Supreme Court Bars Use Of Antitrust Laws To Challenge Conduct Of Investment Banking Firms In Initial Public Offerings

In a decision already being hailed on Wall Street, the U.S. Supreme Court has barred the use of the federal antitrust laws to challenge the allegedly anticompetitive conduct of ten leading investment banking firms in connection with the firms’ underwriting of initial public offerings (IPOs) during the dot-com boom. *Credit Suisse Securities (USA) LLC v. Billing* (June 18, 2007). Relying on precedent dating back to 1963, the Court held that even when the federal securities laws are silent as to the applicability of the antitrust laws to securities-firm conduct, where securities law and the antitrust complaint are “clearly incompatible,” the securities laws preclude the use of the antitrust laws to challenge such conduct.

The plaintiff investors in *Credit Suisse* filed two class action complaints alleging that the defendant investment banking firms formed syndicates to market newly issued shares in several hundred high-tech companies between March 1997 and December 2000. The investors further alleged that the investment banking firms unlawfully agreed with one another to sell shares of a particular new issue only to buyers (typically favored, institutional investors paying artificially low offering prices) who agreed that they would (1) subsequently buy additional shares of the stock at escalating prices (a practice known as “laddering”); (2) pay unusually high commissions on subsequent securities purchases from the investment banking firms; or (3) purchase other, less desirable securities from the firms (a form of tying). The plaintiffs alleged that all of these practices artificially inflated the prices of the new shares on the public markets. The Federal District Court in Manhattan granted the investment banking firms’ motion to dismiss the complaints, finding that the securities industry was unique in its reliance on the use of syndicates, price agreements, and other practices that could be deemed unlawful in other industries. The court therefore held that the federal securities laws implicitly precluded application of the antitrust laws to the conduct challenged in the investors’ lawsuit. On appeal, the Second Circuit Court of Appeals reversed and reinstated the lawsuits.

The Supreme Court, in a seven-to-one decision authored by Justice Breyer (with Justice Kennedy not participating), overturned the judgment of the court of appeals. In so doing, the Court pointed to four factors that were set forth in several of its previous decisions and are critical to determining whether the securities laws preclude use of the antitrust laws to challenge allegedly anticompetitive conduct. First, the Court considered whether the securities laws authorize the Securities and Exchange Commission (“SEC”) to supervise the activities in question. Second, the Court examined whether the SEC had, in fact, exercised that authority. Third, the Court analyzed whether application of both the securities laws and the antitrust laws posed a risk of conflicting guidance, requirements, duties, privileges, or standards of conduct. Finally, the Court considered whether any potential conflict would affect practices that are squarely within the area of financial market activity that securities law regulates.

After applying these factors, the Court found that, because the investment banking firms’ efforts to promote and market new securities were central to proper functioning of well-regulated capital markets, and because the law grants the SEC authority to regulate such activities and the SEC has, in fact, exercised that authority, the first, second, and fourth factors were satisfied. As to the third factor — the potential for conflict between the antitrust laws and the securities laws — the Court found that the line between activity that the SEC permits and activity that it prohibits is often a fine, complex, and detailed one. As such, the Court reasoned that the SEC has the expertise to separate what is forbidden from what is allowed. In contrast, federal courts around the country hearing antitrust cases involving the securities industry may...
produce inconsistent results or make serious mistakes because neither judges nor juries typically possess expertise in sophisticated securities law issues. The court further noted that the SEC actively enforces the rules and regulations that forbid the conduct in question, thus making the need for antitrust suits in this area unusually small. As Justice Breyer summarized, to allow antitrust suits to challenge the conduct at issue in the investors’ class action complaints not only would “threaten serious harm to the efficient functioning of the securities markets,” but also might encourage investors to “dress up what is essentially a securities complaint in antitrust clothing” to circumvent Congress’ efforts in 1995 “to weed out unmeritorious securities lawsuits.”

Although Justice Stevens concurred with the result, he took the position that the court should not have reached the issue of whether the securities laws precluded use of the antitrust laws. Rather, the court should simply have held that the complaints failed to state any antitrust claim. In Justice Stevens’ view, the syndicates formed by the investment banks were pro-competitive joint ventures, and their alleged conduct could not possibly have resulted in injury to any relevant market. As Justice Stevens explained, any particular stock issue is “but an infinitesimal unit of trade in the ocean of security issues running into the billions, which constitutes the relevant market,” and “[t]o suggest that an underwriting syndicate can restrain trade in that market by manipulating the terms of IPOs is frivolous.”

In his lone dissent, Justice Thomas argued that both the Securities Act and the Securities Exchange Act contain broad “savings clauses” that preserve all rights and remedies existing outside the securities laws. According to Justice Thomas, the unambiguous language of these clauses, which preserve “any and all other rights and remedies that may exist at law or in equity,” clearly includes the federal antitrust laws, which were largely in effect long before the securities laws, with their savings clauses, were enacted.

The Supreme Court’s decision in Credit Suisse, while providing an interesting insight on the leverage held by investment banking firms in connection with hot new stock issues, does not break new or significant legal ground. Instead, the court relied on three of its previous cases, each decided more than 30 years ago. Those cases had already established the legal framework for determining when regulatory statutes that are silent regarding whether they bar application of the antitrust laws may nonetheless be deemed to implicitly preclude the use of those laws to challenge conduct that is subject to scrutiny by the federal agency that regulates a particular industry. Nonetheless, Credit Suisse continues the trend of the Roberts Court of raising the bar for antitrust class actions in federal courts. That trend began earlier this year with the Supreme Court’s decision in Bell Atlantic Corp. v. Twombly, which significantly heightened the requirements for alleging an unlawful antitrust agreement or conspiracy. More decisions are needed before the exact contours of this trend become apparent.