UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 94-1564 (Stanley Sporkin) **[filed March 14, 1995]**

O R D E R

In its Order of February 14, 1995 in the above matter, the Court scheduled a status call for March 16, 1995. On February 23, 1995, the Court of Appeals agreed to hear the appeal by both the U.S. Government and Microsoft Corporation. Since the matter is now before the Court of Appeals, there can be no further proceedings before this Court until there has been a final disposition of the joint appeal. Therefore, the scheduled March 16, 1995 status call will be cancelled.

In issuing this Order, the Court wants to take this opportunity to set forth certain observations with respect to its decision of February 14, 1995. This is for two reasons.

First, an appeal joined in by both parties is quite unusual. Ordinarily when an appeal is taken from an adverse court decision, there is a prevailing party who has an abiding interest in seeing that the lower court's decision will be sustained on appeal. Of course, there is no such party in this case. Because of this, the Court of Appeals has granted participation by three amici, whom this Court allowed to participate pursuant to its authority under 15 U.S.C. §16(f)(3).

In our judicial system, amici status is not the same as party status. Often one or more of the amici might have a very specific reason for its appearance that does not extend to all aspects of the lower court's holding. In addition, where there is more than one amicus, the interests of the amici

may diverge. In this case both of these situations exist. IDEA Corporation's primary reason for participation was to express its belief that the decree should provide for reimbursement of prepaid royalties paid under past licensing agreements with Microsoft. The objections of the companies represented by Wilson, Sonsini are not only much broader, but also those companies have not suggested that the decree encompass the remedy proposed by IDEA. What is more, amici not having party status do not have all the rights of a party, including the right of full participation in the proceedings as well as the right of appeal or further participation in the proceedings. None of the amici has been accorded the customary discovery rights that parties have under the Federal Rules of Civil Procedure. While the amici are ably represented, they do suffer from not having true party status.

Second, because much has been said about the Court's decision, there is a need to set the record straight and provide as much assistance as possible to the Court of Appeals in its review of this matter. The Attorney General and Assistant Attorney General have argued that the Court erred by telling the government that it had to file a different, broader complaint. This the Court emphatically did not do. It did not tell the Government that it had to redraw or reframe its pleadings in any respect. All the Court did was hold that, based on the record before it, the Court could not find the proposed settlement to be in the public interest.

The February 14, 1995 opinion explained the basis of the Court's holding and did nothing more than the Attorney General, in her press conference on the Court's decision on February 16, 1995, said would be perfectly appropriate for the Court to do. In her press conference, the Attorney General likened the proceeding before this Court to a plea agreement in a criminal case. She advised that all a Court was permitted to do was either accept or reject the agreement, but that it could not tell the parties to include additional charges in the agreement.[1] In its opinion, this Court specifically

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[1] "If I file criminal charges against somebody and work out an appropriate negotiation and take it to court, the Judge can say I don't like the sentence you are recommending to me and if that's your deal, I don't want it. But [the judge] can't turn around and say I want you to charge this person with another crime that you've not charged him with because I don't think you've thoroughly

refrained from telling the parties what should be included in the decree in order to make it acceptable. It stated:

> The Tunney Act provides that a Court must find that a proposed consent decree is in the public interest before it shall enter an order to that effect. Because of the many concerns that the Court has, that finding cannot be made on the present record. (emphasis added).

In the order accompanying the opinion the Court cited four reasons for refusing to enter the decree, none of which included a requirement that the government file a different complaint:

> First, the government has declined to provide the Court with the information it needs to make its proper public interest determination. Second, the scope of the decree is too narrow. Third, the parties have been unable and unwilling adequately to address certain anticompetitive practices which Microsoft states it will continue to employ in the future and with which the decree is silent. Thus, the decree does not constitute an effective antitrust remedy. Fourth, the Court is not satisfied that the enforcement and compliance mechanisms in the decree are satisfactory.

Certainly, the Court cannot be faulted for its candor in telling the parties the precise reasons for its decision. Clearly, the parties would not have been better off if the Court had simply rejected the decree without providing the basis for its decision. What the government fails to recognize is that it is the Tunney Act that requires the Court to make a specific finding that the consent decree is in the public interest. This cannot be done without certain basic information. For example, it is not unreasonable for a Court to request the parties to tell it and the public what was bargained away in secret at the negotiating table. The Court would be abdicating its responsibility under the Tunney Act to find this decree to be in the public interest without such essential information.

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investigated this case." Attorney General Reno, Press Conference, February 16, 1995.

Much has been said about the negative impact of the Court's holding on the future ability of the antitrust division to enter into consent decrees. That criticism is overstated. Clearly, this is an unusual case. To prepare the complaint it actually filed, the Government would not have needed to do much more than read Microsoft's contracts with OEMs and research the amount of the market controlled by Microsoft. But, the Government's investigation of Microsoft's practices spanned more than four years. It is a matter of public record that the FTC that conducted the first three years of the investigation deadlocked with respect to bringing charges against Microsoft. There has been no disclosure of the circumstances surrounding the FTC's abortive investigation or the findings it reached.

While this Court has been told by the Justice Department that it will reveal no facts about its or the earlier FTC investigation, it is obvious the government looked at more than Microsoft's per processor licensing and non-disclosure agreements. Because of the wide-ranging nature of the Government's investigation in this case, this Court's Tunney Act inquiry must necessarily be broader than the type of inquiry it would need to satisfy itself with respect to the usual consent decree where the investigation focused on only one or a few anticompetitive practices. The inquiry in which a Tunney Act Court must engage is circumscribed by the particular facts of the case before it.[2] The consenting parties must

recognize this fact and be prepared to satisfy the Court's concerns.[3] The Government does not meet

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[2] See Senate Hearings, at 151 (statement of J. Skelly Wright); see also 119 Cong. Rec. 3453 (1973) (statement of Sen. Tunney).

[3] For example, in the Attorney General's February 16, 1995 press conference, the Assistant Attorney General stated that the government could not afford to produce an affidavit from an expert economist in defense of every consent decree as an explanation for the government's failure to do so in this case until the eleventh hour. But this clearly is not the normal antitrust investigation and decree. The Court's request that the government explain how this decree would "effectively pry open the market," was not an assertion that in all cases affidavits or testimony from experts would be warranted. The legislative history of the Act indicates that Congress took into account the idea that the scope of a reviewing court's inquiry would depend on the complexity and importance of the decree. See Senate Hearings, at 151 (statement of J. Skelly Wright). If the Court were to have

its obligation by telling the Court it will provide it with no substantive information concerning its case.

The Tunney Act contemplates the district court's considering comments received from the public. Nowhere does the Act suggest that the Court should disregard those comments simply because the parties choose not to respond to the credible allegations made. In an antitrust complaint, the Government charges that the defendant is a wrongdoer. This is serious business, and once it has made such serious charges, the government cannot then turn around and tell a court to ignore credible charges submitted by the public against the same alleged wrongdoer. To accept the Government's position that it need not address credible evidence presented by public commentators if those comments do not focus solely on the allegations in the complaint would make the Tunney Act a virtual nullity. Particularly, is it so where a Court requests the parties to address the uncontroverted documents presented by the commentators.[4]

The Attorney General has characterized this Court's refusal to approve the decree as an improper infringement on the government's prosecutorial discretion. The Attorney General is correct that a Tunney Act Court cannot force the government to bring a complaint it does not want to bring.

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rested simply on the bland assertions of the government that the decree was adequate, without having expert testimony to consider, it would have been simply "rubber stamping" the decree. Since Microsoft is the world's largest producer of software, an industry vital to the nation's economic future, the Court properly requested that the government supplement the minimal information it had provided the Court.

[4] Much has been written about the so-called "vaporware issue." Many in the antitrust Bar have defended this practice. Those who practice in this specialty must realize that in giving an opinion on the legality of a practice, their research should not begin and end with an analysis of antitrust lore. It is clear that a lawyer who gives an opinion to a client cannot confine his or her opinion to a specific statue if the conduct in question would violate other provisions of law. Cf. SEC v. National Student Marketing Corp., 402 F.Supp. 641, 648 (D.D.C. 1975) (holding that a lawyer must consider all legal ramifications of a transaction even if asked solely for an opinion on a narrow legal question). Antitrust practitioners might find a discussion with their securities law partners quite revealing. See e.g., Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1968), cert. denied 395 U.S. 903 (1969) (holding that fraudulent statements by a corporation may violate the securities laws even if the main purpose of the improper statements was not to mislead investors). See also SEC Release No. 33-6504 ("The antifraud provisions of the federal securities laws apply to all company statements that can reasonably be expected to reach investors and the trading markets, whoever the intended primary audience.")

It is up to the prosecutor to decide what charges to set forth in a complaint. There is, however, more involved in the entry of a consent decree than the prosecutor's decision as to what to put before the Court. Approval of the decree is in every respect an appropriate judicial function. By refusing to approve a decree, in part because it lacked information, the Court did not force the Government to change its complaint.[5] The Government was free to come forth with information to meet the Court's concern, or renegotiate a new decree with Microsoft, or try the case on the complaint it had filed, or drop the case. All of these choices leave the Government's prosecutorial discretion intact.[6] To restrain unduly a court from exercising its function would do great violence to the important role courts play under our constitutional form of government. The parties must realize that an antitrust consent decree does not begin and end with the parties' negotiations. Experienced counsel must factor in the judicial approval component. In this regard, it is incumbent on all counsel in their negotiations to consider how they are going to assure the court that the decree is in the public interest. In this exercise, they must be prepared to respond to the Court's legitimate concerns.

Much has been said about how rare it is for a court to reject a consent decree; others have

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[5] In addition to lack of information, the Court was also concerned that the decree did not constitute an effective remedy because it simply prospectively forbid Microsoft from engaging in practices that the Assistant Attorney General stated had a "not insignificant" effect in helping Microsoft gain its monopoly position from 1988 on. On February 16, 1995 at a press conference, the Assistant Attorney General appeared to criticize the Court for not proposing a remedy that would address the benefits Microsoft had already gained from the practices set forth in the complaint.

> Q: Ms. Bingaman, in his order Judge Sporkin did also criticize the particular remedy against these charges, saying that it . . . didn't do anything to remedy any market share Microsoft might have gained in the past through the types of behavior that you specifically allege. Is that a fair exercise of judicial restraint under the Tunney Act?
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> A: It is an interesting point. He did say that. I have never seen a remedy suggested that would solve the problem.

[6] If the Court were required to approve every proposed decree presented to it, even if the Court had evidence that the government had filed its complaint as part of a sweetheart deal with the defendant, it would be against everything the judicial system stands for and, clearly, an improper infringement on the judicial function.

gone so far as to suggest that "it is never done."[7] To the contrary, courts have regularly refused to approve consent decrees in many areas of the law when a court's approval is required.[8] This is particularly so in class actions.[9] Indeed, in a prior class action lawsuit brought under the antitrust laws, this very Court disapproved at least three different proposed consent decrees submitted. Following each rejection, the parties, after further negotiation, presented a new proposal. This continued until the Court found the settlement to be in the public interest.[10] At no time was the Court admonished that its action would undermine the consent decree practice developed in private litigation. Indeed, in today's current debate over litigation reform, some critics of our current litigation system have complained that courts need to exercise more review powers over consent decrees.

In its recent brief to the Court of Appeals, the government suggests that all that the Tunney Act did was simply codify prior antitrust practice.[11] This Court's understanding of the reasons for

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[7] Although rejection of decrees under the Tunney Act may be rare, that fact in no way contradicts the proposition that "the Court's authority under the Tunney Act to refuse to approve a decree which it finds not to be in the public interest can hardly be questioned." United States v. GTE Corp., 603 F.Supp. 730, 741 n.42 (D.D.C. 1984).

[8] See, e.g., Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (reversing Court of Appeals affirmance of District Court's approval of bankruptcy settlement proposed by the parties). It is "the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable." Id. The reviewing judge's decision must be "informed and independent" and consider "all . . . factors relevant to a full and fair assessment of the wisdom of the proposed compromise." Id.

[9] See, e.g., Georgevich v. Strauss, 772 F.2d 1078, 1085 (3d Cir. 1985) (affirming district court's decision under Fed. R. Civ. P. 23(e) to disapprove proposed class action settlement), cert. denied 475 U.S. 1028; Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983) (reversing district court judge's approval of class action settlement).

[10] See United Vending Service Company v. General Cinema Beverages, 86cv3015 (D.D.C. 1986) (Sporkin, J.)

[11] Brief of Appellant, United States, at 19. The legislative history makes clear that the Tunney Act was an attempt to codify the actions of only those courts that had carefully reviewed proposed decrees and, in some instances, disapproved decrees and forced appropriate modifications. See Senate Hearings at 148 (statement of J. Skelly Wright) (citing with approval the decision of the United States Supreme Court in the El Paso Pipeline litigation in which the Court reversed the

the Tunney Act are quite different. No reason has been proffered why there would have been a need to simply codify prior practice. To the contrary, Congress passed the legislation because it believed that the Department of Justice had been improperly influenced in connection with certain antitrust decrees.[12]

The Justice Department has pointedly suggested that even a so-called "side deal" is out of the purview of the District Court's consideration.[13] It would seem quite incongruous for the Congress to pass an elaborate statute requiring a U.S. district court to determine whether the decree was in the public interest, while at the same time telling the district court that it should not inquire into whether there was an undisclosed "side deal." Suppose, hypothetically, for example, that in affirming a "weak" antitrust decree, the Antitrust Division had told the antitrust violator it would not oppose certain proposed mergers it was considering. The Court, in making a public interest determination, would obviously be entitled to such information.[14] This Court believes that the construction suggested by the Justice Department can in no way be rationalized or in any way sustained based on the congressional record.[15] Indeed, even without the Tunney Act, an inquiry into such matters

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district court's ratification of a decree in which "[t]he United States knuckled under to El Paso and settled.") It is equally clear that the Act was not intended simply to codify the existing state of affairs, otherwise Senator Tunney would not have cited a long list of inappropriate settlements, particularly the ITT decree. See 119 Cong. Rec. 24,596 (1973) (statement of Sen. Tunney). Congress was also concerned that at the time the Act was being considered, many courts were still rubber stamping antitrust consent decrees. See id. The legislative history emphatically shows that the Act was not a codification of prior antitrust practice.

[12] See Footnotes 11 supra and 15 infra.

[13] Brief of Appellant, United States, at 15.

[14] See Footnote 15, infra.

[15] It is undisputed that Congress was concerned with the antitrust decree with ITT when it passed the Tunney Act. In that case, ITT agreed to give up certain holdings, while it retained The Hartford Fire Insurance Co., its crown jewel and most profitable subsidiary. See, e.g., 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). The ITT case demonstrates how the Justice Department's interpretation of the Act is unsupportable. Under the Justice Department's interpretation, it would have been out of bounds for the Court to have considered the circumstances surrounding the secretly negotiated antitrust decree that permitted ITT to retain its acquisition of the Hartford Insurance Co. In the Justice Department's view, it would have been improper for the

by a court would be completely justified. The elaborate nature of the Act, which gives the Court plenary authority, inter alia, to "appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain views, evaluations, or advice of any individual. . . . and take such other action in the public interest as the Court may deem appropriate" is totally inconsistent with the narrow interpretation given the Act by the Justice Department. 15 U.S.C. §16(e)(2) and (e)(5).

The Court will not address Microsoft's recusal motion filed in the first instance before the Court of Appeals. It would seem incumbent on the party seeking such extraordinary relief to present such a motion to the trial court so at the least the court can set the record straight and correct those accusations that are unverified and unsubstantiated.[16]

The status hearing scheduled for March 16, 1995 is cancelled.

DATE: March 14, 1995 _/s/_____

Stanley Sporkin
United States District Judge

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reviewing court to consider the fact that other issues had been traded away, or, indeed the circumstances surrounding a large political campaign contribution made by ITT at the time its antitrust practices were under scrutiny by the Justice Department.

[16] For example, it is alleged the Court erred in allowing anonymous amici to appear before it because, without knowing the identity of these entities, the Court would be unable to determine whether it held a stock ownership in them and thus be disqualified from considering their comments. The fact is the Court has no stock holdings.