

3-2008

Pruning the Antitrust Tree: *Credit Suisse Securities (USA) LLC v. Billing* and the Immunization of the Securities Industry from Antitrust Liability

John P. Lucas

Follow this and additional works at: https://digitalcommons.law.mercer.edu/jour_mlr



Part of the [Securities Law Commons](#)

Recommended Citation

Lucas, John P. (2008) "Pruning the Antitrust Tree: *Credit Suisse Securities (USA) LLC v. Billing* and the Immunization of the Securities Industry from Antitrust Liability," *Mercer Law Review*: Vol. 59 : No. 2 , Article 9.

Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol59/iss2/9

This Casenote is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact repository@law.mercer.edu.

Casenote

Pruning the Antitrust Tree: *Credit Suisse Securities (USA) LLC v. Billing* and the Immunization of the Securities Industry from Antitrust Liability

I. INTRODUCTION

In *Credit Suisse Securities (USA) LLC v. Billing*,¹ the United States Supreme Court, speaking through Justice Breyer, held that the current securities law regime impliedly precludes the application of state and federal antitrust laws to underwriters' and institutional investors' conduct during initial public offerings of securities.² Justice Stevens concurred in the judgment only and issued his own opinion.³ Justice Thomas delivered the lone dissent.⁴ Justice Kennedy did not participate in the decision, likely because his son is a managing director of petitioner Credit Suisse Securities.⁵ Overturning the United States

1. 127 S. Ct. 2383 (2007).

2. *Id.* at 2387.

3. *Id.* at 2397-98 (Stevens, J., concurring).

4. *Id.* at 2398-2400 (Thomas, J., dissenting).

5. Linda Greenhouse, *Justices Back Underwriters on New Issues*, N.Y. TIMES, June 19, 2007, at C1, available at 2007 WLNR 11461453.

Court of Appeals for the Second Circuit,⁶ the Court continued its legacy of pruning the reach of potentially crippling class action antitrust suits for treble damages in the hyper-regulated arena of public corporate finance. The Court's decision makes clear that the securities laws impliedly preclude antitrust laws when the two are "clearly incompatible," given the context and likely consequences.⁷

II. FACTUAL BACKGROUND

A. *Public Offerings of Securities and the Role of Investment Banking Firms*

A public offering of securities immediately infuses capital into a company, which may then use the investors' funds for any number of purposes, including the development of new products, the expansion of existing facilities, or the establishment of new markets.⁸ Companies typically retain investment banking firms to assist with a public offering, which is a highly technical process that can expose an issuing company to crippling liability if improperly performed.⁹ An important way that investment banking firms assist companies wishing to issue securities is by acting as underwriters.¹⁰

"Underwriting" generally refers to the process of helping a company sell securities to the public by means of a registered offering.¹¹ The most common underwriting arrangement is known as "firm commitment" underwriting, where the underwriter purchases securities directly from the issuing company and then resells the securities to the public at a profit.¹² Firm commitment underwriters often form syndicates with other investment banking firms to market the shares, thus hedging the original underwriter's risk of being unable to dispose of an entire issue.¹³

In preparation for a public offering, the syndicate investigates and estimates the probable market demand for a company's securities at various prices.¹⁴ The syndicate makes a preliminary estimate of an

6. *Credit Suisse*, 127 S. Ct. at 2397.

7. *Id.* (internal quotation marks omitted).

8. LARRY D. SODERQUIST & THERESA A. GABALDON, *SECURITIES REGULATION* 19 (6th ed. 2006).

9. *Id.* at 22.

10. *Id.* at 24.

11. *Id.*

12. *Id.*

13. *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383, 2388 (2007).

14. *Id.*

offering's price and quantity, and the offering company submits the estimate to the Securities and Exchange Commission ("SEC") in a registration statement.¹⁵ Afterwards, the syndicate conducts a "road show," during which syndicate underwriters meet with potential investors and gauge the strength of the investors' interest in the company's securities.¹⁶ During this process, known in the industry as "book building," underwriters learn which investors might buy securities and in what quantities, at what prices, and for how long each is likely to hold purchased securities before reselling them.¹⁷ With this information, the underwriting syndicate will negotiate the final details of the offering with the issuing company and will fix the price of the shares and the quantity for which the syndicate will be jointly responsible.¹⁸ On the date the registration becomes effective, the syndicate buys the securities from the issuer at a discounted price and resells them to investors at the agreed upon price.¹⁹ The underwriters' commission is the difference between the purchase price from the issuer and the sales price to the investors.²⁰

B. History of the Litigated Dispute

In January 2002 a group of sixty investors filed two class action antitrust lawsuits against ten of the most prominent investment banking firms in the world.²¹ The complaints alleged that during the underwriting of some several hundred technology-related stocks from 1997 to 2000, the named firms formed syndicates and agreed not to allocate shares to investors who would not pay "additional anticompetitive charges" above the public offering price.²²

These additional anticompetitive charges took the form of conditions that the underwriters forced potential investors to comply with in order to purchase securities. These conditions included (1) "laddering" agreements, where the investors promised to place aftermarket bids for additional securities at escalating prices above the initial offering price; (2) "tying" agreements, where the investors committed to purchasing other, usually less attractive, securities; and (3) the payment of excessive

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 2388-89.

commissions. In addition, the investors alleged that these practices artificially inflated the share prices of the securities in question.²³

The United States District Court for the Southern District of New York dismissed the complaints on the ground that the federal securities laws impliedly precluded application of antitrust laws to the conduct in question.²⁴ The United States Court of Appeals for the Second Circuit reversed and reinstated the complaints.²⁵ The United States Supreme Court granted certiorari to decide whether there was a "plain repugnancy" between the antitrust claims and the federal securities laws.²⁶

III. LEGAL BACKGROUND

A. Introduction

Public corporate finance is an integral part of the American economic system. Without the opportunity to raise capital through public offerings, many companies would be unable to grow and develop. The current securities law regime endows the SEC with extensive authority to regulate all areas of the securities field. The Supreme Court has three times before examined the interplay between the antitrust laws, designed solely to foster competition, and the securities laws, which take competition into consideration along with a number of other factors, including the health of the economy and the public interest.²⁷

B. The Three Precedents: *Silver*, *Gordon*, and *NASD*

The first case to examine the relation of securities law to antitrust law was *Silver v. NYSE*.²⁸ The Supreme Court in *Silver* considered a claim by a broker-dealer that the New York Stock Exchange ("NYSE" or "Exchange") and its members had violated the antitrust prohibition against group boycotts by collectively barring the broker-dealer from the network of instant simultaneous communication used to communicate timely offers to buy and sell securities in the over-the-counter market.²⁹

23. *Id.* at 2389.

24. *Id.* (citing *In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 524-25 (S.D.N.Y. 2003)).

25. *Id.* (citing *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 172 (2nd Cir. 2005)).

26. *Id.* at 2387 (quoting *Gordon v. NYSE*, 422 U.S. 659, 682 (1975)).

27. See generally *Gordon v. NYSE*, 422 U.S. 659 (1975); *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975); *Silver v. NYSE*, 373 U.S. 341 (1963).

28. 373 U.S. 341 (1963).

29. *Id.* at 342-43.

The broker-dealer had obtained private telephone wire connections between his companies and various other securities trading firms.³⁰ The firms that were members of the NYSE applied to the NYSE for approval of the connections, and the Exchange granted “temporary approval.”³¹ Later, without notice, explanation, or any opportunity for a hearing, the Exchange instructed its member firms to disconnect the direct wire connections, and the member firms complied. Despite every effort on the part of the injured broker-dealer to exact an explanation from the Exchange for its action, he received none. After the wires were disconnected, the broker-dealer alleged, his volume of business and profits dropped substantially. The broker-dealer sued under the antitrust laws, seeking, *inter alia*, an injunction and treble damages. The district court granted summary judgment and a permanent injunction to the broker-dealer.³² The Court of Appeals for the Second Circuit reversed, however, holding that the Exchange was exempt from the antitrust laws because it was exercising its power of self-regulation, which it was required to exercise under the Securities Exchange Act of 1934 (the “Exchange Act”).³³

On appeal to the Supreme Court, the majority noted that, as a cardinal rule of construction, implied repeals are not favored.³⁴ The Court cautioned that, where possible, lower courts should attempt to reconcile the operation of both statutory schemes rather than completely ousting one.³⁵ Fashioning a guiding principle in the quest to reconcile the two schemes, the Court explained that “[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.”³⁶

The Court began its analysis in *Silver* by recognizing that if this conduct had occurred in a context free from other federal regulation, it would have constituted a *per se* violation of the Sherman Act.³⁷ Such concerted agreements not to deal with other traders had long been included in the forbidden category of injurious restraints on trade.³⁸

30. *Id.* at 343.

31. *Id.* at 344.

32. *Id.* at 344-45.

33. *Id.* at 346 (citing *Silver v. NYSE*, 302 F.2d 714, 720 (2d Cir. 1962)); 15 U.S.C. §§ 78a-78nn (2000 & Supp. V 2005).

34. *Silver*, 373 U.S. at 357 (citing *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)).

35. *Id.*

36. *Id.*

37. *Id.* at 347; 15 U.S.C. §§ 1-7 (2000 & Supp. V 2005).

38. *Silver*, 373 U.S. at 348 (quoting *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959)).

Therefore, unless the conduct was justified by some other policy, the Exchange had violated the Sherman Act.³⁹ The Court held that the Exchange Act did not justify the NYSE's anticompetitive collective action taken without according fair procedure.⁴⁰

In *Silver* the Exchange Act gave the SEC power to request that registered exchanges, such as the NYSE, make changes to their rules.⁴¹ However, the Exchange Act did not give the SEC jurisdiction to review specific instances of enforcement of exchange rules.⁴² This absence of SEC jurisdiction demonstrated that nothing in the securities regulation regime performed the antitrust function of insuring that exchanges did not apply their rules in a manner that injured competition and that was not justified by some other regulatory end.⁴³

In the absence of administrative oversight, the Court decided that some form of review of exchange self-regulation by the courts was not incompatible with the fulfillment of the aims of the Exchange Act.⁴⁴ The Court noted in dicta, however, that a "different case" would arise concerning antitrust immunity were there SEC jurisdiction and ensuing judicial review of a particular application of an exchange rule.⁴⁵

The Court had an opportunity to decide this different case twelve years later in *Gordon v. NYSE*.⁴⁶ In *Gordon* a class of small investors sued the NYSE for fixing commission rates on small transactions, a practice that allegedly violated the antitrust laws.⁴⁷ In this case, unlike in *Silver*, Congress had clearly given the SEC authority to supervise exchange self-regulation with respect to the fixing of reasonable rates of commission.⁴⁸ The SEC would determine what rates would both protect investors and insure fair dealing.⁴⁹ The SEC was also authorized to require the adoption of such changes as were necessary or appropriate.⁵⁰ While *Gordon* had been percolating through the court system, the SEC, by order, abolished fixed commission rates, and Congress enacted legislation codifying this result but

39. *Id.* at 348-49.

40. *Id.*

41. *Id.* at 357.

42. *Id.*

43. *Id.* at 358.

44. *Id.* at 359.

45. *Id.* at 358 n.12.

46. 422 U.S. 659 (1975).

47. *Id.* at 660-61.

48. *Id.* at 681 (quoting 15 U.S.C. § 78s(b) (1970) (amended 1975)).

49. *Id.* at 681.

50. *Id.* at 681-82.

permitting the SEC discretion to impose fixed rates in the future if warranted.⁵¹

The Court began its analysis by restating the axiom of construction that repeal of the antitrust laws would be implied only where there is a “plain repugnancy between the antitrust and regulatory provisions.”⁵² Turning next to the issue raised in the case, the Court looked to *Silver* as a starting point and reiterated that repeal would only be implied if necessary to make the Exchange Act work, and then only to the minimum extent necessary.⁵³

The Court, relying on three considerations, held that implied immunity was necessary to make the Exchange Act work.⁵⁴ The Court noted that (1) the Exchange Act gave the SEC direct regulatory authority over exchange rules and practices concerning the fixing of reasonable rates of commission; (2) the SEC had actively reviewed proposed rate changes during the previous fifteen years,⁵⁵ and (3) without antitrust immunity, courts would likely impose different standards, which would put exchanges in the precarious position of not being able to proceed without violating either a court or an SEC mandate.⁵⁶ It was apparent, concluded the Court, that Congress intended to allow the SEC to supervise the fixing of reasonable rates of commission, and therefore, making the Exchange Act work as intended required implying antitrust immunity in this context.⁵⁷

While joining the majority opinion, Justice Douglas authored a separate concurring opinion in which he stressed the single most important factor in the Court’s analysis—actual review by a competent regulatory agency.⁵⁸ Justice Douglas argued that the antitrust laws safeguard a strong public interest in free and open competition, and immunity from those laws should only be implied when some other equivalent mechanism is functioning to protect that interest.⁵⁹

*United States v. National Ass’n of Securities Dealers, Inc.*⁶⁰ was the last of the three precedent cases to consider the interplay between the securities and antitrust regulatory regimes and was decided the same day as *Gordon*. The Court considered an antitrust action by the United

51. *Id.* at 682.

52. *Id.* (quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 350-51 (1963)).

53. *Id.* at 683 (quoting *Silver*, 373 U.S. at 357).

54. *Id.* at 685.

55. *Id.*

56. *Id.* at 689.

57. *Id.* at 691.

58. *Id.* (Douglas, J., concurring).

59. *Id.* at 692.

60. 422 U.S. 694 (1975).

States Department of Justice against the National Association of Securities Dealers, Inc. ("NASD"), certain mutual funds, and certain broker-dealers.⁶¹ The complaint alleged that the defendants agreed (1) to fix resale prices of mutual fund shares; (2) to limit the free distribution of shares by limiting when, how, to whom, and from whom broker-dealers could buy and sell mutual fund shares; and (3) to restrict broker-dealers from selling and buying shares from each other.⁶² The Department of Justice, joined by a host of private plaintiffs, argued that these agreements constituted horizontal and vertical combinations and conspiracies that restricted trade of mutual fund shares in secondary market transactions in violation of the Sherman Act.⁶³

Like in *Gordon* the SEC was legislatively empowered to regulate the conduct at issue.⁶⁴ Specifically, the Investment Company Act of 1940 ("ICA")⁶⁵ vested in the SEC broad regulatory authority over the business practices of mutual fund companies.⁶⁶ The ICA required that broker-dealers maintain a uniform price with respect to sales in the primary market, where issuing companies trade shares with investors directly or through broker-dealers.⁶⁷ The ICA also authorized mutual funds to impose restrictions on the negotiability and transferability of their shares, provided these restrictions did not contravene any SEC rule.⁶⁸ These provisions of the ICA were intended to remedy the problem of a bootleg secondary market in mutual fund shares, which, during the enactment of the statute, had been identified by Congress as detrimental to mutual fund investors.⁶⁹

Examining the legislative history of the ICA, the Court held that the restrictions on the transferability of shares (the alleged vertical restraints) were, subject to SEC disapproval, among the restrictions contemplated by Congress when it enacted the ICA.⁷⁰ Therefore, these restrictions were immune from antitrust liability because there was no way to reconcile the SEC's power to authorize the restrictions and the competing mandate of the antitrust laws.⁷¹ Citing *Silver* the Court explained that if the regulatory scheme established by the ICA was to

61. *Id.* at 700.

62. *Id.* at 701-03.

63. *Id.* at 701-02.

64. *Id.* at 704-05.

65. 15 U.S.C. §§ 80a-1 to -64 (2000 & Supp. V 2005).

66. *NASD*, 422 U.S. at 704-05.

67. *Id.* at 699.

68. *Id.* at 720-21.

69. *Id.* at 709.

70. *Id.* at 721-22.

71. *Id.*

work properly, the antitrust laws had to yield.⁷² As to the alleged horizontal conspiracy pertaining to the defendants' attempts to prevent the growth of a secondary mutual fund market, the Court held that the SEC's substantial regulatory authority in the area of mutual fund activities was sufficiently pervasive to confer implied antitrust immunity on the defendants.⁷³ In closing, the Court held that allowing an antitrust action to proceed against activities so directly related to the SEC's responsibilities posed a substantial risk of subjecting the defendants to duplicative and inconsistent standards.⁷⁴

NASD, unlike *Gordon*, was decided over the vigorous dissent of four Justices.⁷⁵ The dissent complained that the majority's holding would imply immunity in all cases where a regulatory agency has the authority to approve business conduct.⁷⁶ This immunity could occur regardless of whether the agency is required to weigh antitrust considerations or whether Congress intended to replace judicial oversight with administrative oversight of the antitrust laws.⁷⁷ The dissent distinguished *Gordon*, which was decided the very same day as *NASD*, and argued that in *Gordon*, Congress provided an administrative substitute for antitrust enforcement by vesting in the SEC the power to fix commission rates and calling on the agency to take competitive factors into account in approving or disapproving proposed rates.⁷⁸

IV. COURT'S RATIONALE

A. *Implying Antitrust Immunity*

The Court in *Credit Suisse Securities (USA) LLC v. Billing*⁷⁹ began its analysis by noting that in some circumstances, regulatory statutes explicitly state whether and to what extent they preclude application of the antitrust laws.⁸⁰ However, where regulatory statutes do not mention antitrust, courts must determine whether and in what respect the statutes implicitly preclude the antitrust laws.⁸¹

72. *Id.* at 729-30 (citing *Silver*, 373 U.S. 341 (1963)).

73. *Id.* at 730.

74. *Id.* at 735.

75. *Id.* 735-48 (White, J., dissenting).

76. *Id.* at 736.

77. *Id.*

78. *Id.* at 741.

79. 127 S. Ct. 2383 (2007).

80. *Id.* at 2389.

81. *Id.*

B. *The Securities Precedents*

The Court next turned to its three precedent cases that specifically addressed the relation of securities law to antitrust law. Analyzing *Silver v. NYSE*,⁸² the majority reiterated that courts, where possible, should attempt to reconcile the operation of both conflicting schemes instead of holding one completely ousted.⁸³ The majority also repeated with approval *Silver's* guiding principle in the reconciliation of the two schemes that “[r]epeal of the antitrust laws is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.”⁸⁴

The Court turned next to *Gordon v. NYSE*⁸⁵ and highlighted that opinion’s emphasis on three sets of considerations: (1) the existence of direct SEC regulatory power over the subject matter involved; (2) the SEC’s active role in regulating the area; and (3) the conflicting standards that exchanges would be subjected to without immunity from the antitrust laws.⁸⁶ According to the Court, the majority in *United States v. NASD*⁸⁷ also relied on the three *Gordon* factors in reaching its decision that the securities laws implicitly precluded antitrust laws.⁸⁸

Fashioning its inquiry from its prior decisions, the Court in *Credit Suisse* announced that when deciding whether securities laws preclude antitrust laws, a court is deciding whether the two are “clearly incompatible” based on the context and likely consequences.⁸⁹ Looking to *Gordon* and *NASD* for guidance, the Court announced that four factors would be treated as critical: (1) the existence of regulatory authority to supervise the questioned activities; (2) evidence that the responsible agency exercises the authority; (3) the risk of conflicting guidance, requirements, duties, privileges, or standards of conduct if both sets of laws apply; and (4) whether the conflict lies squarely within an area of financial market activity that the securities laws seek to regulate.⁹⁰

82. 373 U.S. 341 (1963).

83. *Credit Suisse*, 127 S. Ct. at 2389-90 (quoting *Silver*, 373 U.S. at 357).

84. *Id.* at 2390 (brackets in original) (quoting *Silver*, 373 U.S. at 357).

85. 422 U.S. 659 (1975).

86. *Credit Suisse*, 127 S. Ct. at 2390 (quoting *Gordon*, 422 U.S. at 685, 689).

87. 422 U.S. 694 (1975).

88. *Credit Suisse*, 127 S. Ct. at 2391.

89. *Id.* at 2392 (internal quotation marks omitted).

90. *Id.*

C. Analysis of the Factors

The Court began its analysis of the four factors it identified as crucial by noting that in this case, three of the factors were clearly met.⁹¹ For one, the Court determined that underwriters' efforts to sell newly issued securities lay at the heart of the securities marketing enterprise.⁹² Additionally, the Court concluded that the Exchange Act⁹³ clearly granted the SEC authority to supervise all of the questioned activity.⁹⁴ Finally, according to the Court, the SEC had continuously exercised its legal authority to regulate the conduct at issue.⁹⁵ Therefore, the Court held, the only factor left to analyze was whether there was a conflict between the securities law and the antitrust laws and, if so, whether the conflict arose to the level of incompatibility.⁹⁶

The Court read the complaints as attacking underwriters' joint efforts to collect commissions through the practices alleged (laddering and tying agreements, for example), as opposed to attacking the formation of syndicates and the fixing of their commissions generally.⁹⁷ The plaintiffs argued there was no conflict because the SEC already disapproved of the conduct in question and would not likely approve it in the foreseeable future.⁹⁸

Even assuming arguendo these pro-plaintiff premises, the Court held that the securities and antitrust laws were clearly incompatible.⁹⁹ To permit the antitrust actions, the Court argued, would threaten serious securities-related harm because "only a fine, complex, detailed line" separates activity the SEC permits from activity the SEC forbids.¹⁰⁰ It would be difficult, the Court stated, for someone who is not familiar with accepted syndicate practices to separate accepted behavior from forbidden behavior.¹⁰¹ With respect to laddering, for example, the SEC permits underwriters to inquire into customers' desired future positions in the long term.¹⁰² However, the SEC forbids an underwriter from

91. *Id.* at 2393.

92. *Id.* at 2392.

93. 15 U.S.C. §§ 78a-78nn (2000 & Supp. V 2005).

94. *Credit Suisse*, 127 S. Ct. at 2392.

95. *Id.* at 2393.

96. *Id.*

97. *Id.* at 2393-94.

98. *Id.* at 2394.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* (quoting Comm'n Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, Release Nos. 33-8565; 34-51500; IC-26828; File No. S7-03-05, 70 Fed. Reg.

asking customers whether, at what price, and in what quantity they intend to place immediate aftermarket orders for shares.¹⁰³ In cases like this, evidence tending to show an unlawful antitrust activity and evidence that shows a lawful securities marketing activity might overlap or be identical.¹⁰⁴ Only the SEC, the Court concluded, is able to make such fine distinctions with confidence.¹⁰⁵

The Court further reasoned that plaintiffs may bring antitrust lawsuits throughout the country in courts with nonexpert judges and juries.¹⁰⁶ Given the fact-sensitive nature of the considerations, there would be an unusually high risk that courts would evaluate similar factual circumstances differently if they were allowed to hear these types of cases.¹⁰⁷ The Court reiterated the SEC's concerns, voiced in the district court, that failing to imply immunity in this situation would threaten to disrupt the SEC's ability to regulate the marketing of securities and would have a chilling effect on tremendously important, lawful syndication activities.¹⁰⁸

D. *The Need for Lawsuits to Enforce Antitrust Laws*

In *Silver* there was no other way to police the strong antitrust policy protecting competition other than through private suits under antitrust laws; in *Credit Suisse*, the Court held that no such need was present.¹⁰⁹ The Court noted that, in this case, the SEC actively enforced the rules and regulations that prohibited the challenged conduct.¹¹⁰ Moreover, the SEC is instructed to consider competition, among other things, when deciding which rules and regulations to promulgate.¹¹¹ Further, the Court noted that, as an alternative, harmed investors could bring lawsuits under the securities laws and obtain damages.¹¹²

Having concluded that all four factors derived from *Gordon* and *NASD* were clearly met, the Court held that the securities laws were "clearly

at 19, 672, 19, 676 (Apr. 7, 2005)).

103. *Id.* (quoting Comm'n Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, 70 Fed. Reg. at 19, 675).

104. *Id.* at 2395.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 2396.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* It should be noted, however, that plaintiffs suing under the securities laws would not be able to recover treble damages, as they would under an antitrust theory of recovery. *See id.*

incompatible” with the application of the antitrust laws in the context of the marketing of securities by underwriters.¹¹³

E. Justice Stevens’s Concurrence

Justice Stevens, concurring in the Court’s judgment, argued that there was no need to imply antitrust immunity because the defendants’ alleged conduct did not violate the antitrust laws.¹¹⁴ According to Justice Stevens, to suggest that underwriters could restrain trade in the incredibly vast market of publicly traded securities by manipulating the terms of certain public offerings was frivolous.¹¹⁵ Justice Stevens also took issue with the Court’s reliance on the risk that antitrust courts were unusually prone to making serious mistakes.¹¹⁶

F. Justice Thomas’s Dissent

Justice Thomas, in true originalist fashion, argued in his dissenting opinion that the savings clauses found in both the Securities Act of 1933¹¹⁷ and the Exchange Act preserved the rights and remedies existing outside the securities laws.¹¹⁸ Those provisions state that the rights and remedies provided by the respective securities laws “shall be in addition to any and all other rights and remedies that may exist in law or in equity.”¹¹⁹ Surely, Justice Thomas argued, the Sherman Act,¹²⁰ enacted in 1890, would have been thought of as a right and remedy that existed in law or in equity by the Congresses that enacted the Securities Act and the Exchange Act in the early 1930s.¹²¹ For Justice Thomas, there was no convincing argument for why these savings clauses should not resolve the case in favor of the plaintiff-respondents.¹²²

V. IMPLICATIONS

The Court’s decision in *Credit Suisse Securities (USA) LLC v. Billing*¹²³ will have a number of different, far-reaching effects. By

113. *Id.* at 2397 (internal quotation marks omitted).

114. *Id.* at 2398 (Stevens, J., concurring).

115. *Id.*

116. *Id.*

117. 15 U.S.C. §§ 77a-77aa (2000 & Supp V 2005).

118. *Credit Suisse*, 127 S. Ct. at 2399 (Thomas, J., dissenting).

119. *Id.* (quoting 15 U.S.C. § 77p(a) (2000)).

120. 15 U.S.C. §§ 1-7 (2000 & Supp. V 2005).

121. *Credit Suisse*, 127 S. Ct. at 2399 (Thomas, J., dissenting).

122. *Id.*

123. 127 S. Ct. 2383 (2007).

holding in favor of the defendants, the Court has immunized investment banks from any form of antitrust liability in connection with the marketing of securities. This is particularly important because antitrust claims pose the threat of awards of treble damages as well as attorney fees. This immunization from antitrust attack effectively takes the important task of protecting competition in the securities markets away from private plaintiffs and entrusts it solely to the SEC. As a practical matter, this makes sense because securities law issues can be exceedingly complex and, in certain cases, competition must yield to other interests, such as the continued effective administration of the nation's capital markets. Normal, everyday people and judges generally do not have the comprehensive knowledge of the intricate securities laws that is needed to balance the twin public policy goals of promoting competition and protecting the securities industry. After *Credit Suisse*, the responsibility for making these difficult decisions has been effectively transferred from the judicial to the executive branch.

While the Court's distrust of juries and lower court judges is questionable, particularly because these less distinguished individuals are regularly called upon to make similarly difficult policy decisions, one result of *Credit Suisse* that is beyond dispute is that the investment banking industry has scored a major coup by insulating itself from any sort of antitrust liability. The decision in *Credit Suisse* coats with a patina of acceptability the investment banks' overreaching behavior during the technology bubble of the late 1990s. While the banks might well eventually have to answer for their behavior in actions under the securities laws—which the majority opinion intimates is the correct avenue for recovery in this case—the banks need not fear the rod of treble damages and attorney fees. In addition, the banks will save the tremendous expense required to respond to sweeping antitrust discovery requests.

While the Court's decision in *Credit Suisse* implicates both securities and antitrust law, the case primarily serves as another star in the Court's recent constellation of cases limiting the reach of antitrust laws. During its 2006-2007 term, the Court decided four antitrust cases.¹²⁴ While each case revolved around different factual scenarios, they all shared one unifying theme: limiting potential plaintiffs' recourse under the antitrust laws.¹²⁵ In all four cases, the Court overturned circuit

124. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Credit Suisse*, 127 S. Ct. 2383; *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

125. Marcia Coyle, *Tough Term for Antitrust Plaintiffs: Decisions Limit Access to Recourse Under the Antitrust Laws*, 189 N.J. L.J. 267, 267 (2007).

court decisions that favored the plaintiffs.¹²⁶ While lawyers on the plaintiff's bar complain that this shows the Court's lapdogish pandering to large business interests and conservative politics, this is not exactly true.¹²⁷ A better explanation is that the Court is trying to streamline the vastly expensive system of antitrust litigation, allowing competitive issues to be solved in the marketplace rather than the courtroom and weeding out nonmeritorious claims at the pleading stage.¹²⁸

JOHN P. LUCAS

126. *Id.*

127. *See id.*

128. *Id.*
