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CASE NOTE:

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Regime**

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Supreme Court Rules That Antitrust Claims Relating To IPO Underwriting Conduct Are Precluded By The Securities Regulatory Regime

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In *Credit Suisse Securities (USA) LLC v. Billing et al.*, No. 05-1157, 2007 WL 1730141 (U.S., June 18, 2007), the Supreme Court limited the ability of plaintiffs to bring antitrust claims for conduct that is regulated under the securities laws. On June 18, 2007, the Court by a 7-1 vote (with Justice Kennedy not participating) reversed a Second Circuit Court of Appeals decision, and held that the securities laws implicitly preclude the application of the antitrust laws to conduct involving initial public offerings (IPOs) that was challenged in that case. *Billing* is the first securities industry antitrust case addressing the issue of implied repeal that the Supreme Court has heard since 1975, when it issued its decisions in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), and *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975).

In *Billing*, a putative class of investors alleged that investment banks and institutional investors had violated the antitrust laws in connection with the sale of IPOs for several hundred technology-related companies. *Id.* at 1. In particular, the investors alleged unlawful agreements not to sell IPO securities to a buyer unless the buyer agreed (1) to buy additional shares of that security later at escalating prices (known as “laddering”), or (2) to pay unusually high commissions on subsequent securities purchases, or purchase other, less desirable securities (known as “tying”). *Id.*

In deciding that the antitrust laws were impliedly repealed as to the challenged conduct even though it allegedly was improper under both the securities and antitrust laws, the Court discussed the following factors: (1) whether the conduct in question is subject to the authority of the Securities and Exchange Commission (SEC); (2) whether the SEC has exercised that authority; and (3) whether application of both the antitrust laws and the securities laws in this context would likely produce conflicting guidance, requirements, duties, privileges or standards of conduct. *Id.* at 14. The Court also emphasized the extent to which the practices at issue lie within the “heartland” of the securities laws.

Noting that the antitrust laws should not be displaced unless there is a “clear repugnancy” with securities law, the Supreme Court gave great weight to the authority and regulatory expertise of the SEC, and its exercise of its powers. The Court also found that the very nature of antitrust litigation, in this context before judges and juries – which it believed “are likely to make unusually serious mistakes in this respect” – renders it “clearly incompatible” with the securities laws (which are the subject of expert SEC adjudication), and with the efficient operation of the securities markets (which could be

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adversely affected by such antitrust decision-making). *Credit Suisse*, at 11, 12. Thus, the Court declared that, even when the SEC has expressed disapproval of particular practices, antitrust claims can be implicitly precluded, because the SEC is better qualified to draw lines and adjust rules to suit changing conditions. *Id.* at 11. It concluded that: “In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct.” *Id.* at 14.

At the end of its opinion, the Court noted a concern expressed by the Solicitor General that the Court not “read the law as totally precluding application of the antitrust law to underwriting syndicate behavior, even were underwriters, say, overtly to divide markets.” *Id.* The Court stated, parenthetically, that “market divisions appear to fall well outside the heartland of activities related to the underwriting process than the conduct before us here, and we express no view in respect to that kind of activity.” *Id.*

In his concurring opinion, Justice Stevens made a different point, stating that “agreements among underwriters on how best to market IPOs...should be treated as procompetitive joint ventures for purposes of antitrust analysis.... In all but the rarest cases, they cannot be conspiracies in restraint of trade within the meaning of §1 of the Sherman Act.” *Id.* at 15.