IN THE 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 ex rel. Attorney General DENNIS C. VACCO, et al., Plaintiffs, v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1233 (TPJ)

UNITED STATES' OPPOSITION TO MICROSOFT CORPORATION'S MOTION FOR A STAY

The United States opposes Microsoft Corporation's Motion for a Stay of this Court's Order of August 11, 1998.

1. The United States shares a number of Microsoft's doubts about the desirability of the procedures mandated by the Publicity in Taking Evidence Act, 15 U.S.C. 30. Indeed, last year the Department of Justice recommended to Congress that the Act, which is uniquely applicable to government antitrust cases, be repealed (a recommendation on which Congress did not act). However, the Act is the law of the land, and this Court properly held it applicable to pretrial discovery depositions. Microsoft's argument that the term "deposition," as used in 15 U.S.C. 30, should be limited to depositions taken in lieu of trial testimony is inapplicable to most of the depositions now scheduled because (to the extent the deponent is not a trial witness) the deposition testimony will be used in lieu of trial testimony and may contain party admissions.

Moreover, every court to consider 15 U.S.C. 30 has read it to mean what it says: that it extends to all depositions, including discovery depositions. See, e.g., United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958) (assuming 15 U.S.C. 30 would apply to discovery depositions conducted by the United States); United States v. IBM Corp., 67 F.R.D. 40, 43 (S.D.N.Y. 1975) (applying 15 U.S.C. 30 to discovery depositions); Times News Ltd. of Great Britain v. McDonnell Douglas Corp., 387 F. Supp. 189, 196 (C.D. Cal. 1974) (giving 15 U.S.C. 30 as an example of a statute that permits access to discovery depositions). Congress has not seen fit to disturb this consistent line of cases. To the contrary, Congress has legislated on the assumption that the statute applies to discovery depositions.[1]

The statute's legislative history supports, rather than draws into question, the Court's ruling here. In enacting 15 U.S.C. 30, Congress specifically intended to reverse United States v. United Shoe Mach. Co., 198 F. 870 (D. Mass. 1912), which barred the public from attending the taking of testimony by an examiner. The basis for the court's decision was that, while trials were traditionally open to the public, that principle did not extend to pretrial proceedings, including the taking of evidence. See id. at 872. The court further explained that, because no judicial officer is present at the taking of a deposition, "all effective protection against [the improper revelation of] scandal, impertinence, and irrelevancy is practically gone." Id.; see also 49 Cong. Rec. 4621, 4622 (Mar. 2, 1913) (statement of Rep. Kahn) (criticizing the proposed Act because it makes public "a proceeding preliminary to trial" during which "although the attorney . . . may make an objection against any particular question upon the ground that it is immaterial, incompetent, and irrelevant, still the witness is bound to answer"). These considerations, of

[1]In 1976, Congress amended the Antitrust Civil Process Act, the statute pursuant to which the United States conducts precomplaint discovery in antitrust actions. The ACPA provides, among other things, that the antitrust investigator "shall exclude from the place where the deposition is held all persons except the person being examined, his counsel" and court personnel. 15 U.S.C. 1312(i)(2). Congress added that "[t]he provisions of section 30 of this title shall not apply to such examinations." Id. There would, of course, have been no need to exempt depositions conducted pursuant to the ACPA from 15 U.S.C. 30 if, as Microsoft contends, 15 U.S.C. 30 does not apply to discovery depositions.

course, are just as applicable to discovery depositions as depositions taken for the purpose of preserving a witness's testimony. Microsoft's contention that the broad language of 15 U.S.C. 30 must be narrowed because Congress specifically intended not to reach discovery depositions is, therefore, unpersuasive.

2. Microsoft will not suffer irreparable harm absent a stay. The depositions in this case have been stayed until an acceptable procedure is put in place, which we believe can be agreed to promptly. Any possible appeal will presumably be resolved promptly as well. If Microsoft's stay were granted, depositions could not proceed without mooting the intervenors' claims. Given that Microsoft has little likelihood of success on its appeal,[2] a stay would only serve to postpone the implementation of a procedure that complies with the Publicity in Taking Evidence Act.

CONCLUSION

For the foregoing reasons, Microsoft's Motion for a Stay should be denied.

Respectfully submitted.

_____/s/_____
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[2]The Court certified the question of 15 U.S.C. 30's applicability for interlocutory appeal pursuant to 28 U.S.C. 1292(b) "to the extent necessary to enable an interlocutory appeal to be taken." Order at 2. Section 1292(b) appeal is unavailable in actions brought by the United States for equitable relief under the antitrust laws. See 15 U.S.C. 29(a); Kaufman v. Edelstein, 539 F.3d 811, 816 (2d Cir. 1976). The certification could apply to the suit brought by the State Attorneys General. However, the issue of 15 U.S.C. 30's applicability arises in the States' case only because of the consolidation of the States' case with the United States's case, and it might be questioned whether, under these circumstances, an interlocutory appeal is appropriate in light of 15 U.S.C. 29(a) and the policy it embodies.

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August 12, 1998

CERTIFICATE OF SERVICE

I hereby certify that on August 12, 1998, I caused the foregoing Opposition of the United States to Microsoft Corporation's Motion for a Stay to be served by fax upon:

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