



eSAPIENCE CENTER FOR COMPETITION POLICY

CASE NOTE:

Credit Suisse, Regulatory Immunity, and the Shrinking Scope of Antitrust

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***Credit Suisse*, Regulatory Immunity, and the Shrinking Scope of Antitrust**

By Keith Sharfman*

Last week, in *Credit Suisse Securities v. Billing*, the U.S. Supreme Court dismissed a variety of antitrust claims brought by investors against underwriters from whom they had purchased securities, on the theory that securities underwriting is implicitly immune from antitrust scrutiny because it is an activity regulated by the securities laws. The underwriting firms had been accused, among other things, of “tying” the sale of some securities to the purchase of others, a practice of which both the SEC and antitrust (at least in some circumstances) disapprove.

Speaking for six members of the Court (Alito, Breyer, Ginsburg, Roberts, Scalia, and Souter), Justice Breyer’s majority opinion did not address the merits of the plaintiffs’ antitrust claims. Rather, it assessed whether the underwriting transactions in question qualified for implicit antitrust immunity under a “clear incompatibility” standard that applies when Congress (as here in the case of the securities laws) has been silent about whether conduct regulated by another body of federal law should receive antitrust immunity. The majority concluded that, in light of the Securities and Exchange Commission’s (“SEC”) extensive regulation of underwriters and the substantial risk that dual regulation could produce conflicting guidance to underwriters, antitrust immunity applied.

In a concurring opinion, Justice Stevens agreed with this outcome but not with the majority’s reasoning. In his view, the claims should have been dismissed as frivolous on the merits rather than on account of antitrust immunity. Justice Thomas dissented for similar reasons, arguing that the securities laws explicitly preserve remedies to securities purchasers beyond those specifically created by the securities laws themselves, including those available from antitrust (an argument that the Court had previously considered and rejected and that the majority chose here not to reconsider). Justice Kennedy did not take part in the case.

Credit Suisse has important implications for antitrust practice. The decision’s effect is to narrow the scope of antitrust law and to invite efforts by regulated industries to narrow it still further. The court’s “clearly incompatible” standard is new and (though it purports not to) seems to water down considerably the old “plain repugnancy” test of *Gordon v. New York Stock Exchange, Inc.* 422 U.S. 659, 682 (1975). Under the new incompatibility standard, there no longer has to be an *actual* conflict between antitrust and other federal law for antitrust implicitly not to apply. Even a mere regulatory overlap may now be sufficient to trigger antitrust immunity. (Recall that in *Credit Suisse* the Court assumed that both antitrust and the SEC disapproved of the tying and other practices in question, and yet the Court still considered the two bodies of law incompatible on account of the regulatory overlap.)

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Firms regulated by various federal agencies may now rightly wonder whether they too are immune from antitrust. Should drug manufacturers enjoy antitrust immunity for conduct that is regulated by the FDA? Should broadcasters be immune because they're regulated by the FCC? What about energy firms regulated by FERC and the NRC, banks regulated by OCC and the Federal Reserve, commodity trading firms regulated by the CFTC, or airlines and railroads regulated by the DOT? One can certainly imagine any of these federally-regulated firms (and many others) plausibly arguing for *Credit Suisse* immunity if they find themselves defending a business practice or a merger from an antitrust attack.

The Court likely did not intend to shrink the scope of antitrust so dramatically when it decided *Credit Suisse*. While antitrust is riddled with various exemptions and immunities, most of these are both narrow and statutorily explicit (as in the exemptions for labor unions and baseball) or constitutionally required (as in the case of *Noerr-Pennington* immunity for lobbying and litigating). The closest analogy to the federal regulatory immunity at issue in *Credit Suisse* is probably "state action" immunity, which (under the Court's *Midcal* test) covers conduct that a state "actively supervises" under a "clearly articulated policy." But *Credit Suisse* goes further than the state action cases ever did, by creating the possibility of antitrust immunity even in cases of potential future incompatibility where an actually conflicting federal regulatory policy has yet to be clearly (or even at all) articulated.

Going forward, the Court will need to tighten the rule in *Credit Suisse* if it wants antitrust to continue to operate as Congress intended it to in conjunction with the compartmentalized maze of federal regulatory law. No one thinks that securities firms should be exempt from the legal obligations that generally flow from non-securities law (antitrust aside). If we expect to hold securities and other regulated firms accountable for torts and breaches of contract, or for crimes and discrimination, then why not also hold them accountable for antitrust violations? If Congress says otherwise, that is one thing. But if Congress is silent on the question, a federal agency should not have any more power than a state to confer antitrust immunity upon those that it regulates. Of states we require a clearly articulated policy that presents an actual conflict, not merely the possibility of future potential incompatibility. From federal agencies we should not expect any less.

Just yesterday, in its historic decision in *Leegin*, the Court strongly reaffirmed its confidence in the Rule of Reason's workability by overturning *Dr. Miles* and extending the rule's reach to vertical RPM. That same confidence also justifies antitrust's application to even the most closely guarded and far flung fiefdoms of the regulatory state.