

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1232 (TPJ)

STATE OF NEW YORK, et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (TPJ)

MICROSOFT CORPORATION,

Counterclaim-Plaintiff,

v.

ELIOT SPITZER, attorney general of the
state of New York, in his official
Capacity, et al.,

Counterclaim-Defendants.

[PROPOSED] ORDER CERTIFYING DIRECT APPEAL TO THE SUPREME COURT

On May 22, 1998, the Court, at Microsoft's request, consolidated Civil Action Nos. 98-1232 and 98-1233 for all purposes.

Following a trial of this consolidated case, on April 3, 2000, the Court entered judgment in accordance with its Findings of Fact and Conclusions of Law.

On June 7, 2000, the Court entered its Final Judgment in this consolidated case.

Defendant Microsoft Corporation filed its notices of appeal on June 13, 2000, and the plaintiffs filed their Motion for Certification under the Expediting Act, 15 U.S.C. 29(b), immediately thereafter, also on June 13, 2000.

The Expediting Act, provides in part that:

An appeal from a final judgment [in civil Sherman Act case brought by the United States] shall lie directly to the Supreme Court, if, upon application of a party filed within fifteen days of the filing of a notice of appeal, the district judge who adjudicated the case enters an order stating that immediate consideration of the appeal by the Supreme Court is of general public importance in the administration of justice.

The Court concludes that certification of the appeal from the Final Judgment in this case is appropriate for the following reasons:

This Court's determination to certify this case for direct review by the Supreme Court under the Expediting Act depends not on the significance of the particular legal issues presented, but rather on the importance of a prompt decision by the Supreme Court. United States v. Western Electric Co., 1983-2 Trade Cases ¶65,596 at 68,971 (D.D.C. 1983). Direct review is appropriate in exceptional cases "where the underlying antitrust judgment involves matters of great and general importance to the public interest because of their 'impact on the economic welfare of this nation.'" Id.; United States v. Western Electric Co., 1982-83 Trade Cases ¶65,130 at 71,311 (D.D.C. 1982); H.R. Rep. No. 93-1463, 93d Cong. 2d Sess. 14 (1974). Both because of the importance of prompt resolution of the issues on appeal to the software industry and because of the importance of the software industry to the nation's economy, this is such a case.

The markets found by the Court to be the loci of Microsoft's illegal conduct -- operating systems for Intel-based personal computers and web browsers -- are global markets that affect hundreds of millions of consumers and businesses throughout the world. See Findings of Fact ¶¶ 199-201. Microsoft dominates the market for world-wide licensing of all Intel-compatible PC operating systems, and the Court found that it engaged in practices that have seriously impeded competition and have had a substantial anticompetitive impact on innovation in the personal computer industry. See Findings ¶¶ 18, 35, 412; Conclusions of Law at 4. The harm from Microsoft's illegal conduct has been, and until fully remedied, will be, pervasive. See, e.g., Findings ¶ 412.

This Court has concluded that the separation of Microsoft's Operating System and Applications Businesses, combined with various transitional injunctive provisions, is necessary to prevent the continuance or recurrence of Microsoft's illegal activities and to restore the competitive conditions injured by those activities. The Court has stayed the implementation of the divestiture pending disposition of Microsoft's appeal, see Final Judgment §6.a, and completion of the divestiture will not occur for up to 12 months following that disposition. See Final Judgment § 1.c. Thus, prompt resolution of issues raised by the appeal both of the appropriateness of the Court's remedy order and of Microsoft's liability under the Sherman Act is of great "importance to the public interest because of their impact on the economic welfare" of the country and the global economy. See Western Electric, 1983-2 Trade Cases ¶65,696 at 68,971.

Prolonged uncertainty about the divestiture resulting from a lengthy appeals process would have significant adverse consequences. If the divestiture is to be affirmed on appeal, prompt resolution of that appeal is critical quickly to effectuate the divestiture remedy and to begin the process of restoring competitive conditions in the affected markets. Even a brief delay in

effectuating remedies that will reduce Microsoft's ability and incentive to engage in anticompetitive conduct will have a serious adverse impact on competition and innovation in the rapidly evolving technology markets at issue in this case. It is important to the public interest that there be as little delay as possible before consumers begin to receive the benefits of restoration of competitive conditions. Alternatively, if the Court's determination on remedy were not to be affirmed on appeal, the public interest would still be served by a prompt decision that would end uncertainty about the remedy facing Microsoft's employees, stockholders and firms in the technology industry and throughout the economy that do business with it.

Further, the Court finds that prompt resolution of the appeal issues is important to minimize uncertainty about and potential delay in implementing the injunctive conduct relief provided for in the Final Judgment.

Moreover, direct Supreme Court review is appropriate to facilitate expedited review of the liability issues in this case. In light of the importance of both Microsoft and the liability issues in this case to the software industry and the software industry to the global economy, direct Supreme Court review is appropriate in order to expedite final resolution of the continuing disagreement among the parties about the standards that should govern Microsoft's conduct.

This case is in an appropriate posture for Supreme Court review. This Court has made extensive factual findings, and the appeal is likely to turn on legal issues -- principally the standard for evaluating the lawfulness of a defendant's conduct under Section 2 of the Sherman Act and the question whether special rules are appropriate in matters of software design, as well as the appropriateness of the remedy in the Final Judgment -- that do not require extensive reexamination of the parties' factual contentions.

Direct appeal to the Supreme Court in the first instance will resolve this case more quickly

than interim review by the Court of Appeals. The Court of Appeals would be unlikely to render a decision satisfactory to both sides, thus foreclosing the possibility that intermediate review will obviate further petitions to the Supreme Court. Given the importance of the case and its impact on the nation's economic welfare, the Court believes there is a likelihood that the Supreme Court would grant review.

For these reasons, it is, this _____ day of June, 2000,

ORDERED, that the Court certifies that immediate consideration of the appeal of this consolidated case by the Supreme Court is of general public importance in the administration of justice, and it is

FURTHER ORDERED, that this Order shall forthwith be filed in this Court and transmitted to the Clerk of the Supreme Court, with copies to the Clerk of the Court of Appeals.

Thomas Penfield Jackson
U.S. District Judge