts at issue and the relationship between antitrust law and the regulatory regime. *Id.* at *6. As to the conduct at issue in *Billing*, the Court concluded (a) that the SEC has the legal authority "to supervise all of the activities here in question," (b) that the SEC has "continuously exercised" such authority by regulating underwriter activity and prosecuting regulatory violations, and (c) that the activities in question are "central to the proper functioning of well-regulated capital markets." *Id.* at *9-10.

Most of the Court's assessment focused on whether a conflict exists between the securities and antitrust laws that "rises to the level of incompatibility[.]" *Id.* at *10. While the Court accepted plaintiffs' premise that the SEC "has *disapproved* . . . the conduct that the antitrust complaints attack," *id.* at *11, it nonetheless concluded that the securities laws are "clearly incompatible" with the antitrust laws in this context:

> Now consider these factors together-the fine securities-related lines separating the permissible from the impermissible; the need for securities-related expertise (particularly to determine whether an SEC rule is likely permanent); the overlapping evidence from which reasonable but contradictory inferences may be drawn; and the risk of inconsistent court results. Together these factors mean there is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors [here] seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law. Rather, these factors suggest that antitrust courts are likely to make unusually serious mistakes . . . *i.e.*, results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), 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).

Id. at *12.

In reaching its decision, the Court noted that it was reducing the risk that plaintiffs would "circumvent" the recently heightened procedural requirements of the Private Securities Litigation Reform Act (PSLRA), which Congress passed "in an effort to weed out unmeritorious securities lawsuits." *Id.* at *13. Since the "enforcement-related need for an antitrust lawsuit is unusually small" where the SEC and individual plaintiffs can enforce the securities laws, the Court was less inclined "to rely upon antitrust actions to address anticompetitive behavior." *Id.*

Conclusion

In *Billing*, the Supreme Court underscored the importance and potentially broad applicability of the implied preclusion doctrine. The Court acknowledged that, were antitrust laws applied to the conduct at issue, the threat of antitrust liability (and private treble damages) may cause a company to choose between conflicting mandates of the securities and antitrust laws. *Billing* suggests that courts should recognize such concerns and consider carefully whether to allow antitrust suits to proceed where the sole allegations involve conduct regulated by the securities laws.

Companies should also tread carefully in areas where securities and antitrust laws may both apply, as the *Billing* Court implied that a determination of whether activities are sufficiently central to the capital markets and otherwise warrant preclusion of antitrust suits will depend on the particular facts at issue.

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