

Supreme Court Grants Certiorari in *Leegin* and *Billing**

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On December 7, 2006, the Supreme Court granted *certiorari* in two closely watched antitrust cases: *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 06-480, concerning resale price maintenance, and *Credit Suisse First Boston, Ltd. v. Billing*, No. 05-1157, concerning the implied immunity doctrine. With *Leegin* and *Billing* added to the two other antitrust cases on the Court's docket – *Twombly* (concerning whether *Matsushita* applies on Rule 12(b)(6) motions to dismiss, transcript of oral argument available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1126.pdf) and *Weyerhaeuser* (concerning whether *Brooke Group* applies to Section 2 predatory bidding, transcript of oral argument available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-381.pdf) – the coming year will surely prove to be an interesting one for antitrust law.

Supreme Court Poised to Overrule *Dr. Miles*

At issue in *Leegin* is whether vertical minimum resale price maintenance should continue to be *per se* illegal as held nearly a century ago in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). In language reminiscent of the Seventh Circuit in *State Oil v. Khan* and the Federal Circuit in *Illinois Tool Works v. Independent Ink*, the Fifth Circuit had upheld the *per se* illegality of vertical minimum resale price maintenance rule in affirming a plaintiff's verdict, observing that “[b]ecause the [Supreme] Court has consistently applied the *per se* rule to such agreements, we remain bound by its holding in *Dr. Miles Medical Co.*” *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 2006 U.S. App. LEXIS 6879 (5th Cir. Mar. 20, 2006).

Defendants ask the Court to overrule *Dr. Miles* in light of modern antitrust developments, including *State Oil v. Khan* and *Illinois Tool Works v. Independent Ink*, in which the Court overruled the long-held but greatly criticized rules of *per se* illegality for maximum vertical resale price maintenance and the presumption of market power in patent-tying cases, respectively. Thirty years after *GTE Sylvania* and a decade after *Khan*, it looks as though *Dr. Miles* may finally be overruled.

The docket for this case is available at <http://www.supremecourtus.gov/docket/06-480.htm>.

Supreme Court Will Decide Whether Implied Immunity Bars Claims in IPO Antitrust Litigation

At issue in *Billing* is whether the federal securities laws by implication mandate dismissal of an antitrust class action alleging a wide-ranging conspiracy concerning initial public offerings during the internet bubble of the late-nineties. The Second Circuit reversed the District Court's dismissal of the case on grounds of implied immunity, holding that the alleged “epic Wall Street conspiracy” among the nation's leading underwriting firms to “grossly inflate[] the price of the securities after the IPOs” by, among other things, engaging in tie-in and laddering practices, was not shielded by the

securities laws. *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 136 (2d Cir. 2005). Defendants ask the Supreme Court to vacate the Second Circuit decision, arguing that antitrust immunity is necessary in this matter to make the securities laws work; that the class action in large measure challenges conduct otherwise perfectly legal and acceptable; and that, because the SEC has jurisdiction to prohibit tie-ins and laddering, parallel antitrust enforcement should be foreclosed.

Having previously filed competing letter briefs at odds with each other in the matter, the SEC and the Antitrust Division now jointly suggest that both the District Court and the Court of Appeals were incorrect in their application of the law. The government not only argues that the Second Circuit failed to afford appropriate protection to conduct that is “inextricably linked” to legitimate collaborative underwriting activity, but also that defendants overreach by contending that implied immunity “shields all conduct relating to initial public offerings.” In particular, the government advocates that the Court should employ a variation on the “fact-specific inquiry” advocated by it in *Twombly* -- *i.e.*, that in order to state a claim, plaintiffs must present allegations of conduct that is neither legal itself nor “inextricably linked” to legal conduct, such that there is a “reasonably grounded expectation” that implied immunity will not act to bar the claim -- a standard which may be in at least some tension with the principle that “acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme.” *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962).

The docket for this case is available at <http://www.supremecourtus.gov/docket/05-1157.htm>.

* Earlier versions of these summaries were posted on the S1 Listserv (Leegin), the Exemption and Immunities Listserv (Billing), and the S2 Listserv (Leegin and Billing).