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FEDERALISM, SUBSTANTIVE PREEMPTION, AND LIMITS ON ANTITRUST: AN APPLICATION TO PATENT HOLDUP

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ABSTRACT

In *Credit Suisse v. Billing*, the Court held that the securities law implicitly precludes the application of the antitrust laws to the conduct alleged in that case. The Court considered several factors, including the availability and competence of other laws to regulate unwanted behavior, and the potential that application of the antitrust laws would result in "unusually serious mistakes." This paper examines whether similar considerations suggest restraint when applying the antitrust laws to conduct that is normally regulated by state and other federal laws. In particular, we examine the use of the antitrust laws to regulate the problem of patent holdup of members of standard setting organizations. Although some have suggested that this conduct illustrates a gap in the current enforcement of the antitrust laws, our analysis finds that such conduct would be better evaluated under the federal patent laws and state contract laws.

I. INTRODUCTION

In *Credit Suisse v. Billing*,[1] the Court held that the securities law implicitly precludes the application of the antitrust laws to the conduct alleged in that case. The Court considered several factors, including the availability and competence of other laws to regulate unwanted behavior, and the potential that application of the antitrust laws would result in "unusually serious mistakes." This paper examines whether similar considerations suggest restraint when applying the antitrust laws to conduct that is normally regulated by state and other federal laws. In particular, we examine the use of the

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[1] Credit Suisse Sec. (USA) LLC *v.* Billing, 127 S. Ct. 2383 (2007).

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