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Securities Law and Antitrust Law: Two Legal Titans Clash Before the United States Supreme Court in *Credit Suisse Securities v. Billing*

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I. Introduction

As part of a 1959 study of the application of antitrust law to certain regulated industries and public utilities, G.E. and Rosemary Hale noted:

> The evils which result from the failure of the competitive mechanism to operate smoothly and equitably in an imperfect market have given rise to two theoretically distinct bodies of law, one aimed at strengthening the competitive forces which drive the self-regulating mechanism, and the other founded on an abandonment of the competitive principle in favor of direct government control.[1]

Because of this inherent tension between antitrust law on one hand and industry-specific regulations on the other, the United States Supreme Court has often been called upon to reconcile antitrust provisions with certain regulatory schemes.

The Court was called on to resolve such a conflict in 2007 when antitrust laws and securities laws converged in *Credit Suisse Securities v. Billing*.[2] In *Credit Suisse*, the Court confronted whether underwriters who allegedly engaged in anticompetitive activities in an initial public offering were immune from antitrust liability by virtue of a strict regulatory scheme set in place by the Securities Exchange Commission (SEC).[3] The Court held that the underwriters were entitled to implied antitrust immunity because antitrust laws and securities laws are "clearly incompatible," and simultaneous application of them would detrimentally affect the securities industry.[4]

In *Credit Suisse*, however, the Court did not fully consider precedent requiring it to give deference to antitrust laws in its securities-antitrust implied immunity analysis; consequently, the Court squandered an opportunity to provide guidance to lower courts on the reconciliation of securities and antitrust laws. The result of the Court's analysis is a lower standard for implied immunity when a regulatory scheme can also be applied to the conduct at issue—a standard that could lead to further findings of implied immunity in

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1. G.E. Hale & Rosemary D. Hale, *Competition or Control II: Radio and Television Broadcasting*, 107 U. PA. L. REV. 585, 585 (1959).
2. Credit Suisse Sec. v. Billing, 127 S. Ct. 2383 (2007).
3. *Id.* at 268-69.
4. *Id.* at 284-85.

other regulated industries, potentially weakening the ability of private individuals and government entities to combat anticompetitive conduct in the marketplace.

In Part II, this note offers a brief description of the United States Supreme Court's previous attempts to reconcile antitrust laws with industry-specific regulatory schemes, including securities laws. Part III outlines the facts, issues, and holding of *Credit Suisse*, and provides an analysis of the Court's decision. Part IV discusses the weaknesses of the Court's analysis and promotes an alternative approach that would reduce the conflict between antitrust and securities laws. This note concludes in Part V.

II. Law Before the Case

The United States Supreme Court has addressed the applicability of antitrust laws to a multitude of regulated industries, including the securities sector. In resolving the tension between competition and regulation, the Court has reached differing outcomes, often depending on the specific regulatory scheme and the relevant facts. One common theme emerges from the Court's implied immunity jurisprudence: the Court's reluctance to find broad implied immunity for a particular regulated industry is often accompanied by a deliberate statement that repeals of the antitrust law by implication are not favored.

A. Reconciling Securities Law and Antitrust Law

The United States Supreme Court has previously addressed the reconciliation of antitrust law and securities law in three cases: *Silver v. New York Stock Exchange*;[5] *Gordon v. New York Stock Exchange*;[6] and *United States v. National Ass'n of Securities Dealers*.[7]

In the 1963 case *Silver v. New York Stock Exchange*, the Court established the securities-antitrust implied immunity framework.[8] Silver, a Dallas corporate securities dealer, brought suit against the New York Stock Exchange (NYSE) when the Exchange's Department of Member Firms cancelled his wire and ticker connections to the corporate securities desks of ten of NYSE's member firms without explanation, severely crippling Silver's securities business.[9] In his lawsuit, Silver alleged several claims against the New York

5. 373 U.S. 341 (1963).
6. 422 U.S. 659 (1975).
7. 422 U.S. 694 (1975).
8. Silver v. N.Y. Stock Exch., 373 U.S. 341, 347-61 (1963).
9. *Id.* at 343-45.

Stock Exchange, including a claim that NYSE's actions amounted to a conspiracy under the Sherman Act.[10]

The district court granted summary judgment for Silver, holding that antitrust laws applied to the Exchange and that the Exchange's actions amounted to a per se violation of the Sherman Act.[11] The United States Court of Appeals for the Second Circuit reversed the district court with respect to the antitrust claims, holding that the Securities Exchange Act gave the SEC and NYSE disciplinary powers over the members of NYSE, and that the statute required NYSE to fully exercise those powers.[12] Therefore, NYSE was exempt from the Sherman Act because it exercised the regulatory power required of it under the Securities Exchange Act.[13] Thus, the Second Circuit concluded that the NYSE benefited from an implied antitrust immunity.

The United States Supreme Court reversed the Second Circuit's grant of implied antitrust immunity, stating that "the proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted."[14] In order to reconcile the two bodies of law, the Court imposed procedural safeguards on NYSE's actions against protesting non-members, including a notice and hearing requirement.[15] These procedural safeguards, the Court reasoned, "not only will substantively encourage the lessening of anticompetitive behavior outlawed by the Sherman Act but will allow the antitrust court to perform its function effectively."[16]

Twelve years later in *Gordon v. New York Stock Exchange*, the Court again considered the securities-antitrust implied immunity issue.[17] Plaintiff Gordon filed suit individually and on behalf of a class of small investors against NYSE, the American Stock Exchange (AMEX), and two of the exchanges' member firms, alleging that the fixed commission rate system used by the exchanges for transactions less than $500,000 violated the Sherman Act.[18] Gordon requested injunctive relief and treble damages.[19]

In *Gordon*, the Court acknowledged the deference to the antitrust laws evident in *Silver*, stating that "[r]epeal of the antitrust laws by implication is

10. *Id.* at 345.
11. *Id.* at 345-46.
12. *Id.* at 346.
13. *Id.* at 346-47.
14. *Id.* at 357.
15. *Id.* at 361-63.
16. *Id.* at 363.
17. Gordon v. N.Y. Stock Exch., 422 U.S. 659 (1975).
18. *Id.* at 660-61.
19. *Id.* at 661 n.3.

not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied."[20] Nevertheless, the Court distinguished *Gordon* from *Silver*, stating that the provision governing commission rates allows for much greater SEC control than the regulatory function at issue in *Silver*.[21] As evidence that Congress intended for the SEC to have strict regulatory control over rate regulation, the Court noted the statutory provision authorizing SEC regulation of rates and its legislative history, the SEC's thorough review of exchange commission rate practices, and continuing congressional approval of the SEC's authority on the issue.[22]

Eventually, the Court concluded that because Congress clearly intended for the SEC to have rate regulation authority, implied repeal of the antitrust laws in this context was necessary for the Securities Exchange Act to operate as intended.[23] The Court concluded that "failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates."[24]

The same day it decided *Gordon*, the Court reached a similar result in *United States v. National Ass'n of Securities Dealers* (*NASD*).[25] In *NASD*, investors and the United States sued the NASD, certain mutual funds and their underwriters, and certain broker-dealers, alleging that the defendants agreed to restrict sales and fix prices of mutual fund shares.[26] The investors and the United States alleged a horizontal conspiracy among members of the NASD to prevent the growth of a secondary dealer market for mutual fund shares, as well as various vertical restraints on secondary market activities.[27]

The United States District Court for the District of Columbia held for the defendants, stating that the provisions of the Investment Company Act[28] and the Maloney Act[29] were "incompatible with the maintenance of (an) antitrust action,"[30] and that §§ 22(d) and 22(f) of the Investment Company Act, when read with the Maloney Act, granted antitrust immunity for the challenged

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20. *Id.* at 682 (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 350-51 (1963)).
21. *Id.* at 685.
22. *Id.* at 690-91.
23. *Id.* at 691.
24. *Id.*
25. 422 U.S. 694 (1975).
26. *Id.* at 700.
27. *Id.* at 701-02.
28. 15 U.S.C. § 80a-1 to -64 (2006).
29. *Id.* § 78o-3.
30. *Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 703 (quoting Silver v. N.Y. Stock Exch., 373 U.S. 341, 358 (1963)) (internal quotation marks omitted).

practices.[31]

The United States appealed to the United States Supreme Court.[32] The government contended that the antitrust immunity implied to the horizontal restraints under § 22(d) of the Investment Company Act should not be extended beyond the precise language of the Act, which states that "no dealer shall sell any such security to any person except a dealer, a principal underwriter, or the issuer, except at a current public offering price described in the prospectus."[33] The government argued that because the statute specifically referred to "dealers," the sale of mutual fund shares to broker-dealers (deemed "contract dealers" by the Court) fell outside the scope of the statute and, therefore, was not immune from antitrust liability.[34] The United States also argued that the district court expanded the implied immunity doctrine beyond the Supreme Court's precedent.[35]

In deciding whether § 22(d) extended the price maintenance exception to broker-dealers, the Court examined the statute's legislative history and the SEC's position on the issue.[36] The Court also relied upon *United States v. Philadelphia National Bank*[37] and *United States v. Borden Co.*[38] for the presumption against implied antitrust immunity and the "clear repugnancy" standard for discarding the antitrust laws in favor of a specific regulatory scheme.[39] Additionally, the Court recognized its responsibility to reconcile the antitrust and regulatory statutes where feasible, as acknowledged in *Silver*,[40] and held that § 22(d) could not be expanded to include transactions by broker-dealers acting as brokers.[41]

The United States also argued that § 22(f) of the Investment Company Act[42] did not allow immunity for the vertical restrictions engaged in by the

31. *Id.*
32. *Id.*
33. *Id.* at 703-04; 15 U.S.C. § 80a-22(d).
34. *Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 703-04.
35. *Id.* at 704.
36. *Id.* at 712-20.
37. 374 U.S. 321 (1963).
38. 308 U.S. 188 (1939).
39. *Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 719-20.
40. *Id.* at 720 (citing Silver v. N.Y. Stock Exch., 373 U.S. 341, 356-57 (1963)).
41. *Id.*
42. Section 22(f) provides:

> No registered open-end company shall restrict the transferability or negotiability of any security of which it is the issuer except in conformity with the statements with respect thereto contained in its registration statement nor in contravention of such rules and regulations as the Commission may prescribe in the interests of the holders of all of the outstanding securities of such investment company.

15 U.S.C. § 80a-22(f) (2006).

defendants,[43] claiming that the vertical restrictions at issue did not fall within the scope of the statute.[44] Citing legislative history and the position taken by the SEC, the Court affirmed the district court's finding that § 22(f) authorized the vertical restrictions complained of by the plaintiffs.[45] Because applying antitrust laws to the type of vertical restraints engaged in by the defendants would seriously undermine the authority of the SEC, the Court deemed the antitrust laws and § 22(f) irreconcilable.[46] Therefore, the Court upheld the district court's ruling that the Sherman Act did not apply to the vertical restrictions alleged by the government.[47]

Finally, the Court considered whether the district court properly dismissed the government's claims alleging horizontal restraints on the ground that the SEC's exercise of regulatory authority under the Investment Company Act and the Maloney Act was sufficiently pervasive to confer implied antitrust immunity.[48] The Court found that the SEC had broad authority to regulate the type of restraints complained of by the plaintiffs and that "the history of Commission regulations suggests no laxity in the exercise of this authority."[49] Based on the grant of authority to the SEC and evidence that the SEC actually exercised that authority, the Court held that implied repeal of the antitrust laws in this context was "necessary to make the (regulatory scheme) work."[50] Moreover, subjecting the type of activities engaged in by the defendants to antitrust liability presented a risk that the defendants would face "duplicative and inconsistent standards."[51]

B. Reconciling Antitrust Law with Other Regulatory Schemes

The manner in which the Court has reconciled antitrust law with regulatory schemes other than securities regulation proves helpful in understanding the implied immunity framework. Though these cases examine a broad spectrum of regulatory schemes, they illustrate two common principles in implied immunity analysis: (1) the principle that repeals by implication are disfavored, and (2) the weight given to legislative intent.

43. *Nat'l Ass'n of Sec. Dealers*, 422 U.S. at 721.
44. *Id.*
45. *Id.* at 729.
46. *Id.*
47. *Id.* at 730.
48. *Id.*
49. *Id.* at 734.
50. *Id.* (quoting Silver v. N.Y. Stock Exch., 373 U.S. 341, 357 (1963)).
51. *Id.* at 735.

In its 1939 decision in *United States v. Borden Co.*,[52] the Supreme Court considered whether the application of the Agricultural Marketing Agreement Act precluded criminal liability under the Sherman Act.[53] The defendants, comprised mainly of dairy producers and distributors, were accused of conspiring to fix prices in the Chicago market for milk produced in Illinois, Indiana, Michigan, and Wisconsin.[54]

The district court held that the production and marketing of agricultural products fell outside the reach of the Sherman Act because the Agricultural Marketing Agreement Act[55] and the Capper-Volstead Act[56] regulated the conduct at issue.[57] Therefore, the district court dismissed the indictment as to all defendants.[58] The government appealed directly to the United States Supreme Court to challenge the district court's finding of implied immunity.[59]

The *Borden* Court set a high standard for implied immunity, stating that "[i]t is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible."[60] The Court cited specific provisions of the Agricultural Marketing Agreement Act that provided antitrust immunity in certain situations, but declined to extend immunity to the conduct allegedly engaged in by the defendants, stating that "[i]f Congress had desired to grant any further immunity, Congress doubtless would have said so."[61] The Court also found that immunity under the Capper-Volstead Act did not extend to the defendants' conduct.[62]

Twenty-four years after the *Borden* decision, the Court considered the application of antitrust laws to the commercial banking industry for the first time in *United States v. Philadelphia National Bank*.[63] In *Philadelphia National Bank*, the United States sought to enjoin a proposed merger of the Philadelphia National Bank and Girard Trust Corn Exchange Bank.[64] The district court held that section 7 of the Clayton Act[65] did not apply to bank

52. 308 U.S. 188 (1939).
53. *Id.* at 194.
54. *Id.* at 191.
55. 7 U.S.C. §§ 671-674 (2006).
56. *Id.* §§ 291-292.
57. *Borden*, 308 U.S. at 191.
58. *Id.* at 192.
59. *Id.*
60. *Id.* at 198 (citing United States v. Tynen, 78 U.S. (11 Wall.) 88, 92 (1890)).
61. *Id.* at 201.
62. *Id.* at 204-05.
63. 374 U.S. 321 (1963).
64. *Id.* at 323.
65. 15 U.S.C. §§ 12-14, 15(a)-(h), 16-17, 18(a), 19, 21-25, 26(a)-(b), 27 (2006); 29 U.S.C.

mergers because banks are not corporations "subject to the jurisdiction of the Federal Trade Commission."[66]

The United States Supreme Court disagreed with the district court, citing legislative history and intent clearly showing that banks were corporations subject to Federal Trade Commission jurisdiction within the meaning of section 7 of the Clayton Act.[67] The Court also viewed the statute through the implied immunity framework, recognizing that implied immunity from antitrust laws was not favored, and stating that "[t]his canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here."[68] The Court proceeded to reverse the district court's decision and enjoin the proposed merger.[69]

In *Otter Tail Power Co. v. United States*,[70] the Court considered the application of antitrust laws to the electric power industry.[71] In *Otter Tail*, the United States brought a civil suit against the Otter Tail Power Company alleging that Otter Tail had monopolized and attempted to monopolize under section 2 of the Sherman Act.[72] The district court found that Otter Tail, a retail seller of electric power in Minnesota, North Dakota, and South Dakota, attempted to prevent several communities from replacing Otter Tail's retail distribution franchise with a municipal distribution system at the expiration of the franchise.[73] Otter Tail attempted to defeat these proposed systems through a host of anticompetitive activities, including refusals to deal and the initiation of litigation against municipalities attempting to establish their own distribution systems.[74]

The district court enjoined Otter Tail from engaging in these anticompetitive activities.[75] On appeal to the United States Supreme Court, Otter Tail contended that the Federal Power Act granted it antitrust immunity with respect to its refusal to deal.[76] The Court rejected this argument.[77] It cited *Philadelphia National Bank* for the proposition that repeals of antitrust law by

§§ 52, 53.

66. *Phila. Nat'l Bank*, 374 U.S. at 335 (quoting 15 U.S.C. § 18) (internal quotation marks omitted).

67. *Id.* at 335-49.

68. *Id.* at 348.

69. *Id.* at 372.

70. 410 U.S. 366 (1973).

71. *Id.* at 368.

72. 15 U.S.C. § 2.

73. *Otter Tail*, 410 U.S. at 368.

74. *Id.*

75. *Id.* at 368-69.

76. *Id.* at 372.

77. *Id.*

implication are disfavored, and acknowledged that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws."[78]

The Court concluded that nothing in the legislative history of the Federal Power Act rendered electric power companies immune from the antitrust laws, and the authority of the Federal Power Commission did not provide a substitute for antitrust regulations.[79]

Eight years later, the Court examined antitrust immunity in the context of the National Health Planning and Resources Development Act of 1974 (NHPRDA)[80] in *National Gerimedical Hospital & Gerontology Center v. Blue Cross of Kansas City*.[81] In *National Gerimedical*, the plaintiff hospital failed to receive acceptance as a participating provider under Blue Cross' health care plan.[82] The plaintiff filed suit alleging a wrongful refusal to deal and a conspiracy within the meaning of the Sherman Act between Blue Cross and Mid-America Health Systems Agency, a Kansas City health planning agency.[83]

Blue Cross moved to dismiss the plaintiff's complaint on the ground that the NHPRDA had repealed the antitrust laws by implication.[84] The district court treated the defendant's motion to dismiss as a motion for summary judgment and found for the defendant, holding that a "clear repugnancy" existed between the NHPRDA and the antitrust laws.[85] The United States Court of Appeals for the Eighth Circuit affirmed the decision of the district court, also finding a clear repugnancy.[86]

The United States Supreme Court began its implied immunity analysis by stating the standard set forth by previous implied immunity cases: that repeals by implication are disfavored,[87] that there must be a "clear repugnancy between the antitrust laws and the regulatory system" at issue,[88] and that intent to repeal the antitrust laws must be clear.[89]

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78. *Id.*
79. *Id.* at 374-75.
80. 42 U.S.C. §§ 300q, 300q-2, 300r, 300s-1a, 300s2 to -5, 300t (2006).
81. 452 U.S. 378 (1981).
82. *Id.* at 380.
83. *Id.* at 382.
84. *Id.*
85. *Id.* (citing Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City, 479 F. Supp. 1012, 1024 (W.D. Mo. 1979)).
86. *Id.* at 383.
87. *Id.* at 388 (quoting United States v. Nat'l Ass'n of Sec. Dealers, 422 U.S. 694, 719-20 (1975)).
88. *Id.*
89. *Id.* at 389.

Recognizing that the relevant regulatory scheme differed from any it had considered before, the Court also discussed the function and legislative history of the NHPRDA.[90] Though the Court examined the regulatory scheme at length, it found that no clear repugnancy existed that would create an implied repeal of antitrust laws.[91]

III. Credit Suisse Securities v. Billing

A. Facts and Procedural History

Credit Suisse arises out of two class action lawsuits filed in the United States District Court for the Southern District of New York, which were later consolidated.[92] Both groups of plaintiffs alleged antitrust injuries in connection with their purchase of initial public offering shares of certain technology-related securities (referred to as "Class Securities") during the "dot-com" boom of the late 1990s.[93]

One group of plaintiffs (deemed the "Sherman Act Plaintiffs" by the Court) alleged violations of the Sherman Act[94] and state antitrust laws by ten investment banks (deemed "Underwriter Defendants" by the Court)[95] who underwrote the majority of technology-related initial public offerings during the relevant time period.[96] The Sherman Act Plaintiffs alleged that the Underwriter Defendants used the fixed price equity underwriting system (referred to as the "syndicate system") to inflate the aftermarket prices of the Class Securities through a host of anticompetitive activities.[97] Those activities included requiring the Sherman Act Plaintiffs to pay non-competitively determined commissions on later securities purchases, requiring the Sherman Act Plaintiffs to commit to buy other, less attractive securities (a practice known as "tying"), and forcing the Sherman Act Plaintiffs to purchase shares of Class Securities in secondary offerings at higher prices (a practice known as "laddering").[98] The Sherman Act Plaintiffs alleged that the Underwriting

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90. *Id.* at 383-89.
91. *Id.* at 391.
92. *In re* Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d 497 (S.D.N.Y. 2003).
93. *Id.* at 499.
94. 15 U.S.C. §§ 1-7 (2006).
95. The "Underwriter Defendants" were Bear, Stearns & Co., Inc.; Credit Suisse First Boston Corp.; Deutsche Bank Alex. Brown; Goldman Sachs & Co.; J.P. Morgan Chase & Co.; Lehman Brothers, Inc.; Merrill Lynch, Pierce, Fenner & Smith, Inc.; Morgan Stanley & Co., Inc.; Robertson Stephens, Inc.; and Solomon Smith Barney, Inc. *In re* Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d at 499.
96. *Id.*
97. *Id.*
98. *Id.* at 500.

Defendants used the syndicate system to promote their anticompetitive activity through "road shows"[99] and other information-sharing practices.[100]

The Sherman Act Plaintiffs argued that these practices "increase[d] the consideration that aftermarket purchasers paid for the Class Securities above the levels that would have existed in a competitive market" and "create[d] artificial demand for the Class Securities, thereby inflating their price."[101]

The second group of plaintiffs (deemed the "Robinson-Patman Act Plaintiffs") alleged the same conduct as the Sherman Act Plaintiffs, but also alleged that the Underwriter Defendants violated the Robinson-Patman Act[102] by favoring long-term investors over "flippers"[103] in their allocation of "hot issue" shares of stock sold through initial public offerings.[104] The Robinson-Patman Act Plaintiffs also alleged that most of the Underwriting Defendants and certain institutional investors (deemed the "Institutional Defendants")[105] agreed not to flip the shares they received from the Underwriter Defendants in exchange for favorable IPO allocations and that the Institutional Defendants paid or received money for such allocations.[106] The Robinson-Patman Act Plaintiffs argued that such preferential treatment toward long-term investors "tends to assure an excess of purchasers over sellers and to drive the market price of the securities upward."[107]

The Underwriting Defendants moved to dismiss the Sherman Act claim and the Robinson-Patman Act claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the conduct alleged by both classes was immune from scrutiny under federal and state antitrust laws.[108] The Underwriter Defendants also moved to dismiss on other Rule 12(b)(6)

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99. A "road show" is a "series of meetings with potential investors in key cities, designed and performed by a company and its investment banker as the company prepares to go public." *Id.* (quoting NASD: Resources-Glossary, http://www.finra.org/Resources/Glossary/P011147 (last visited Oct. 9, 2007)).

100. *Id.*

101. *Id.* (internal citations omitted).

102. 15 U.S.C. § 13(c) (2006).

103. In their complaint, the Robinson-Patman Act Plaintiffs defined a "flipper" as a "customer who sells his allocation of securities within twenty-four to forty-eight hours after purchasing them on the effective date of the offering." *In re* Initial Pub. Offering Antitrust Litig., 287 F. Supp. 2d at 500 n.4.

104. *Id.* at 500.

105. The Institutional Defendants were Fidelity Distributors Corporation; Fidelity Brokerage Services LLC; Fidelity Investments Institutional Services Co.; Janus Capital Corporation; Comerica, Inc.; Van Wagoner Capital Management, Inc.; and Van Wagoner Funds, Inc. *Id.* at 500 n.3.

106. *Id.* at 500.

107. *Id.*

108. *Id.* at 501.

grounds; however, the district court found the antitrust immunity issue to be dispositive and did not consider the other issues raised by the Underwriter Defendants.[109]

The district court granted the Underwriter Defendants' Rule 12(b)(6) motion on the basis that the conduct alleged by both groups of plaintiffs was impliedly immune from federal and state antitrust liability.[110] The district court based its decision on the potential for conflict between the antitrust and securities laws, reasoning that "[a]ny other result would force the defendants to navigate the Scylla of securities regulation and Charybdis of antitrust law."[111] The Sherman Act Plaintiffs moved for partial reconsideration, asserting that the finding of implied immunity with respect to the federal antitrust claims should not keep the state antitrust claims from advancing.[112] The district court denied this motion, stating that preemption of the state antitrust claims was appropriate.[113]

Both classes of plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which heard the case in December 2004 and rendered its opinion in September 2005.[114] The Second Circuit found the implied immunity decision of the district court to be overly broad and stated that securities laws did not protect the defendants' anticompetitive behavior.[115] The Second Circuit observed that "[t]he district court's decision goes too far. The heart of the alleged anticompetitive behavior finds no shelter in the securities laws."[116]

The Underwriting Defendants petitioned the United States Supreme Court for certiorari, which the Court granted in December 2006.[117] The Court heard arguments on the case on March 27, 2007, and rendered its opinion on June 18, 2007.[118]

B. Issue and Holding

The Court framed the issue as whether a "plain repugnancy" existed between the respondents' antitrust claims and federal securities laws.[119] Such

109. *Id.*
110. *Id.* at 499.
111. *Id.*
112. *In re* Initial Pub. Offering Antitrust Litig., Nos. 01 Civ.2014(WHP) & 01 Civ.11420(WHP), 2004 WL 789770 (S.D.N.Y. Apr. 13, 2004).
113. *Id.* at *3.
114. Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130 (2d Cir. 2005).
115. *Id.* at 137.
116. *Id.*
117. Credit Suisse First Boston Ltd. v. Billing, 549 U.S. 1092 (2006).
118. Credit Suisse Sec. v. Billing, 551 U.S. 264 (2007).
119. *Id.* at 267 (internal quotation marks omitted).

a repugnancy would result in the repeal of antitrust laws by implication and the dismissal of the plaintiffs' antitrust claims.

In an opinion by Justice Breyer, the Court held 7-1[120] that securities laws are "clearly incompatible with the application of antitrust laws in this context" and reversed the Second Circuit's decision.[121] Justice Stevens concurred in the judgment of the Court but not its opinion.[122] Justice Thomas dissented.[123]

C. The Court's Rationale

In rendering its decision, the Court relied upon *Silver*, *Gordon*, and *NASD* as precedent for reconciling securities law and antitrust law.[124] These three cases, the Court asserted, indicate that a court deciding this issue must determine whether a "clear repugnancy" exists between securities law and antitrust claims.[125]

The Court set the framework for its consideration of the issue using principles applied in *Gordon* and *NASD*, noting that the *Gordon* and *NASD* courts deemed the following factors critical in deciding whether sufficient incompatibility exists to warrant implied immunity from antitrust liability: "(1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct."[126]

The Court also gleaned a fourth factor from *Gordon* and *NASD*—whether the potential conflict between securities and antitrust laws affects practices falling "squarely within an area of financial market activity that the securities law seeks to regulate."[127]

Considering the fourth factor first, the Court discussed the underwriters' ability to jointly promote and sell newly issued securities—the practice which prompted the plaintiffs' claims.[128] The Court found that the joint underwriting activities giving rise to the alleged anticompetitive activity in this case were

120. Justice Kennedy did not participate in the decision of the Court. *Id.* at 285. His son, Gregory, is a managing director of Credit Suisse Securities. Linda Greenhouse, *Justices Back Underwriters on New Issues*, N.Y. TIMES, June 19, 2007, at C1.

121. *Credit Suisse*, 551 U.S. at 285 (internal quotation marks omitted).

122. *Id.* at 285-87.

123. *Id.* at 287-90.

124. *Id.* at 271-75.

125. *Id.* at 275.

126. *Id.* at 275-76.

127. *Id.* at 276.

128. *Id.*

"essential to the successful marketing of an IPO."[129] Therefore, the Court held that the respondents' antitrust claims "concern practices that lie at the very heart of the securities marketing enterprise," and the fourth factor of the *Gordon* test was met.[130]

Next, the Court moved to the first factor—whether regulatory authority exists to supervise the activities at issue.[131] Citing provisions of the federal securities laws,[132] the Court found that the SEC had sufficient authority to "forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage"[133] and that the SEC's ability to regulate satisfied the first *Gordon* guideline.

The Court then considered the second factor–whether the supervising entity actually exercises its authority to regulate the activities at issue.[134] The Court found that the SEC has exercised this authority, citing the Commission's strict instructions on what underwriters may and may not do during road shows and its actions against underwriters who violate these regulations.[135] Also persuasive to the Court was the ability of private litigants to bring securities actions for conduct similar to that complained of by the respondents.[136] These actions, the Court reasoned, amounted to a sufficient exercise of SEC authority to regulate the conduct at issue; accordingly, the second factor of the *Gordon* framework was met.[137]

The bulk of the Court's opinion focused on the third *Gordon* factor–whether the application of both securities and antitrust law will result in conflicting standards of conduct. In considering whether such a conflict existed, the Court pointed to several potential problems with the concurrent application of securities and antitrust law.[138] First, the Court reasoned, an extremely "fine, complex, detailed line separates" the permissible from the impermissible in the SEC's regulation of the conduct at issue.[139] Making distinctions between what

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129. *Id.*
130. *Id.*
131. *Id.*
132. The Court cited 15 U.S.C. §§ 77(b)(a)(3), 77(j), and 77z-2 as a grant of authority to the SEC to regulate bookbuilding and communications between underwriters and their customers, encompassing communications occurring during road shows, and 15 U.S.C. §§ 78o(c)(2)(D), 78i(a)(6), and 78j(b) as a grant of power to the SEC to define and prevent fraudulent, deceptive, and manipulative practices. *Id.* at 276-77.
133. *Id.* at 276.
134. *Id.* at 276-77.
135. *Id.* at 277.
136. *Id.*
137. *Id.*
138. *Id.* at 279-80.
139. *Id.* at 279.

is forbidden and what is allowed in this context requires the knowledge of a securities expert, and will prove "difficult for someone who is not familiar with accepted syndicate practices . . . ."[140]

Second, the Court found that an overlap of evidence may exist between unlawful antitrust activity and lawful securities marketing activity.[141] Third, the Court found that allowing antitrust plaintiffs to bring securities-related lawsuits before nonexpert judges and juries throughout the nation would potentially produce inconsistent results.[142]

Based on these considerations, the Court found the application of antitrust laws to the conduct at issue met the third *Gordon* factor[143]—a risk that the securities laws and the antitrust laws would provide "conflicting guidance, requirements, duties, privileges, or standards of conduct."[144] The Court stated that "[t]ogether these factors mean there is no practical way to confine antitrust suits so that they challenge only activity of the kind the investors seek to target . . . . Rather, these factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect."[145] The Court noted that allowing antitrust lawsuits with the potential for such errors "would threaten serious harm to the efficient functioning of the securities markets."[146]

The Court found all four elements of *Gordon* to be present in this case and held that securities laws and the antitrust laws were "clearly incompatible." Accordingly, the Court reversed the Second Circuit's decision.[147]

Justice Stevens concurred only in the Court's judgment.[148] He stated his belief that courts should treat agreements among underwriters in the marketing of initial public offerings "as procompetitive joint ventures" under the antitrust laws, and that such joint ventures rarely result in conspiracy liability under the Sherman Act.[149] Justice Stevens argued that although the practices allegedly committed by the petitioners in this case may have been injurious, they do not give rise to an antitrust claim.[150] Consequently, he would have found that the defendants' conduct did not violate antitrust laws, "rather than holding that Congress has implicitly granted them immunity from those laws."[151]

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140. *Id.* at 280.
141. *Id.* at 281.
142. *Id.* at 281-82.
143. *Id.* at 281-83.
144. *Id.* at 275-76.
145. *Id.* at 282.
146. *Id.* at 283.
147. *Id.* at 285.
148. *Id.* (Stevens, J., concurring in judgment).
149. *Id.* at 285-86.
150. *Id.* at 285-87.
151. *Id.* at 287.

Justice Thomas' dissent centered on the saving clauses found in the Securities Act of 1933 and the Securities Exchange Act of 1934.[152] Justice Thomas asserted that the antitrust laws clearly fell within the "'rights and remedies' that existed" when Congress passed the Securities Act and the Securities Exchange Act because the Sherman Act was passed in 1890.[153] Justice Thomas stated, "There is no convincing argument for why these saving provisions should not resolve this case in respondents' favor."[154]

Thomas also attacked the petitioners' contention that the saving clauses should not apply because the Court did not consider them in its analysis of previous securities-antitrust implied immunity cases.[155] In response to this argument, Thomas replied that "[a]bsent any indication that these omissions were the product of reasoned analysis instead of inadvertent oversight, I would not allow the Court's prior silence on this issue to erect a perpetual bar to arguments based on a full reading of the statute's relevant text."[156]

IV. Analysis

In *Credit Suisse*, when addressing the question of implied immunity in the securities context, the Supreme Court appears to be more concerned with the potential complex litigation that could result from the concurrent application of antitrust and securities law than with decades of precedent stating that antitrust law should only be repealed by implication when absolutely necessary. By failing to give weight to such precedent and rejecting a compromise approach suggested by the Solicitor General, the *Credit Suisse* Court has promulgated a lower standard for implied immunity that threatens to expand beyond the securities context into any industry governed by a federal regulatory scheme.

A. The Court Departs from Precedent

The *Credit Suisse* Court broke from precedent when it found implied immunity even though there was no "plain repugnancy" between securities law and antitrust law with respect to the defendants' alleged anticompetitive

152. *Id.* at 288-89 (Thomas, J., dissenting). The saving clause contained in the Securities Act of 1933 reads, "The rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. § 77p(a) (2006). The saving clause contained in the Securities Exchange Act of 1934 reads, "The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." 15 U.S.C. § 78bb(a) (2006).

153. *Credit Suisse*, 551 U.S. at 288-89 (Thomas, J., dissenting).

154. *Id.* at 288.

155. *Id.* at 288-89.

156. *Id.* at 289.

conduct. The Court appropriately found implied immunity in *Gordon*, where SEC regulations allowed the very conduct that the plaintiffs claimed was illegal under antitrust laws.[157] The Court also repealed the antitrust laws by implication in *NASD* because the antitrust laws and securities laws were in direct conflict—the resale price maintenance engaged in by the defendants was per se illegal under the antitrust laws but allowed under the securities laws.[158]

No such conflict exists under the facts of *Credit Suisse*. Though the SEC has broad authority over the IPO process, it has previously disapproved of the laddering and tying activities complained of by the plaintiffs.[159] The antitrust laws and securities laws are in accord on this point. Because neither antitrust laws nor securities laws allow the anticompetitive activities allegedly engaged in by the defendants, no "clear repugnancy" exists between the two schemes.

The Court accepted the premise of this argument when it was offered by the plaintiffs.[160] Nevertheless, the Court concluded that the securities laws were "clearly incompatible" with the application of antitrust laws.[161] The Court based this on its finding of a fine line between what is permissible and impermissible activity in the IPO context, the potential for overlap of evidence used to prove both unlawful antitrust activity and lawful securities activity, and the risk of antitrust juries delivering inconsistent results.[162]

Though the Court raises valid concerns, they do not present a conflict of the type found in *Gordon* and *NASD*. Mark J. Botti, writing for the Andrews Antitrust Litigation Reporter, speculates that the Court's change in terminology in *Credit Suisse* can be attributed to the facts of the case, which exhibit a lesser conflict between securities laws and antitrust laws. He explains:

> [T]he Supreme Court extended prior decisions that had only displaced the antitrust laws when they were "clearly repugnant" to some other statutory scheme. The Court changed its test to now ask whether the antitrust laws were only "clearly incompatible" with the other statutory framework. While the actual difference between the linguistic changes from "repugnant" to "incompatible" is not something capable of precise definition, the implication of the change is that the Court believed it necessary in order to decide the case the way it did.[163]

157. Gordon v. N.Y. Stock Exch., 422 U.S. 659 (1975).
158. United States v. Nat'l Ass'n of Sec. Dealers, 422 U.S. 694 (1975).
159. *See* SEC Regulation M, 17 C.F.R. §§ 242.100-242.405 (2005).
160. *Credit Suisse*, 551 U.S. at 2394.
161. *Id.* at 279.
162. *Id.* at 279-80.
163. Mark J. Botti, *Four Suits Deal a Weak Hand to Antitrust Plaintiffs: A Review of Cases*

Clearly, this change in terminology represents more than a mere difference in semantics. The shift from "clearly repugnant" to "clearly incompatible" signifies a break from nearly seventy years of Supreme Court jurisprudence, which required an irreconcilable conflict between antitrust laws and an applicable regulatory scheme before justifying implied antitrust immunity.[164]

The Court correctly concluded that antitrust litigation in the context of an IPO would likely be complex and ridden with evidentiary difficulties. These are not the types of difficulties, however, that would have lead to a finding of implied immunity if the Court had applied the "clear repugnancy" standard. Prior implied immunity cases have instructed that repeal of the antitrust laws is appropriate only when applying the laws would render the applicable regulatory scheme nugatory.[165] Declaring the antitrust laws inapplicable with respect to a certain regulatory scheme simply because applying them might be difficult is not warranted under Supreme Court precedent.

B. The Court Rejects a Moderate Approach

Another interesting facet of the *Credit Suisse* opinion is the Court's rejection of the position taken by the Solicitor General, which the Court considered to be "a compromise between the differing positions that the SEC and Antitrust Division of the Department of Justice took in the courts below."[166] The Court's unwillingness to accept this moderate approach provides further evidence of its eagerness to expand implied immunity at the expense of antitrust law.

According to the Solicitor General, neither the district court nor the court of appeals struck the correct balance between the competing interests of antitrust law and securities law.[167] By dismissing the plaintiffs' complaint with prejudice, the district court gave "too little weight to the antitrust laws and

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From the Supreme Court's 2006 Term, Andrews Antitrust Litig. Rep., Nov. 7, 2007, at 13, 13 (vol. 15, no. 8), *available at* 15 No. 8 ANANTILR 13 (Westlaw).

164. *See* Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City, 452 U.S. 378, 388-89 (1981)(citing United States v. Nat'l Ass'n of Sec. Dealers, 422 U.S. 694, 719-20 (1975) (acknowledging the "clear repugnancy" standard required to find implied immunity); Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973) (citing United States v. Phila. Nat'l Bank, 374 U.S. 321, 350-51 (1963)) (recognizing the need to find "plain repugnancy" in order to find implied immunity); United States v. Borden Co., 308 U.S. 188, 199 (1939) (requiring "positive repugnancy" between the laws).

165. *See Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694; Gordon v. N.Y. Stock Exch., 422 U.S. 659 (1975); Silver v. N.Y. Stock Exch., 373 U.S. 341 (1963); *see also Nat'l Gerimedical Hosp.*, 452 U.S. 378; *Otter Tail*, 410 U.S. 366; *Phila. Nat'l Bank*, 374 U.S. 321; *Borden*, 308 U.S. 188.

166. *Credit Suisse*, 551 U.S. at 284.

167. Brief for the United States as Amicus Curiae Supporting Vacatur at 9, *Credit Suisse*, 551 S. Ct. 264 (No. 05-1157).

their fundamental policy of competition."[168] Conversely, the finding of no implied immunity by the Second Circuit did not afford "adequate protection for the securities laws' policy of encouraging certain types of collaborative activity."[169] This lack of protection could stifle legitimate collaborative practices in the IPO context.[170]

The Solicitor General acknowledged the problematic nature of applying antitrust laws to IPO activity, stating that "distinguishing between permissible and impermissible conduct in the IPO context can present close and difficult questions in some circumstances."[171] The Solicitor General also cautioned against giving blanket immunity for all conduct related to IPOs, noting that "it does not follow that every alleged agreement among IPO participants to inflate prices through tie-ins or laddering is necessarily immune from antitrust scrutiny on the ground that it is inextricably intertwined with approved conduct."[172]

The Solicitor General advised the Court to circumvent the potential for evidentiary confusion and avoid a chilling effect on legitimate collaborative activity by using a pleading standard for IPO-related antitrust claims that would require a plaintiff to "make clear that the claims alleged do not rest on impermissible inferences from protected conduct."[173] The Solicitor General emphasized that this was not a heightened pleading standard; rather, it was based on "the accepted principle that the adequacy of a complaint to demonstrate a reasonable basis for inferring wrongful conduct must be measured against the substantive legal standards applicable to that claim."[174] The substantive legal standard in this case was the need to give meaning to both securities regulations and antitrust laws.[175]

The Solicitor General suggested that the case be remanded to the district court and the respondents be allowed to amend their complaint to meet the necessary legal standard.[176] He also argued that the Court should narrowly tailor discovery under Federal Rules of Civil Procedure 16 and 26[177] and "strictly limit" introduction of evidence of practices protected by the securities laws through Federal Rules of Evidence 105, 402, and 403 as mechanisms to

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168. *Id.* at 10.
169. *Id.* at 23.
170. *Id.*
171. *Id.* at 20.
172. *Id.*
173. *Id.* at 25.
174. *Id.*
175. *Id.*
176. *Id.* at 28.
177. *Id.* at 28-29.

ensure that the petitioners would not be prejudiced by their legitimate collaborative activity.[178] The Solicitor General further suggested that "the court must grant judgment for petitioners" if it determines respondents cannot "establish an antitrust violation without relying on conduct that is authorized by the regulatory scheme or cannot be practicably separated from authorized conduct[.]"[179]

The Solicitor General's approach would allow plaintiffs to pursue antitrust lawsuits within a securities-related context while protecting defendants from being prejudiced by unfair inferences derived from their legal conduct. This would give meaning to both antitrust and securities law rather than favoring one at the exclusion of the other. This approach, however, did not satisfy the Supreme Court's desire to avoid the complexities of trying antitrust claims in a securities framework.[180] The Court rejected the suggestions of the Solicitor General, stating that they did not "convincingly address" the Court's concerns of overlapping of evidence, the need for expert decision making in securities-related lawsuits, and the potential for inconsistent results that would lead to chilling effects in the IPO realm.[181]

Though the Court's concerns regarding the potential for confusion are valid, its failure to reconcile antitrust laws and securities laws in a way that would give meaning to both policies is not. The Solicitor General's suggestions, had the Court implemented them, would result in extremely complex litigation requiring extensive judicial management. Complex antitrust-securities litigation with proper procedural safeguards, however, is preferable to ousting antitrust laws in favor of a regulatory scheme, especially in light of decades of Supreme Court precedent disfavoring repeals of antitrust law by implication.

C. Significance of the Credit Suisse *Decision in Antitrust Enforcement and Implied Immunity Analysis*

The Supreme Court's approach in *Credit Suisse* severely undermines the importance of antitrust laws to the functioning of the American economy. In *United States v. Topco Associates*,[182] Justice Thurgood Marshall wrote, "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic

178. *Id.* at 29; *see* FED. R. EVID. 105, 402-03 (ensuring parties are not unduly prejudiced by the introduction of evidence, in this case, of petitioners' collaborative activity that is legitimate under securities laws).

179. Brief for the United States as Amicus Curiae Supporting Vacatur, *supra* note 167, at 29.

180. Credit Suisse Sec. v. Billing, 551 U.S. 264, 284-85 (2007).

181. *Id.*

182. 405 U.S. 596 (1972).

freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[183] In *Carnation Co. v. Pacific Westbound Conference*, Chief Justice Warren characterized antitrust laws as "a fundamental national economic policy."[184] Antitrust principles should work with other laws whenever possible; they should not be tossed aside because their application would make litigation too complex.

Another troubling facet of the *Credit Suisse* holding is its overbreadth. The Court does not appear to limit its ruling to the IPO context; rather, implied immunity could extend to any activity ruled to be within the "heartland" of securities regulations. According to antitrust attorney Stephen J. Hill, "Justice Stephen Breyer's sweeping majority opinion leaves virtually no room for any private action with respect to conduct within the reach of the SEC's regulatory authority."[185] The broad holding of *Credit Suisse* could potentially eliminate an avenue for private plaintiffs, as well as government entities, to address any securities-related antitrust violations, not just those related to an IPO.

The implications of the *Credit Suisse* decision for future implied immunity cases are even more troubling. According to securities expert Bruce H. Schneider, the "clearly incompatible" standard for implied antitrust immunity announced by the *Credit Suisse* decision will lead to more frequent findings of implied immunity in regulated industries:

> It is widely perceived that the Supreme Court's recent decision in *Credit Suisse Securities (USA) LLC v. Billing* conferred on the securities industry enormous protection from antitrust liability . . . Other federally regulated or quasi-regulated industries undoubtedly will look to this decision to determine whether practices in their respective industries qualify for similar immunity.[186]

It is easy to see how members of other regulated industries could use *Credit Suisse* to their advantage in order to obtain immunity from the antitrust laws under the new, lower standard. Before *Credit Suisse*, an antitrust defendant in a regulated industry had to prove that application of antitrust laws to industry practices would render the regulatory scheme futile. Now a similar defendant

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183. *Id.* at 610.

184. Carnation Co. v. Pac. Westbound Conference, 383 U.S. 213, 218 (1966).

185. Stephen J. Hill, *Supreme Court Decision Precludes Overlap Between Antitrust and Securities Laws*, Andrews Sec. Litig. & Reg. Rep., Oct. 3, 2007, at 4, *available at* http://www.parrbrown.com/articles/20081222-111031316.pdf.

186. Bruce H. Schneider, Credit Suisse v. Billing *and a Case for Antitrust Immunity for Mortgage Lenders Subject to Federal Regulation*, 124 BANKING L.J. 833, 833 (2007).

need only argue persuasively that application of antitrust laws to the regulated industry would be complicated or impractical.

V. Conclusion

The United States Supreme Court's decision in *Credit Suisse Securities v. Billing* will likely have a number of positive effects within the securities sector. *Credit Suisse* will likely decrease the number of antitrust suits brought within the securities industry, thus decreasing the drain on judicial resources caused by complex, costly, discovery-intensive litigation. The Court's decision in *Credit Suisse* also eliminates the potential for crafty plaintiffs to circumvent securities-related pleading standards by bringing securities lawsuits under the guise of antitrust laws, and eliminates the potential chilling effect of antitrust liability on IPO activity.

However, the positive effects of *Credit Suisse* are outweighed by one critical negative effect: the virtual elimination of public or private enforcement of antitrust laws within the entire securities context. This outcome will likely extend into a number of other regulated industries, forcing the objective of protecting competition further down the national agenda.

The resolution of the tension between regulation and competition does not require the harsh result that the Court believed to be necessary in this case. A better result would be one that gives meaning to both bodies of law, allowing them to operate side-by-side in a manner that promotes the unique policies and goals of each and emphasizing the distinct place of each in America's legal landscape.

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