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CASE NOTE:

**Has the Supreme Court Given Regulated Industries Implied Immunity
from the U.S. Antitrust Laws?**

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Has the Supreme Court Given Regulated Industries Implied Immunity from the U.S. Antitrust Laws?

By Connie Robinson and Svetlana Gans*

Introduction

In a 7-1 decision, the U.S. Supreme Court recently determined that the Securities and Exchange Commission (“SEC”) is better equipped than judges and juries to determine the legality of underwriting activities, such as syndication and marketing techniques, taking place during initial public offerings. *Credit Suisse Sec. (USA) LLC v. Billing*, No. 05-1157, 127 S.Ct. 2383 (2007). The Supreme Court found the conduct impliedly immune from the antitrust laws, broadening that immunity to conduct that the SEC itself had disapproved. The Court concluded that in the face of the SEC’s active and ongoing regulation, where a serious conflict arises between the antitrust and securities regulatory scheme, the securities laws are deemed “clearly incompatible” with the antitrust laws, and thus the conduct is immune from the antitrust laws. This decision follows an established line of Supreme Court precedent finding antitrust immunity when there is a clear regulatory structure and active supervision of conduct at the heart of the industry.

The Case and the Supreme Court Decision

In January 2002, a group of 60 investors filed two antitrust class actions against 10 leading investment banks under Sections 1 and 2 of the Sherman Act, the Robinson-Patman Act, and state antitrust laws. The complaint alleged that the defendant banks agreed to impose anticompetitive rates over and above the price of IPO shares and underwriting commissions through the use of: (i) laddering agreements, in which investors agreed to buy additional shares of the securities at higher prices; (ii) tying arrangements, in which investors agreed to purchase other, less attractive securities; and (iii) additional commissions related to follow-up or secondary public offerings. The banks moved to dismiss the investors’ complaints on the ground that federal securities laws impliedly immunized the conduct at issue. The Southern District of New York dismissed the complaints, but the Second Circuit reversed.

Writing for the Supreme Court, Justice Breyer stated that the securities laws provide an implied immunity from the antitrust laws where there is a “plain repugnancy” between the application of the two sets of laws to the conduct at issue. The Court found four factors critical in determining whether implied antitrust immunity applied: (i) the conflict affects “practices that lie squarely within an area of financial market activity that the securities law seeks to regulate;” (ii) “the existence of regulatory authority under the

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securities law to supervise the activities in question;” (iii) evidence that the responsible regulator exercises that authority; and (iv) “a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct.”

Only the fourth factor was at issue – namely, whether the application of the antitrust laws would be incompatible with the SEC’s administration of the federal securities laws. In this inquiry, the Court first found that applying antitrust scrutiny to the conduct at issue “threatens serious securities-related harm,” because of the fine line between activity that the SEC permits or encourages (which is clearly immunized) and activity that the SEC forbids (which the respondents argued should be subject to antitrust attack). The lack of familiarity with the industry and the difficulty of determining in which category conduct falls “suggest that antitrust courts are likely to make unusually serious mistakes in this respect.”

Second, the Court found little need for antitrust enforcement because: (i) the SEC is required to consider competitive consequences in creating policies, rules, and regulations; (ii) securities rules and regulations forbid the conduct; and (iii) the SEC and private plaintiffs can challenge alleged illegal conduct under the securities laws. The Court criticized private plaintiffs for dressing up securities lawsuits in “antitrust clothing,” and seeking treble damages under the antitrust laws when they have recourse under the securities laws.

The Implications of the Decision

What is the future of antitrust enforcement in regulated industries? The Court expressly rejected the Solicitor General’s attempt to preserve some areas of antitrust enforcement in the securities industry. Nonetheless, regulatory oversight itself will be insufficient to overcome the application of the antitrust laws; a clear inconsistency in the application of the two regulatory schemes will be required for the conduct to be impliedly immunized. On the other hand, this case echoes sentiments raised in *Trinko*, a case where, despite the express statutory antitrust savings clause, Justice Scalia nonetheless stated that the “detailed regulatory scheme” created by the 1996 Telecommunications Act “ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity.” *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004). While future cases will involve a fact-driven inquiry into the specific regulatory scheme and conduct at issue, this decision will be used by parties in other regulated industries facing antitrust challenges.