WLF Washington Legal Foundation
Advocate for freedom and justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302

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COURT RULES THAT ANTITRUST LAW DOES NOT APPLY TO IPOs

(Credit Suisse Securities (USA) LLC v. Billing)

The U.S. Supreme Court ruled today that plaintiffs' attorneys may not impose new restraints on the securities industry by bringing antitrust suits against investment bankers for the manner in which they conduct IPOs ("initial public offerings" of securities).

The decision was a victory for the Washington Legal Foundation (WLF), which filed a brief in the case, *Credit Suisse Securities (USA) LLC v. Billing*, arguing against expansion of antitrust laws. The Court agreed with WLF that the securities industry is already fully regulated under the Securities Exchange Act of 1934 and other securities laws, and that permitting another layer of regulation would likely lead to conflicting rules. WLF's brief was drafted with the pro bono assistance of lawyers from Orrick, Herrington & Sutcliffe LLP, including Howard M. Ullman, James A. Meyers, Antony P. Kim, Garret G. Rasmussen, Erin L. Bansal, Cathy Lui, and Daniel Tyukody.

The underlying suits, filed against ten leading investment banks, arose out of initial public offerings for internet and technology stocks during the "bubble" market of the late 1990s. The suits alleged that the defendants conspired to impose anticompetitive charges on prospective IPO purchasers and to inflate the aftermarket prices of offered securities. The suits claimed that those activities constituted an antitrust conspiracy in restraint of trade, in violation of the Sherman Act.

It is uncontested, however, that the defendants' practices are heavily regulated under federal securities laws and by rules established by the Securities and Exchange Commission (SEC). The Supreme Court agreed with WLF that when Congress adopted comprehensive securities laws, it intended thereby largely to displace application of the antitrust laws to the securities industry.

The district court dismissed the case on that ground, but the U.S. Court of Appeals for the Second Circuit reinstated it. The Supreme Court subsequently agreed to review the Second Circuit's decision. Today's decision reverses the appeals court and reinstates the district court's dismissal. Interestingly, in the lower courts, the SEC and the U.S. Department of Justice (DOJ) were on opposite sides of the case. The SEC agreed with the defendants that their underwriting practices should be deemed impliedly immune from the antitrust laws, while DOJ sided with the plaintiffs.

Before the Supreme Court, the U.S. Solicitor General's office attempted to craft a compromise position between the views of DOJ and the SEC: it asked the Court to remand the case to the district court to see whether there was any way to separate the more serious antitrust allegations raised in the complaint (allegations that, if true, would also constitute violations of the securities laws) from antitrust allegations regarding IPO conduct that the SEC has explicitly endorsed. The Supreme Court rejected that compromise position; it foresaw no way that courts could easily separate those two types of antitrust claims. Because it did not believe that such separation was possible, the Court ruled that all such antitrust claims are barred; otherwise, the Court warned, there was too great a danger that antitrust suits by plaintiffs' lawyers would lead to inconsistent results and would deter IPO conduct that the SEC actively encourages.

"The actions about which the plaintiffs complain are necessarily immune from antitrust attack because they are actively regulated by the SEC under three broad grants a statutory authority," WLF Chief Counsel Richard Samp said after reviewing the Supreme Court's decision. "Subjecting the defendants to antitrust liability would pose an actual or potential conflict with the SEC's regulatory scheme," Samp said.

In its brief, WLF argued that subjecting the defendants to antitrust enforcement not only was contrary to congressional intent, but also was bad public policy. WLF argued that layering treble-damage antitrust suits on top of the already robust SEC regulatory framework threatened to deter conduct that is beneficial and even crucial to the proper functioning of U.S. equity markets. WLF argued that, given the mounting perception abroad that U.S. markets are replete with excessive regulatory and litigation risks, the specter of antitrust liability would only further diminish the attractiveness and competitiveness of the U.S. with respect to global capital-raising activities.

WLF is a public interest law and policy center with supporters in all 50 states. It devotes a substantial portion of its resources to promoting tort reform and reining in excessive litigation.

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For further information, contact WLF Chief Counsel Richard Samp, (202) 588-0302. A copy of WLF's brief is posted on its website, www.wlf.org.