

The Supreme Court Curbs Antitrust Lawsuits Challenging Securities-Related Conduct

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*Credit Suisse Securities (USA) LLC v. Billing*¹ is the Supreme Court's first implied immunity decision concerning the interface of the federal securities statutes with the federal antitrust laws in nearly three decades. In *Billing*, the Court expanded the scope of the immunity doctrine and clarified the standard that lower courts should apply when plaintiffs bring antitrust claims challenging conduct that is regulated under the securities laws. While *Billing* is certainly not the last chapter in this story, the Court's decision provides flexible, pragmatic standards designed to ensure both that: (a) there is an enforcement mechanism to redress the challenged conduct; and (b) defendants are not subject to potentially conflicting standards of conduct, which could chill certain conduct that the Securities and Exchange Commission (SEC) deems beneficial.

Implied immunity is a defense exempting a defendant from antitrust liability in cases involving the application of the antitrust laws to conduct subject to another statutory and/or regulatory scheme, where that application could result in conflicting norms for defendants. The implied immunity doctrine is, thus, an exception to the traditional principle of statutory interpretation that "the existence of duties under one federal statute does not, absent express congressional intent to the contrary, preclude the imposition of overlapping duties under another federal statutory regime."² The overarching question in the implied immunity analysis is whether a "repugnance" exists between the antitrust laws' "competition-first" principles and the more nuanced norms prescribed by the other relevant regulatory scheme. Repugnance often turns on whether the regulator in question has the power to permit the conduct that plaintiffs challenge under the antitrust laws. For this reason, *Billing* presented a tougher challenge for the Court than most implied immunity cases because plaintiffs contended that the SEC could never permit the core challenged conduct.

The Supreme Court overcame this hurdle by grounding its decision largely in the novel "chilling effect" rationale. The SEC had made the chilling effect argument in its amicus submission to the district court, arguing that applying the Sherman Act and the treble damages remedy to the allegedly illegal manipulative conduct would cause underwriters to steer so clear of the allegedly illegal conduct that they would be chilled from engaging in conduct that the SEC permits. The danger of this happening, the Court explained, was very real because the difference between permissible and forbidden conduct in this context often turns on fine line-drawing that often involves ambiguous evidence. The Court believed that, in some circumstances, only the SEC would be competent to draw the appropriate lines between the forbidden and permissible. Ultimately, this potential over-deterrence troubled the Court because it meant that underwriters might avoid engaging in conduct beneficial to the capital formation process and impede the function of the nation's vital capital markets.

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¹ 127 S. Ct. 2383 (2007).

² *In re Worldcom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 767 (S.D.N.Y. 2003).

Notably, *Billing* was one of four major antitrust cases the Court decided this term. In all four—*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,³ *Bell Atlantic Corp. v. Twombly*,⁴ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,⁵ and *Billing*—the Solicitor General filed an amicus brief in support of the petitions for certiorari, urged reversal in favor of the defendants, and the Supreme Court reversed. As discussed more fully below, the Solicitor General's position in favor of the defendants in *Billing* was somewhat equivocal, stopping short of advocating immunity for the challenged conduct. But, in light of the Court's recent history of taking the course urged by the SG's office, the SG's position urging reversal in *Billing* certainly helped the defendants.

The Plaintiffs' Claims

The plaintiffs' claims arose out of the decline of the dot-com boom of the late 1990s and 2000. In December 2000, the *Wall Street Journal* reported that the SEC was investigating certain underwriters concerning alleged misconduct in connection with certain "hot" initial public offerings (IPOs) during the tech boom. The SEC was investigating claims that some banks required investors to pay large commissions to obtain allocations in hot offerings. In addition, the SEC was investigating whether the banks also required investors, as a condition of getting allocations, to buy additional shares in the aftermarket at agreed-upon escalating prices once public trading began. These agreements were purportedly reached in the course of the underwriters' "book-building" process, by which they solicit indications of interest from potential investors in the IPO in the course of road shows⁶ and other communications. As the SEC has recognized, by collecting these indications of interest, underwriters are able to assess the demand for the offering and better price the offering.⁷

Just four weeks after the *Wall Street Journal* initially reported the SEC's investigations, the plaintiffs filed the first of more than 1000 securities class actions alleging that 55 of the leading investment banks manipulated the aftermarket prices of the stocks of 310 companies that the banks took public between August 1998 and November 2000. The actions were eventually consolidated around the 310 different offerings at issue, and the 310 putative class actions were coordinated for pre-trial purposes, known as *In re Initial Public Offering Securities Litigation*.⁸ The core claim in all cases was that the defendants manipulated the aftermarket prices of the underwritten stocks by requiring investors to buy additional shares in the aftermarket as a condition of getting an IPO allocation.

In March 2001, still in the early stages of the onslaught of securities class action filings, one plaintiff filed an action under the Sherman Act based on the identical misconduct alleged in the securities class actions. Rather than alleging misconduct by the underwriters for a single IPO, the complaint alleged that ten underwriters conspired across IPOs to require investors to: (a) pay excessive commissions (later labeled by plaintiffs as "anticompetitive charges"); and (b) buy

³ 127 S. Ct. 2705 (2007).

⁴ 127 S. Ct. 1955 (2007).

⁵ 127 S. Ct. 1069 (2007).

⁶ Road shows involve the underwriters traveling throughout the country with the issuer's management to market the company to potential investors.

⁷ *Guidance Regarding Prohibited Conduct In Connection with IPO Allocations*, 70 Fed. Reg. 19,672 (2005).

⁸ These cases have had a lengthy history. Most recently, the court of appeals vacated the district court's order certifying classes in six test cases. *See* 471 F.3d 24 (2d Cir. 2006); *see also* 241 F. Supp. 2d 281 (S.D.N.Y. 2003) (granting in part, and denying in part defendants' motions to dismiss).

additional shares in the aftermarket (labeled “tie-in” or “laddering” agreements) for the purpose of raising the compensation the banks received for underwriting the IPOs. The conspiracy claims rested on allegations, among others, that the defendants: (a) “worked together as co-underwriters and members of underwriting syndicates”; (b) were members of the Securities Industry Association; and (c) jointly and individually conducted “road shows.”

The Prior Cases

The plaintiffs were not pleading on a clean slate. The implied immunity doctrine is most developed in the context of Sherman Act claims challenging conduct in the heavily regulated securities industry. Anticipating an implied immunity defense, the plaintiff alleged that “[t]he defendants’ secret combination and conspiracy was not disclosed to, approved by, or regulated by the NASD or SEC.”⁹

The Supreme Court’s first decision in this arena, *Silver v. New York Stock Exchange*,¹⁰ concerned an alleged collective refusal to deal. There, the plaintiff challenged a New York Stock Exchange (NYSE) rule requiring members to immediately terminate, without explanation, private communications wires between member and non-member broker-dealers. The plaintiff, a non-member municipal securities dealer, saw its business plummet once NYSE members terminated their wires with plaintiff’s business. The Court found that the NYSE rule’s goal—protecting the investing public from, among others, boiler room brokers¹¹—furthered the NYSE’s regulatory mandate to protect the integrity of the markets. But the Court held that the NYSE rule’s provisions forbidding members to provide an explanation to non-members why the wires were terminated actually undermined the regulatory mandate to promote confidence in the integrity of the markets and also harmed competition. Thus, NYSE could not justify the notice provisions under its mandate from the Securities Exchange Act. Because the SEC provided no check on the anticompetitive aspect of any NYSE rules, the Court held that the antitrust laws could apply to the challenged conduct.

The Court’s next foray into implied immunity in the antitrust/securities context came twelve years later, when it handed down two cases on the same day. In *Gordon v. New York Stock Exchange*,¹² a small investor sued the NYSE, the American Stock Exchange, and two broker-dealers under the Sherman Act, challenging rules that fixed commissions for trades less than \$500,000. This time the Court held that the exchanges were immune from antitrust liability. The Court focused on: (a) Congress’s decision to entrust in the SEC the supervision of “the fixing” of reasonable commissions; and (b) the SEC’s active study and oversight of fixing commissions, including the competitive effects of switching from fixed to market-determined commissions. If exchanges and broker-dealers were subject to antitrust liability for charging fixed commissions, they would be subject to standards that conflict with those articulated by the SEC, and, indeed, “would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.”¹³

⁹ *Billing Complaint*, ¶ 41.

¹⁰ 373 U.S. 341 (1963).

¹¹ A boiler room broker is “usually a physically small operation which employs high pressure telephone salesmanship to oversell to the public by quantity, and in many cases by quality.” *Id.* at 354 n.10.

¹² 422 U.S. 659 (1975).

¹³ *Id.* at 691.

Finally, in *United States v. National Association of Securities Dealers*,¹⁴ the Department of Justice challenged the arrangements among the National Association of Securities Dealers (NASD), various mutual funds, mutual fund underwriters, and broker-dealers concerning the sale of mutual fund shares in the secondary market. The Court first held that the challenged vertical restraints that mutual funds placed on the negotiability and transferability of their shares were permitted by the Investment Company Act of 1940 (ICA), provided the restraints were disclosed to investors in fund prospectuses. The Court concluded that Congress had contemplated mutual funds employing the challenged restraints. The conduct was deemed immune from scrutiny to avoid subjecting the defendants to “the competing mandate of the antitrust laws.”¹⁵ Despite the DOJ’s prosecution of the action, the SEC urged the Court to find immunity because “its authority [to regulate the mutual fund industry] will be compromised seriously if these agreements are deemed actionable under the Sherman Act.”¹⁶ The Court agreed, and next wrestled with the claim that there was a horizontal agreement between the NASD and its members to thwart the growth of the secondary market for the resale of mutual fund shares. Though the Court agreed that the ICA neither required nor authorized the challenged conduct, it still found immunity to make the regulatory scheme work. The Court explained that the SEC had a lengthy history of pervasive oversight of the defendants and the challenged conduct. As part of that oversight, the SEC weighed competitive concerns. Once again, the Court held that applying the antitrust laws to the alleged conspiracy “poses a substantial danger that [the defendants] would be subjected to duplicative and inconsistent standards.”¹⁷

Against this backdrop, the defendants in *Billing* filed the expected motion to dismiss.

The District Court Proceedings

Two notable aspects of the district court proceedings were: (a) the divergent positions taken by the SEC and the DOJ on the implied immunity issue, and (b) the court’s holding that the conduct was impliedly immune even though it could not identify any statute or regulation providing the SEC the power to permit the alleged “tie-ins.”

Before ruling, the district court requested amicus curiae briefs from the SEC and the DOJ on the issue of implied immunity. The SEC urged the district court to find the challenged conduct impliedly immune, “noting its past and continuing regulation of the IPO process, the syndicate system, and various nominally anticompetitive price stabilization techniques.”¹⁸ And in a passage that would become critical to the Supreme Court’s decision, the SEC argued “that a ‘failure to hold that the alleged conduct was immunized would threaten to disrupt the full range of the Commission’s ability to exercise its regulatory authority,’ adding that it would have a ‘chilling effect’ on lawful joint activities . . . of tremendous importance to the economy of the country.”¹⁹ The DOJ, by contrast, opposed implied immunity, arguing that in the absence of express or implied authorization for the

¹⁴ 422 U.S. 694 (1975).

¹⁵ *Id.* at 722.

¹⁶ *Id.* at 729.

¹⁷ *Id.* at 735.

¹⁸ *In re Initial Public Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 506 (S.D.N.Y. 2003) (internal citations omitted).

¹⁹ 127 S. Ct. at 2396 (quoting SEC’s brief to district court. *See Memorandum Amicus Curiae of the Securities Exchange Commission, In re Initial Public Offering Antitrust Litig.*, No. 01 CIV 2014 (WHP) (S.D.N.Y. Dec. 20, 2002), 2002 WL 32153495).

banks to engage in the challenged conduct, no repugnancy exists between the antitrust laws and securities laws.²⁰

The district court granted the motion to dismiss and held that the alleged misconduct was immune from antitrust scrutiny because the SEC “either expressly permits the conduct alleged in the Sherman Act Complaint or has the power to regulate the conduct such that a failure to find implied immunity would ‘conflict with an overall regulatory scheme that empowers the [SEC] to allow conduct that the antitrust laws would prohibit.’”²¹

With respect to the more challenging allegations concerning conduct that could theoretically be deemed prohibited under both the antitrust and securities regimes—the alleged tie-ins and anticompetitive charges—the court held that, even if the conduct was prohibited under both schemes, immunity was appropriate because of the potential conflicts that applying the antitrust laws could present. Because of the SEC’s (a) power to regulate tie-ins, underwriter compensation, and broker-dealer compensation, (b) active regulation of those activities, (c) present rule-making activity with respect to those activities, and (d) recent enforcement actions against some of the same defendants for the same alleged misconduct, the court found that the application of antitrust law’s “competition-first” standards created too great of a potential for conflicting mandates.

The Second Circuit Decision

The Second Circuit, like the district court, sought the views of the SEC and the DOJ, posing specific questions to those agencies concerning whether the SEC has the authority to permit the banks to engage in the alleged conduct, including a conspiracy to inflate aftermarket securities prices. The SEC “offer[ed] a qualified double negative—that, in its view, ‘[c]urrent precedent does *not* . . . *foreclose* [its] ability in response to future developments to authorize conduct by underwriters that *could be characterized* as a tie-in or laddering.”²² The DOJ differed, “find[ing] it very difficult to imagine circumstances” under which the SEC could permit such conduct.

The Second Circuit reversed the district court in a 68-page opinion. The court held that the defendants had not demonstrated “that Congress clearly intended a repeal of the antitrust laws.”²³ Rather than determine whether Congress’s creation of the regulatory scheme “implied” a repeal of the antitrust laws, the court explained, “we will apply immunity if we determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed.”²⁴ The court’s framing of the issue in this fashion arguably brought the implied immunity analysis closer to an *express* immunity inquiry.

The court’s sifting of the case law found the following factors instructive:

- (1) congressional intent as reflected in legislative history and a statute’s structure;
- (2) the possibility for conflicting mandates;
- (3) the possibility that application of the antitrust laws would moot a regulatory provision;
- (4) the history of agency regulation of the anticompetitive conduct; and

²⁰ Memorandum of the United States as Amicus Curiae, *In re Initial Public Offering Antitrust Litig.*, No. 01 CIV 2014 (WHP) (S.D.N.Y. Dec. 20, 2002), 2002 WL 32153494.

²¹ 287 F. Supp. 2d at 523 (quoting *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir. 2003)).

²² *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 168 (2d Cir. 2005) (quoting SEC letter (alterations by court)).

²³ *Id.* at 168–69.

²⁴ *Id.* at 164.

(5) any other evidence indicating that the statute implies a repeal.²⁵

The court found that none of these factors suggested that the alleged misconduct was immune from antitrust scrutiny.²⁶ The court's ruling turned almost entirely on the SEC's inability to authorize the tie-ins or anticompetitive charges.²⁷

The Certiorari Petition

The certiorari process was notable because, in contrast to the briefing below, the United States submitted a single brief, attempting to harmonize the divergent positions of the SEC and the DOJ. The Solicitor General urged the Court to grant certiorari, arguing that while the banks were not entitled to “the sweeping immunity they advocate,” the Second Circuit’s immunity standard was too stingy.²⁸ It contended that courts should dismiss if a complaint’s alleged collaborative activities are either permitted by the regulatory scheme or “inextricably intertwined” with such permitted conduct.²⁹ Because the alleged collaborative activity in this case rested in large part on expressly permitted conduct, the Solicitor General advocated dismissing the complaint and directing the plaintiffs to re-plead to clarify that they are not relying upon permitted conduct to sustain their Section 1 claim.³⁰

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The Supreme Court’s Decision

In a 7–1 decision, the Supreme Court reversed the Second Circuit, holding that the challenged conduct was impliedly immune from antitrust scrutiny.³¹ The Court reaffirmed the overarching “plain repugnancy” standard but simplified the analysis, distilling four “critical” factors from the *Silver, Gordon*, and *NASD* trilogy:

- (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; . . .
- (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct[; and . . .]
- (4) . . . [whether] the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.³²

The Court easily dispensed with three of these factors.

²⁵ *Id.* at 164–65.

²⁶ *Id.* at 169–70.

²⁷ The court also rejected the defendants’ “pervasive regulation” defense. The court interpreted the pervasiveness prong of the immunity defense to apply only when: (1) there is a particular pervasive relationship, such as between the SEC’s oversight of the NASD, and (2) the conduct is “not only impliedly immune but actively encouraged by the SEC.” *Id.* at 171.

²⁸ Memorandum of the United States as Amicus Curiae, *Credit Suisse First Boston Ltd. v. Billing*, No. 05-1157 (U.S. Nov. 9, 2006), 2006 WL 3309862.

²⁹ *Id.*

³⁰ *Id.*

³¹ 127 S. Ct. at 2397. Only six justices joined in the implied immunity opinion. Justice Stevens concurred in the judgment, but wrote that given the patent lack of merit to the antitrust claim, the Court should hold that the plaintiffs failed to state a claim, rather than reach the implied immunity argument. Indeed, he wrote that plaintiffs’ suggestion that underwriters “can restrain trade in [the aftermarket trading] by manipulating the terms of IPOs is frivolous.” 127 S. Ct. at 2398.

³² *Id.* at 2392.

First, the Court found that the allegations concerning syndicated public offerings “lie at the very heart of the securities marketing enterprise.”³³ It noted that the SEC “consider[s] the general kind of joint underwriting activity at issue in this case, including road shows and book-building efforts essential to the successful marketing of an IPO.”³⁴

Second, the Court found it indisputable that the SEC possessed authority to “supervise . . . forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage.”³⁵

Third, there was no doubt that the SEC exercised its authority to regulate the conduct at issue. The SEC had recently issued guidance concerning underwriter conduct in IPO allocations and had brought enforcement actions against underwriters that the SEC found to be out of compliance with the agency’s regulations.³⁶ The Court also added here that private litigants had brought securities claims challenging the identical conduct.

The Court was particularly concerned with the “chilling effect” that the application of antitrust law, with its treble damages remedy, could have on certain permissible, beneficial conduct under the securities laws.

“Is There a Conflict that Rises to the Level of Incompatibility?” The bulk of the Court’s analysis addressed the third factor—whether the application of the antitrust laws would create conflicting standards for the defendants sufficient to rise to the level of “incompatibility.” Put another way, would the application of the antitrust laws to the challenged conduct “prove practically incompatible with the SEC’s administration of the Nation’s securities laws?”³⁷ The Court answered these questions with an emphatic “yes.”

The Chilling Effect. First, even assuming that the SEC could never permit the defendants to engage in tie-ins, the Court was particularly concerned with the “chilling effect” that the application of antitrust law, with its treble damages remedy, could have on certain permissible, beneficial conduct under the securities laws. An underwriter may avoid engaging in certain conduct the SEC permits as part of the book-building process for fear that if its actions are misinterpreted, it could be subject to treble damages under the antitrust laws. This was especially the case in *Billing* because proving the alleged tie-ins hinged on fine line-drawing about often ambiguous conduct. As the Court illustrated, the SEC, on the one hand, encourages underwriters to ask investors about their long-term demand (e.g., three-to-six months) for shares in the issuer’s stock and the price the investors might be willing to pay for the shares. But the SEC’s interpretive guidance, on the other hand, suggests that soliciting orders for the immediate aftermarket before the completion of the distribution, would violate SEC Regulation M.³⁸

The Court also expressed concern that an antitrust jury would have to sift through evidence that is likely to be ambiguous as to whether the conduct is permissible under the securities laws. For example, an underwriter’s conversation with an investor “that elicits comments concerning both the investor’s short and longer term plans . . . might, as [the antitrust] plaintiff sees it, provide evidence of an underwriter’s insistence upon ‘laddering’ or, as a defendant sees it provide evidence of a lawful effort to allocate shares to those who will hold them for a longer time.”³⁹ This type of

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 2393.

³⁷ *Id.*

³⁸ *Id.* at 2394 (citing 17 C.F.R. §§ 242.100–242.105).

³⁹ *Id.* at 2395 (citing Brief for United States as Amicus Curiae, *In re Initial Public Offering Antitrust Litig.*, 127 S. Ct. 2383 (2007) (No. 05-1157), 2006 WL 3309862).

ambiguous evidence will tend to make it “difficult for someone who is not familiar with accepted syndicate practices to determine with confidence whether an underwriter has insisted that an investor buy more shares in the immediate aftermarket (forbidden), or has simply allocated more shares to an investor willing to purchase additional shares of that issue in the long run (permitted).”⁴⁰

For the excessive compensation allegations, the Court noted that on the one hand the SEC had proposed a rule that would “prohibit an underwriter ‘from demanding . . . an offer from their customers of any payment or other consideration [such as the purchase of a different security] in addition to the security’s stated consideration.’”⁴¹ But, on the other hand, “the SEC would permit a firm to ‘allocat[e] IPO shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services.’”⁴² The fine line-drawing that these standards articulate “requires an understanding of just when, in relation to services provided, a commission is ‘excessive,’ indeed, so ‘excessive’ that it will remain *permanently* forbidden.”⁴³ The Court suggested that only the SEC could do so with confidence.⁴⁴

But if the conduct were not impliedly immune from antitrust scrutiny, plaintiffs could bring the claims in different courts throughout the country, with different juries potentially reaching different results about what the ambiguous evidence showed. The inevitable divergent results create a real threat of the defendants being subject to divergent standards.

Thus, the Court found these factors— “[1] the fine securities-related line separating the permissible from the impermissible; [2] the need for securities-related expertise (particularly to determine whether an SEC rule is likely permanent); [3] the overlapping evidence from which reasonable but contradictory inferences may be drawn; and [4] the risk of inconsistent court results”—mean that it would be impossible for an antitrust jury to consider only conduct that was both presently and likely to remain forbidden under the securities laws.⁴⁵ Because the inquiry cannot reasonably be limited to permanently forbidden conduct, the application of the antitrust laws to the alleged misconduct “means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages).”⁴⁶

The Court acknowledged that a chilling effect “exists to some degree in respect to other antitrust lawsuits” but that “the role that joint conduct plays in respect to the marketing of IPOs, along with the important role IPOs themselves [play in relation to the effective functioning of capital markets, means that the securities-related costs of mistakes is unusually high.”⁴⁷ Given the SEC’s concern about the “chilling effect” that the application of the antitrust laws would have on permissible, beneficial conduct that came close to the impermissible, there was a repugnancy between the two regimes.

⁴⁰ *Id.* at 2394.

⁴¹ *Id.* (quoting 69 Fed. Reg. 75,785 (2004)).

⁴² *Id.*

⁴³ *Id.* at 2395.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 2396.

⁴⁷ *Id.*

The Court found that the pervasive regulation by the SEC and remedies provided by the securities laws made application of the antitrust laws unnecessary.

The Lack of Necessity. The Court found that the pervasive regulation by the SEC and remedies provided by the securities laws made application of the antitrust laws unnecessary. The Court explained that: (1) “the SEC actively enforces the rules and regulations that forbid the conduct in question”; (2) “investors harmed by underwriters’ unlawful practices may bring lawsuits and obtain damages under the securities law”; and (3) “the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations.”⁴⁸ The Court noted that in light of Congress’s efforts to “weed out unmeritorious securities lawsuits” through, among other things, the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 (PSLRA), permitting an antitrust lawsuit in this context would permit the plaintiffs to skirt those Congressionally mandated requirements.⁴⁹

The Court Rejects the Solicitor General’s “Inextricably Intertwined” Test. The Court rejected the Solicitor General’s “compromise” position: reversal, but remand to determine whether the “inextricably intertwined” test was met. The Court explained that the fine line-drawing necessary to segregate the permissible from the forbidden requires securities-related expertise. Because federal district courts applying the antitrust laws lack the securities expertise of the SEC, the danger of “inconsistent results . . . will overly deter syndicate practices important in the marketing of new issues.”⁵⁰

Billing’s Implications for Antitrust Claims Challenging Securities-Related Conduct

Billing’s “chilling-effect” rationale is a new path in the Court’s implied immunity analysis for securities-related conduct, as neither *Silver, Gordon*, nor *NASD* focused on it as a basis for implied repeal. And neither of the lower courts addressed this argument even though the SEC made the point in its district court submission. Rather than focus on the abstract principles of “repugnancy” and the potential for “conflicting standards,” the Court grounded its reasoning in the over-deterrence that can result from applying the antitrust treble damages remedy even to conduct that the Court agreed was forbidden under both the securities and antitrust laws.

Justice Breyer, *Billing’s* author, zeroed in on the chilling effect at oral argument immediately after the plaintiffs’ counsel began his argument. In response to counsel’s argument that immunity “is not necessary to make the securities laws work,” Justice Breyer gave a preview of the opinion he would ultimately write:

Well, it might well be, because the reasoning would be, which I find very strong, is that as soon as you . . . bring an antitrust court in, you’re talking about juries and treble damages. And as soon as that happens, the people who are subject to it stay miles away from the conduct that, in fact, would subject them to liability. And yet staying miles away, they will not engage in conduct that, A, the SEC might believe is permissible, or, B, actually favor.

Where you get a complex complaint like yours, that begins to ring true, that argument. And that’s what’s concerning me.⁵¹

The “chilling effect” rationale expands the breadth of securities-related conduct subject to an implied immunity defense. Under previous Second Circuit law (where the vast majority of implied

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 2397.

⁵¹ Transcript of Oral Argument at 27–28, *In re Initial Public Offering Antitrust Litig.*, 127 S. Ct. 2383 (2007) (No. 05-1157), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1157.pdf.

immunity battles have been fought), courts flatly rejected an immunity defense if the conduct was permanently prohibited under both enforcement regimes.⁵² But the Court's new articulation of the standard provides a buffer surrounding even permanently forbidden conduct, provided it has the hallmarks the Court found present here: (1) the fine, securities-related line-drawing; (2) the need for securities-related expertise to separate the permissible from the impermissible; (3) overlapping, ambiguous evidence; and (4) a danger of inconsistent verdicts.

The real question is whether the *Billing* decision will, in practice, deter plaintiffs from bringing antitrust claims for securities-related conduct. Historically, plaintiffs have not brought a significant number of antitrust lawsuits in this area. But the increased number of cases wrestling with the implied immunity question in the early part of this decade suggested a growing trend.⁵³ The Court was mindful that the plaintiffs filed *Billing* against the backdrop of Congress's passage of the PSLRA, which provided new incentives for private plaintiffs, as Justice Breyer put it, "to dress what is essentially a securities complaint in antitrust clothing."⁵⁴ Before the Court's decision this term in *Bell Atlantic Corp. v. Twombly*,⁵⁵ plaintiffs had a relatively easy burden pleading a Section 1 conspiracy claim in most circuits. Unless a plaintiff grounded its conspiracy claim in fraud, it was excused from the heightened pleading burdens under Federal Rule of Civil Procedure 9(b). And the federal courts' recent string of decisions tightening the pleading and class certification requirements for securities' plaintiffs⁵⁶ only magnified the incentive to find an antitrust angle. Despite these significant incentives, we believe that *Billing* will greatly reduce the number of complaints challenging securities-related conduct under the antitrust laws. ●

⁵² *Billing*, 426 F.3d at 162 (citing *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 27–28 (2d Cir.1985)).

⁵³ See, e.g., *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (2d Cir. 2002) (alleging under the Sherman Act that defendants' restriction of the supply of stock manipulated its price and caused plaintiffs to pay higher prices).

⁵⁴ 127 S. Ct. at 2396.

⁵⁵ 127 S. Ct. 1955 (2007) (reversing Second Circuit Court of Appeals' deferential pleading standard for Section 1 claims).

⁵⁶ See, e.g., *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007) (holding plaintiffs must plead "cogent" allegations of scienter that are at least as compelling as any opposing inference); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005) (requiring plaintiffs to plead more than an inflated purchase price to satisfy loss causation pleading requirement); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007); *Miles v. Merrill Lynch & Co.*, 471 F.3d 24, 41–42 (2d Cir. 2006) ("disavowing" Second Circuit's "some showing" burden of proof for class certification).