CREDIT SUISSE SECURITIES (USA) LLC v. BILLING: ONE YEAR LATER

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In June 2007, in *Credit Suisse Securities (USA) LLC v. Billing*,[1] the United States Supreme Court articulated a comprehensive analytical framework for determining when antitrust claims are impliedly "precluded," or conduct is impliedly "immunized" from such claims, because they would conflict with another regulatory framework, based in statute, that also governs the conduct at issue.[2] Specifically, the Court in *Billing* held that antitrust claims brought by purchasers of securities in a series of initial public offerings ("IPOs") could not proceed against underwriting firms that had jointly marketed and distributed those securities. The Court ruled that, in light of the Securities and Exchange Commission's ("SEC") extensive and active regulation of IPOs, including the particular conduct at issue, and its statutory authority to do so, the securities laws must be interpreted to impliedly preclude the application of the antitrust laws

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

[2] A word about nomenclature: the circumstance in which a court determines that antitrust claims may not proceed because they conflict with another pervasive regulatory framework, ordinarily based in another federal statute (such as the securities laws), has been characterized by a variety of labels. In *Billing* alone, the Supreme Court variously referred to "the securities laws as *implicitly precluding* the application of the antitrust laws to the conduct alleged in this case," to whether "federal securities law *impliedly precludes* application of antitrust laws to the conduct in question," to whether the securities laws gave rise to "*implied immunity* from antitrust claims," and to whether the securities laws should be interpreted to embody an "*implied repeal*" of the antitrust laws with respect to the claims and conduct at issue. 127 S. Ct. at 2387, 2389, 2390 (emphasis added). Lower courts and commentators likewise seem to have used these various labels, and others, almost interchangeably, even though a strict approach to interpretation might have counseled otherwise. *See, e.g.*, Helicopter Transp. Servs. v. Erickson Air-Crane Inc., 2008 WL 151833, at *5 (D. Or. Jan. 14, 2008) ("The term 'antitrust immunity' has been loosely employed in several contexts, including as a synonym for express or implied preemption by another federal law . . . ."); Axcan Scandipharm, Inc. v. Ethex Corp., 2007 WL 3095367, at *6 (D. Minn. Oct. 19, 2007) (rejecting *Billing* implied preclusion defense because plaintiff's claims were "not barred by the FDA's 'primary jurisdiction'"); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 243, at 28, 30 (2008 Supp.) (referencing "the *Credit Suisse* 'immunity' approach and the *Trinko* [Verizon Commc'ns. Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004)] 'non-immunity' approach", the authors observed that "[n]otwithstanding these differences in verbal formulation, . . . the differences between the modes of analysis are very slight"). Largely as a nod to consistency, references herein will be to "implied preclusion" or "implied immunity" to denote the situation that was the focus of the Supreme Court's analysis and decision in *Billing.*

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to that conduct. Treble-damages, private antitrust claims based on such conduct, the Court said, would be "clearly incompatible" with the pervasive regulation of the securities markets generally, and of IPOs and the subject conduct specifically, that Congress had authorized the SEC to undertake and that it had, in fact, undertaken. The Court found this preclusive "clear incompatibility" even though the SEC itself had disapproved of the conduct targeted by the antitrust plaintiffs. Moreover, although *Billing* dealt with the securities industry and its regulation by the SEC, it seemed clear that the implied preclusion paradigm articulated there would apply to other settings characterized by pervasive government regulation, as well.[3]

In this era in which each new Supreme Court opinion is critiqued as if it were the latest novel or play, some commentators praised the *Billing* decision, while others decried it.[4] Some viewed it as a sweeping revision or as affording blanket immunity in the securities arena; others saw it as working little change to the landscape of implied immunity or preclusion.[5] But the proof of the pudding, it is said, is in the eating. The only way to take the true measure of a

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[3] *See generally* AREEDA & HOVENKAMP, *supra* note 2 ¶ 243; Bruce H. Schneider, Credit Suisse v. Billing *and a case for Federal Immunity for Mortgage Lenders Subject to Federal Regulation*, 124 BANKING L.J. 833 (2007) ("*Billing* lays out a test for implied antitrust immunity that is not unique to the securities industry.").

[4] *See, e.g.*, Justin Lacour, *Unclear Repugnancy: Antitrust Immunity in Securities Markets after* Credit Suisse Securities (USA) LLC v. Billing, 82 ST. JOHN'S L. REV. 1115, 1121 (2008) ("*Billing* departed from the principles of traditional immunity analysis to create a new, outcome-determinative test for repugnancy. This approach – that a repugnancy exists when there is the potential for conflicting outcomes from lower courts – is an unprecedented broadening of the implied immunity doctrine."); Luitgard W. Lina Chambers, *A New Supreme Court Securities Jurisprudence? How* Credit Suisse Securities (USA) LLC v. Billing *Eviscerates the Role of Antitrust in Securities Law, Resurrects the Primary Jurisdiction Doctrine, and Leaves Retail Investors Out in the Cold*, 44 HOUS. L. REV. 1131, 1174 (2007) ("[T]he *Billing* holding, plain and simple, leaves ordinary retail investors out in the cold.").

[5] *Compare, e.g.*, AREEDA & HOVENKAMP, *supra* note 2, at 27 ("the immunity grant in *Credit Suisse* is broad"); Schneider, *supra* note 3, at 833 ("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."); Lacour, *supra* note 4, at 1156 ("[T]he Court has made the finding of implied immunity all too easy, in contradiction of prior cases that hold that grants of implied immunity should be rare."), *with* Pennsylvania Avenue Funds v. Borey, 2008 WL 2954954, at *4 (W.D. Wash. Feb. 21, 2008) ("nothing in *Credit Suisse* suggests a sea change in preclusion analysis"); *Axcan Scandipharm*, 2007 WL 3095367, at *5 ("*Credit Suisse* does not break any new ground").

Supreme Court decision like *Billing* is to view its application in lower court cases decided in its wake.

In the handful of cases in which *Billing* has been advanced as a potentially dispositive defense, far more courts have rejected the argument for implied immunity or preclusion than have accepted it. Few have accorded the argument marquee status in their analysis. The one decision so far that has applied *Billing* to dismiss antitrust claims based on implied preclusion or immunity, *In re Short Sale Antitrust Litigation*,[6] arose in the securities sector, as did *Billing* itself; that case is now on appeal to the Second Circuit, however, and its continued vitality is in question. In sum, if one year provides a sufficient sample upon which to base such an appraisal, *Billing* has not led the lower courts to a uniformly broad application of implied immunity from the antitrust laws, either in the securities arena or in the context of other regulated conduct; nor has the decision revolutionized the analytical pathways by which lower courts reach such decisions.[7]

Billing Revisited: The "Clear Incompatibility" Standard

Before reviewing *Billing*'s effect in the year since its issuance, a brief refresher on the decision itself is in order. Although certain concerted conduct among potential competitors has long been accepted in the world of IPOs,[8] the plaintiffs in *Billing* alleged that the underwriting firms participating in the IPOs there had engaged in joint activity outside this realm of generally accepted behavior. The parties and the Supreme Court agreed or assumed that the conduct

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6 *In re* Short Sale Antitrust Litig., 527 F. Supp. 2d 253 (S.D.N.Y. 2007), *appeal docketed*, No. 08-0420-CV (2d Cir. Jan. 18, 2008).

7 *See* Harry Frischer, *Courts Tackle Implied Repeal after "Credit Suisse"; Three Did Not Dismiss Claims Alleged to Conflict with Regulatory Schemes*, NAT'L L.J., June 9, 2008, at S2.

8 A group of underwriters, for example, will typically form a syndicate to market the shares in an IPO, will investigate and estimate likely demand for the shares, and ultimately will agree upon a selling price.

attacked by the antitrust plaintiffs had been consistently disapproved by the SEC, and likely would continue to be disapproved for the foreseeable future. Nevertheless, the Court held the securities laws conflicted with and impliedly precluded application of the antitrust laws.

Citing its prior opinions in *Gordon v. New York Stock Exchange, Inc.*, [9] *United States v. NASD, Inc.*,[10] and *Silver v. New York Stock Exchange*,[11] among others, the Court identified the overarching question as whether there is "plain repugnancy" between the antitrust claims and another regulatory system – an inquiry that the Court later recharacterized as whether the antitrust claims are "clearly incompatible" with an existing regulatory regime.[12] The Court identified four criteria, previously articulated in *Gordon*, for answering that question: (1) whether regulatory authority exists under the securities laws (the regulatory scheme there at issue) for supervising the activities in question; (2) whether the responsible regulatory entities actively exercise that authority; (3) whether there is a risk of conflicting guidance, requirements, duties, standards, and results if both the securities laws and regulations and the antitrust laws were applied to that same conduct; and (4) whether possible conflict between the securities and antitrust laws would affect "practices that lie squarely within an area of financial market activity that the securities law seeks to regulate."[13]

Three of these four criteria presented little challenge to the Court. Without doubt, the securities laws granted the SEC authority to regulate the conduct at issue, and the SEC had actively exercised that authority by, among other things, disapproving the very practices targeted

[9] 422 U.S. 659 (1975).
[10] 422 U.S. 694 (1970).
[11] 373 U.S. 341 (1963).
[12] 127 S. Ct. at 2387, 2390, 2392.
[13] *Id*. at 2392.

by the plaintiffs. Relying on an *amicus* brief filed by the SEC in the trial court, the Supreme Court also had little difficulty finding that the defendants' joint efforts to promote and sell newly issued securities in IPOs were "central to the proper functioning of well-regulated capital markets," and therefore were "squarely within the heartland of securities regulations."[14]

The only significant battleground in the Supreme Court's view, therefore, was whether allowing both the securities and antitrust laws to apply to the conduct in question would likely produce conflicting guidance, requirements, duties, standards, or results – *i.e.,* "[i]s there a conflict that rises to the level of incompatibility?"[15] Even though the conduct at issue was prohibited under existing securities laws and regulations, the Court found that letting antitrust claims proceed on the basis of that conduct would present too great a danger of conflict with the efficient application of the securities laws, and it took a pragmatic path to this conclusion. Noting that "evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical," the Court found an "unusually high risk" that "different nonexpert judges" and "different nonexpert juries" would be incapable of the "fine, complex, detailed line[-drawing]" that the securities experts at the SEC engage in to govern the nation's securities markets, with the resultant probability "that antitrust courts are likely to make unusually serious mistakes" or issue inconsistent results.[16] This, the Court also observed, undoubtedly would lead those participating in the securities industry to "act in ways that will avoid not simply conduct that the securities law forbids . . . but also a wide

14 *Id*. at 2392-93.
15 *Id*. at 2393.
16 *Id*. at 2395-96.

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)."[17]

And so, the Court in *Billing* found the antitrust claims there to be impliedly precluded by the securities laws and regulatory scheme.[18] In response to briefing by the Government, the Court paused to say that it was not foreclosing application of the antitrust laws to *all* conduct that relates in any way to IPOs or the operation of the securities markets generally – noting, for example, that an overt agreement among underwriters to divide markets likely would not meet the same fate as the antitrust claims at issue in *Billing* itself.[19] Still, it seemed clear that antitrust claims predicated upon any conduct that is close to the "heartland of activities related to the underwriting process," or securities markets overall, likely would be found to be impliedly precluded under the Court's reasoning in *Billing*.

[17] *Id*. at 2396.

[18] In reaching its decision, the Court also took note of other, prudential considerations. *Id*. at 2396-97. For example, the Court found that there was little or no enforcement-related need for antitrust supervision, on top of the extant securities regulation. The oversight and deterrence embodied in SEC regulation and in private securities lawsuits provided adequate means to rein in errant conduct, without the need for private litigants brandishing treble-damages antitrust claims. Further, the Court observed that allowing antitrust claims to proceed in this arena could potentially undermine measures that Congress recently had put in place to discourage non-meritorious securities claims – for example, the various provisions of the Private Securities Litigation Reform Act ("PSLRA"). Authorizing overlapping antitrust claims could provide an avenue for strike plaintiffs to attempt an end-run around the protections erected in the PSLRA and subsequent legislation.

[19] One somewhat remarkable aspect of the Court's decision was its rejection of the advice of those who administer the nation's securities and antitrust laws. In the lower courts, the SEC and the Department of Justice's Antitrust Division ("DOJ") had found themselves on opposite sides of the case, with the SEC favoring implied preclusion and the DOJ advocating retained application of the antitrust laws. In the Supreme Court, however, the Solicitor General had forged a compromise; in a unified presentation, the Government urged the Court to hold that application of the antitrust laws would be deemed to have been impliedly precluded only if the conduct at issue was "inextricably intertwined" with SEC-*permitted* activity. 127 S. Ct. at 2397. The Supreme Court brushed aside this proposed compromise, finding that the suggested standard would not adequately eliminate the potential for conflict and inconsistency. *Id*.

***In re Short Sale Antitrust Litigation*: *Billing* Extended**

Applying in detail the Supreme Court's decision in *Billing*, the district court in *In re Short Sale Antitrust Litigation*[20] dismissed a Sherman Act Section 1 class action against most of the "prime broker" participants in the short sale securities market. In so doing, it not only became the first court to dismiss pursuant to the *Billing* analysis; it arguably took a step beyond *Billing,* finding the requisite "plain repugnancy" or "clear incompatibility" even though the SEC had never actually stepped in to regulate the specific conduct there at issue.

The court began its opinion with a primer on short selling:[21] Short Seller tells his or her broker to sell shares Seller doesn't own (in the expectation that shares of the subject stock can later be purchased for less than the price he or she is getting in this "short sale"). At least theoretically, Seller "borrows" the shares to complete this original sale from his or her broker who, in turn, may use its own holdings or locate and acquire them elsewhere. Later, Seller purchases shares of the same stock in the market to "cover" the short sale – *i.e.*, repay or replenish the "borrowed" stock used in the short sale. In addition, Seller must pay a daily fee for the stock borrowed to complete the original short sale. "Hard-to-borrow" stocks – stocks in short supply, for example – logically command higher fees. Short Seller's profit, if any, comes from the net proceeds of the short sale, less the cost of acquiring replacement shares later, and the fees incurred in "borrowing" the stock needed to complete the original short sale.

Plaintiffs (short sellers of securities) alleged that the defendant "prime" broker-dealers violated Section 1 of the Sherman Act by, among other things, (1) conspiring to fix the fees

[20] 527 F. Supp. 2d 253 (S.D.N.Y. 2007).
[21] *Id.* at 255-56.

charged on hard-to-borrow stocks and colluding to classify particular stocks as hard-to-borrow, and (2) agreeing in some cases essentially just to mimic short sales and borrowings by failing to actually locate and deliver any borrowed stock, but nevertheless charging sellers the full borrowing fees.

Defendants moved to dismiss on a variety of grounds, but the only one addressed by the court was implied preclusion under *Billing*. In short, defendants argued that the SEC had adopted Regulation SHO,[22] specifically to govern the short sale market, creating a comprehensive, active regulatory regime with which Sherman Act claims were "clearly incompatible."

The district court applied the four criteria articulated by the Supreme Court in *Billing* for determining whether the antitrust claims were in fatal conflict with the securities laws and therefore impliedly precluded.[23] Noting that short selling provides the securities markets with needed liquidity and pricing efficiency, the court quickly determined that the "short sale securities market lies squarely within an area of financial market activity that the securities laws seek to regulate," satisfying the first *Billing* factor.[24] Given the Securities Exchange Act's broad grant of authority to the SEC to regulate short sales,[25] and the SEC's adoption and enforcement of Regulation SHO, the district court then rather summarily found that factors two and three

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22 17 C.F.R. § 242.203(b).
23 527 F. Supp. 2d at 257.
24 *Id.* at 258-59.
25 Section 10(a) of the Exchange Act, 15 U.S.C. § 78j(a)(1), makes it unlawful "[t]o effect a short sale . . . of any security registered on a national securities exchange, in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." Section 10(a) has been characterized as granting the SEC "plenary authority to regulate short sales of securities." 68 Fed. Reg. 62,972, 62,973 (Nov. 6, 2003).

(authority to regulate and actual regulation by the SEC) also were met.[26] While the court's conclusion about the SEC's authority to regulate seems solid, its determination of the SEC's actual and active regulation of the specific conduct targeted by the plaintiffs' antitrust claims appears to be on shakier ground. Plaintiffs rightly argued that, unlike the situation in *Billing*, the SEC had never specifically sought (even in Regulation SHO) to regulate the borrowing fees charged by brokers in short sales, much less *agreements* among brokers to *fix* such fees – a logical gap the court did not directly address.

The district court then invoked language from *Billing* – referencing concerns about "a serious legal line-drawing problem" – to find the final factor to be fulfilled.[27] But its analysis of this fourth factor seemed to present the court with the most difficulty. It may be true that antitrust claims for brokers' failures to deliver borrowed securities (a second general focus of the plaintiffs' claims) could conflict with Regulation SHO's treatment of failures to deliver. But it is more difficult to conclude that an actual price- or fee-fixing conspiracy among brokers, such as plaintiffs alleged, would conflict with any present, past, or anticipated SEC regulation of the short sale market. As in *Billing*, however, the court found serious potential conflict – not so much in the allegedly wrongful conduct itself, as in the evidence and attendant activities that would be used to prove an antitrust violation. The court noted that brokers in the business of effecting short sales for their clients have many legitimate reasons to communicate regularly about that market – for example, in specific instances, to locate and borrow securities to complete a transaction, and more generally, to evaluate which securities truly are "hard-to-

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26 527 F. Supp. 2d at 259-60.

27 *Id*. at 260-61.

borrow." Evidence of such communications might be portrayed by defendants as necessary to the operation of the market, but might be painted by plaintiffs (or taken by a jury) as evidence of collusion. So, as in *Billing*, the court found that allowing the plaintiffs' antitrust claims to go forward "would likely chill a broad range of activities that the securities laws permit and encourage," and thereby improperly inhibit beneficial conduct in the short sale market.[28] The court, therefore, dismissed the plaintiffs' antitrust claims as impliedly precluded by the existing securities laws and regulatory structure.

Plaintiffs have appealed the dismissal to the United States Court of Appeals for the Second Circuit.[29] The primary battle lines there appear to be (a) whether defendants have shown, or must show, that the SEC actually exercises regulatory authority over the specific alleged collusive conduct actually targeted by plaintiffs' complaint, as distinct from its regulation of short sales generally, and (b) whether, in any event, defendants have demonstrated the requisite conflict between SEC regulation and antitrust claims (even in the practical arena of overlapping or confusing evidence or the potential for "a serious legal line-drawing problem" either for courts or for participants in the short sale industry). On both factors, it would seem the district court went beyond the specific circumstances in *Billing*. Whether it overstepped the principles established there, however, will be up to the Second Circuit.[30]

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[28] *Id*. at 260. The court did not invoke the argument, persuasive in *Billing*, that allowing the antitrust claims to proceed would in effect countenance an end run around Congress's efforts in the PSLRA and elsewhere to rein in spurious securities actions.

[29] *In re* Short Sale Antitrust Litig., 527 F. Supp. 2d 253 (S.D.N.Y. 2007), *appeal docketed*, No. 08-0420-CV (2d Cir. Jan. 18, 2008).

[30] It is worth noting that neither the SEC nor the DOJ weighed in on the implied preclusion issue before the district court, as they did in *Billing*. Nor has either done so as yet on appeal.

Other Courts Decline to Find Implied Immunity or Preclusion

Other cases stand in contrast to *In re Short Sale*, both in result and, for the most part, in the scope of their treatment and analysis of *Billing*.

In re Insurance Brokerage Antitrust Litigation

The first reported lower court decision to apply the *Billing* analysis was *In re Insurance Brokerage Antitrust Litigation*,[31] a multidistrict litigation involving numerous class actions filed against a number of insurers and insurance brokers, alleging violations of the antitrust laws and of the Racketeer Influenced and Corrupt Organizations Act. Plaintiffs charged that the defendants "engaged in a series of unlawful horizontal conspiracies . . . to reduce or eliminate competition . . . by among other things, allocating customers to and among members of the conspiracies . . . in violation of section 1 of the Sherman Act."[32] The plaintiffs also alleged that the defendants "agreed with each other not to compete for each others' existing customers" and effectuated this agreement by bid-rigging and other devices.[33] Defendants moved to dismiss these claims, arguing that the McCarran-Ferguson Act expressly exempted from federal antitrust law conduct such as this, which they contended to be related to the business of insurance and subject to state regulation as such.[34] Although the district court had previously rejected a McCarran-Ferguson argument with respect to a prior version of the plaintiffs' consolidated complaint,[35] the defendants argued that the court should reevaluate its prior decision in part

[31] 2007 WL 2533989 (D.N.J. Aug. 31, 2007).
[32] *Id.* at *2.
[33] *Id.* at *3.
[34] The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides, in effect, that the Sherman Act, Clayton Act, and FTC Act do not apply to "the business of insurance to the extent that such business is . . . regulated by state law" – an *express* preclusion or preemption similar to the standard for *implied* preclusion articulated in *Billing*.
[35] *In re* Ins. Brokerage Antitrust Litig., 2006 WL 2850607 (D.N.J. Oct. 3, 2006).

because of the Supreme Court's intervening decision in *Billing*. In particular, the defendants observed that, while the court previously had denied application of the McCarran-Ferguson exemption from the antitrust laws on the basis that the bid-rigging and other conduct targeted by plaintiffs did not constitute "the business of insurance" under McCarran-Ferguson, its approach had been unduly narrow; the more practical approach to "incompatibility" under the *Billing* analysis, they argued, would focus on whether that conduct nevertheless lay at the core of insurance marketing activities generally, and whether allowing private antitrust claims to target such conduct would, as in *Billing*, tend to inhibit *lawful* conduct and threaten to interfere with the efficient functioning of the insurance market and industry, an industry heavily regulated by the states. The *Insurance Brokerage* court acknowledged that it had previously relied upon "the principle that exemptions from antitrust laws should be narrowly construed," but summarily determined that the Supreme Court's reasoning and decision in *Billing* did not lead to a different outcome.[36] To the contrary, the court found that *Billing* did not "change[] the law of this case so as to warrant a reconsideration of [the] prior ruling."[37] In the first reported application of *Billing*, therefore, that decision and its analytical structure were found not to have altered the court's prior analysis of antitrust immunity in any meaningful way.[38]

Axcan Scandipharm, Inc. v. Ethex Corp.

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36 2007 WL 2533989, at *8.

37 *Id.*

38 The court ultimately granted the defendants' motions to dismiss on other grounds. *In re* Ins. Brokerage Antitrust Litig., 2007 WL 2533989, at *7-*16 (D.N.J. Aug. 31, 2007). That decision is now on appeal to the United States Court of Appeals for the Third Circuit as Case No. 07-4046. It does not appear, however, that the parties have focused on *Billing* in that appeal.

The next case to apply *Billing*, *Axcan Scandipharm, Inc. v. Ethex Corp.*,[39] did not involve either the antitrust laws or securities regulation. In *Axcan*, the plaintiff alleged that the defendants had engaged in false advertising and unfair competition under the Lanham Act by improperly touting their products as "generic equivalents" of prescription drugs manufactured by Axcan. Defendants invoked *Billing* to contend that Axcan's Lanham Act claims were impliedly precluded or immunized by the extensive regulatory system governing prescription drugs under the Food, Drug and Cosmetic Act, implemented by the Food and Drug Administration ("FDA"). They argued that the FDA must be the final arbiter of what constitutes a "generic equivalent" in the realm of prescription drugs. The district court disagreed, however, and found in essence that the defendants' *Billing* challenge was off-target. Defendants, it concluded, had misapprehended the plaintiff's claims: Axcan did not contend that the defendants had falsely portrayed their drugs as "'equivalent' in the FDA sense – that is, bioequivalent and pharmaceutically equivalent" to plaintiff's products; rather, they purportedly had falsely advertised their products as "equivalents" or "substitutes" as those terms generally are understood by the public.[40] Such claims could be maintained, the court ruled, "without infringing on the FDA's right to determine whether the Defendants' drugs are 'generic' versions of [plaintiff's drugs] under [the FDA's] own definition of 'equivalent.'"[41] In sum, the court concluded that there was simply no conflict at all between plaintiff's claims and the FDA regulations, and therefore no "plain repugnancy" or "clear incompatibility" between the two under *Billing*. The court's interpretation of the plaintiff's claims effectively eliminated any prospect that the court would engage in a detailed

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39 2007 WL 3095397 (D. Minn. Oct. 19, 2007).
40 *Id*. at *4, *5.
41 *Id*. at *5.

application of the *Billing* analytical structure, in such a way as to reveal its view of how *Billing* had affected the law of implied immunity. Nevertheless, in framing its conclusion, the court observed – as had the court in the *Insurance Brokerage* case some months earlier – that "*Credit Suisse* [*v. Billing*] does not break any new ground . . . ."[42]

Billing and the FAA

Implied preclusion or immunity defenses fared no better and played no larger role in the next two cases, decided earlier this year, in the context of FAA regulations. In *Helicopter Transport Services, Inc. v. Erickson Air-Crane, Inc.*,[43] the plaintiff lodged antitrust claims against the defendant under Sections 1 and 2 of the Sherman Act based upon the defendant's refusal to sell it helicopter replacement parts. The defendant attempted to interpose a defense of immunity or implied preemption under *Billing*, arguing that the applicable FAA regulatory scheme effectively displaced antitrust law in this context. While noting the "plain repugnancy" or "clearly incompatible" standard articulated by the Supreme Court in *Billing*, the district court peremptorily disposed of the defendant's argument, granting summary judgment against its "immunity or implied preemption" defense. The court found "no applicable FAA regulation or statute that expressly preempts the antitrust laws" and concluded, further, that "the applicable regulations [do not] occupy the field to such an extent as to leave no room for enforcement of antitrust laws" and that there was no "irreconcilable conflict with the antitrust laws" to justify implied immunity or preclusion under *Billing*.[44] The court had so little difficulty in rejecting the

42 *Id.*
43 2008 WL 151833 (D. Or. Jan. 14, 2008).
44 *Id.* at *5.

defendant's tenuous *Billing* arguments that its analysis offered no insight into its views on *Billing's* effects upon the analytical framework of implied immunity or preclusion.

Of even less help was the brief treatment of *Billing* in *Rectrix Aerodome Centers, Inc. v. Barnstable Municipal Airport Commission.*[45] Plaintiff claimed that defendants were exploiting their authority over operations at Barnstable Municipal Airport to monopolize the sale of jet fuel there. Citing the FAA's regulation of airport operations, the defendants asserted an implied immunity defense, relying upon *Billing*. But, while the court faithfully recounted the *Billing* analytical framework, it ultimately dismissed the case on grounds of state action immunity, declining to decide whether implied immunity or preclusion under *Billing* would have applied.[46]

Pennsylvania Avenue Funds v. Borey

Finally, the securities sector once again supplied the context for a *Billing* implied immunity or preclusion analysis in *Pennsylvania Avenue Funds v. Borey*,[47] also decided earlier this year. In the end, the *Borey* court concluded that the plaintiff had failed to state an actionable claim under Section 1 of the Sherman Act, and dismissed on that basis. Along the way, however, the court engaged in a brief but interesting analysis of the defendants' alternative argument that the plaintiff's antitrust claim was impliedly precluded by the securities laws under *Billing*.

The case had its basis in a tender-offer auction process by which potential purchasers expressed interest in and made bids to acquire a company in which the plaintiff owned stock. The plaintiff contended that the defendants entered into an unlawful conspiracy to rig their bids,

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45 534 F. Supp. 2d 201 (D. Mass. 2008).
46 *Rectrix*, 534 F. Supp. 2d at 206 & n.7.
47 2008 WL 2954954 (W.D. Wash. Feb. 21, 2008).

lowering the price paid for the target company (and, thereby, the proceeds to be received by its shareholders, such as plaintiff). Defendants argued that plaintiff's antitrust claims were impliedly preempted by the Williams Act,[48] which governs tender offers. Notwithstanding this established statutory framework and the attendant "sweeping power" of the SEC to regulate most aspects of the tender-offer process, the court concluded that defendants had failed to satisfy the four *Billing* factors because they had not shown that the SEC had the authority, or had exercised authority, to prevent bidders from doing exactly what the defendants in *Borey* were charged with doing, *i.e.*, joining forces in the bidding process. Noting, as had other courts, that "nothing in *Credit Suisse* [*v. Billing*] suggests a sea change in preclusion analysis," the court went on to say that the *Billing* decision "emphasized that preclusion depends on showing SEC regulatory authority and enforcement over 'all of the activities' that a plaintiff challenges as anticompetitive."[49]

In contrast to the analysis and conclusion in *In re Short Sale Antitrust Litigation*, the court then concluded that, while the SEC plainly had significant authority over most aspects of the tender-offer process, defendants had "not convinced the court either that the SEC possesses authority over the anticompetitive conduct that Plaintiff alleges, or that it ha[d] exercised that authority."[50] The court ended its analysis in somewhat puzzling fashion, saying that it "decline[d] to decide whether securities law precludes Plaintiff's antitrust claim," even though it

48 15 U.S.C. §§ 78m(d)-(e) & 78n(d)-(f).
49 2008 WL 2954954, at *4.
50 *Id.*

was clear that the court had rejected defendants' implied preclusion or immunity defense based on *Billing*.[51]

Conclusion: Looking Ahead

In the year or so since its issuance, the *Billing* decision and its analytical framework have hardly given rise to the sweeping change in implied immunity or preclusion law that some foretold. But the sample size of reported cases actively applying the *Billing* analysis has been sufficiently small that it is safe to say that the true picture of *Billing*'s impact is yet to be revealed.

The coming months, however, offer significant opportunities for lower courts to explore the issue further. The Second Circuit – which was reversed by the Supreme Court in *Billing* – will hear argument and decide the appeal of *In re Short Sale Antitrust Litigation*, in which it may either confirm the district court's seeming expansion upon the *Billing* implied immunity paradigm, or reverse and rein in the scope of implied immunity. Yet another implied immunity or preclusion storm is brewing on the horizon, again in the United States District Court for the Southern District of New York, and again in the context of the heavily regulated financial sector. In recently-commenced multidistrict antitrust actions, plaintiffs have alleged that the defendant banks and brokerage houses colluded to fix prices, allocate customers, and rig bids in the field of municipal derivatives.[52] Although motions to dismiss have yet to be filed, commentators have recognized from the outset that plaintiffs' claims in the *Municipal Derivatives Antitrust*

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51 *Id*.

52 *In re* Municipal Derivatives Antitrust Litig., MDL No. 1950, Master Dkt. No. 08-02516(VM)(JCF) (S.D.N.Y.). Coincidentally, the cases have been consolidated by the Multidistrict Panel in the court of the Hon. Victor Marrero, who just this past year issued the implied immunity decision in *In re Short Sale Antitrust Litigation*.

Litigation will have to surmount "the looming implied repeal issue" of *Billing*, if the case is to move forward on its merits.[53] As these and other cases proceed, we will gain a greater appreciation and understanding of *Billing*'s true effect on the jurisprudence of implied immunity and preclusion.

[53] *See, e.g.*, John T. Delacourt, *Municipal Derivatives Case Pits Securities vs. Antitrust*, LEGAL OP. LTR. Vol. 18 No. 5 (Apr. 18, 2008).