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The Revised Focus Of Implied Antitrust Immunity

Monday, Jul 16, 2007 --- The Supreme Court's decision in Credit Suisse v. Billings, number 05-1157, slip op. (June 18, 2007) was the third in this term's by now well-documented, pro-defendant quartet of antitrust cases.

The opinion marked the Court's first foray into the question of implied antitrust immunity in the face of congressional silence in over thirty years, since its simultaneous issue of Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) and United States v. NASD, 422 U.S. 694 (1975).

In dismissing a class action complaint alleging antitrust violations against ten investment banks on the ground that the defendants' underwriting activities were impliedly immune from the antitrust laws, the Court evinced a new willingness to preclude enforcement of the antitrust laws even where there was no suggestion that an administrative agency was likely to approve otherwise anti-competitive conduct—but where the behavior alleged in the complaint raised arguably difficult line-drawing questions uniquely within the agency's expertise.

* Summary of the Case *

In Credit Suisse, a putative class of investors sued ten investment banks, including Credit Suisse First Boston Corp., alleging that certain underwriting agreements consummated during the initial public offerings (IPOs) of various technology-related companies violated the antitrust laws.

Specifically, plaintiffs' alleged that the defendants agreed to impose three conditions on investors vying to purchase shares of the newly issued securities: (1) requiring investors to place bids (for a premium) in the aftermarket ("laddering"); (2) requiring investors to purchase other, less attractive securities ("tying"); and (3) requiring investors to purchase additional shares in a secondary offering. Defendants moved to dismiss, arguing that the federal securities laws impliedly preclude application of the antitrust laws.

Issues of antitrust preclusion are easy where, as is sometimes the case, statutes contain explicit antitrust-savings clauses or specifically preclude application of the antitrust laws. The Securities Exchange Act of 1934, however, is silent (although Justice Thomas, in his lone dissent, disagrees), requiring a deeper analysis.

Engaging in this deeper analysis, the Court here reviewed its precedents to distill four "critical factors" to determine whether a securities-related business practice "warrant[s] an implication of preclusion" of the antitrust laws, Credit

Suisse, slip op. at 10: (1) whether the SEC has authority to supervise the activity in question; (2) whether the SEC has exercised that authority; (3) the likelihood that application of the antitrust and securities laws “would produce conflicting guidance, requirements, duties, privileges or standards of conduct”; and (4) whether the activity in question was central to the proper functioning of the securities market. Id.

Readily concluding that (1) the SEC has authority to supervise underwriter behavior; (2) the SEC has exercised this authority with respect to the practices at issue here; and (3) underwriting syndicates are “central to the proper functioning of well-regulated capital markets,” the Court focused exclusively on the third factor: whether application of both antitrust and securities laws was “practically incompatible.” Id. at 10-11.

Turning to this factor, the Court found the application of both securities and antitrust law to the underwriting practices to be clearly incompatible, notwithstanding that both regimes prohibited the activities in question.

Importantly, the Court did not base its holding on the likelihood that the SEC would, in the future, condone the specific practices alleged in the complaint. Rather, the Court held that the antitrust laws “threatened serious securities-related harm,” id. at 13, due to the likelihood that federal judges and juries would be unable to separate the SEC-blessed practices from the dually prohibited behavior, resulting in inconsistent decisions.

The risk of inconsistent decisions convinced the Court that without the safety blanket of SEC expertise as the final word, underwriters may be forced to “act in ways that will avoid not simply conduct that the securities laws 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 16-17. Thus, the underwriting practices alleged in the complaint were immunized from antitrust attack.

* Looking Backward *

Although Credit Suisse arrived at the same result as Gordon, the more closely analogous of the two 1975 precedents, the Court’s analysis differed considerably.

First, in Gordon, Justice Blackmun’s majority opinion dedicated approximately 19 of its 32 pages to a painstakingly thorough review of the history of fixed commissions (the allegedly anti-competitive practice at issue) and the gradual move toward competitive rates.

This history unambiguously demonstrated that the Securities Exchange Act mandated SEC scrutiny and approval for each stage of commission rate practices. In light of this close scrutiny and exhaustive consideration, application of the antitrust laws would “preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity." Gordon, 422 U.S. at 691. Thus, the antitrust laws must give way.

By contrast, Credit Suisse's discussion of the SEC's long experience of scrutinizing, studying, and testing various IPO underwriting practices is conspicuously missing. Unlike in Gordon, the Court here simply accepted, without much analysis, that certain practices are subject to the scrutiny and approval of the SEC.

Thus, while future litigants should not ignore this aspect of the prima facie antitrust immunity argument, it seems wise to focus on the question whether the two regimes can coexist, rather than on historical regulation (or lack thereof). In sum, the Court is less likely to be concerned with the so-called "lazy agency" problem.

Second, at the time the respective complaints were filed in both Gordon and Credit Suisse, the allegedly anti-competitive conduct was prohibited by both the securities and antitrust laws; there was no present conflict in either case.

The Court in Gordon, however, found that Congress explicitly authorized the SEC to reintroduce fixed rates upon the making of specified findings. In other words, there was at least a potential future conflict that could render the antitrust laws "clearly repugnant" to the securities regime.

In Credit Suisse, however, the Court did not even ask this question. Rather, the Court assumed that the practices would continue to be prohibited by both securities and antitrust law indefinitely. Credit Suisse, slip op. at 13.

Credit Suisse's finding of "clear incompatibility," therefore, was not based on a potential future conflict, but simply on the perceived difficulties antitrust courts and juries were likely to experience applying the fine lines of the securities regime—and the risk that, under the guise of the antitrust laws, acceptable underwriting practices would mistakenly be forbidden.

Thus, Credit Suisse arguably signals a shift in focus away from a fear of a direct conflict (or actual incompatibility) between multiple regulatory regimes and towards a fear of judicial incompetence and the perceived complexities of the practices at issue.

* Looking Forward *

It is here—in the question of the degree to which special knowledge is needed to resolve a dispute in a particular subject matter, beyond the ken of an average antitrust-focused judge (or worse, a lay antitrust jury)—that future battles will likely be fought.

Antitrust immunity is now dependent on the reviewing court's assessment of whether other federal courts are competent to apply the antitrust laws in such a manner that their decisions will not intrude on the finely drawn demarcations set by expert agencies.

The implications of Credit Suisse will likely transcend its securities-specific confines, offering defense attorneys a new option in seeking to dismiss antitrust suits alleging conduct occurring in other heavily regulated industries (in circumstances, of course, where Congress is silent on the question).

One can envision a defendant's counsel arguing that the practice in question—whether it involves securities, drugs, trucking, nuclear energy, etc.—is decidedly complicated and nuanced, requiring the relevant agency to bring its substantial expertise to bear outside the meddling eyes of an antitrust judge or jury.

The questions facing district courts when adjudicating such arguments will necessarily be those of degree—a notoriously difficult task. The courts will have to determine how fine a line separates permissible and impermissible conduct, and how complicated the practices at issue really are, i.e., is the agency's expertise essential?

Ironically, the district courts will be judging their own acumen—after all, one of Credit Suisse's primary concerns is that "nonexpert judges" will have difficulty with the "nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible." Id. at 16. In addition, district court's will be asked—with scant Supreme Court guidance—to determine whether the area of conduct in question falls "squarely within the heartland" of the agency's regulatory regime.

Ultimately, as is so often the case, the Supreme Court's reasoning dictates the arguments that will be made, but it is the lower courts that are left to develop manageable standards for resolving these contests. The percolation of these new issues may result in inconsistent outcomes in the short run, but such is the price of Article III decision-making.

Of course, Congress retains the option of studying and reevaluating the many regulatory regimes to determine whether antitrust savings clauses or explicit preclusive language is appropriate in each situation. Short of congressional intervention, only time and judicial experience will sharpen (or dull) the contours of the antitrust immunity doctrine.

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