IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICROSOFT CORPORATION, Defendant-Appellant.	No. 00-5212
STATE OF NEW YORK *ex rel.* Attorney General ELIOT SPITZER, *et al.*, Plaintiffs-Appellees, v. MICROSOFT CORPORATION, Defendant-Appellant.	No. 00-5213

PLAINTIFFS' JOINT REPLY ON THEIR MOTIONS FOR SUMMARY DISMISSAL OF MICROSOFT'S MOTION FOR LEAVE TO FILE A MOTION FOR STAY PENDING APPEAL ON THE GROUND THAT IT IS PREMATURE, OR TO DEFER CONSIDERATION PENDING A DETERMINATION AS TO JURISDICTION

In our Motions, we argued that Microsoft's stay motion should be summarily dismissed because Microsoft had not given the district court a fair chance to rule on its stay request, as Rule 8 of the Federal Rules of Appellate Procedure requires; and that, alternatively, consideration of Microsoft's motion should be deferred until the district court's Expediting Act certification decision determines which court will have jurisdiction over Microsoft's appeal.

Microsoft's response argues that the district court has had a fair chance to rule on the stay request. Beyond that, it chooses to view the Final Judgment as properly giving rise to two

cases on appeal, and argues that, even if the district court certifies one of them -- the United States' case -- to the Supreme Court, there will remain in this Court a separate appeal in the States' case that can be the subject of stay litigation. Both responses are unsound. Upon certification, the Supreme Court will have jurisdiction under the Expediting Act, 15 U.S.C. 29, to hear Microsoft's entire appeal from the Final Judgment in this consolidated proceeding -- including its appeal in the States' action -- in the event the district court grants Plaintiffs' joint certification motion. Moreover, upon certification of the Final Judgment under the Expediting Act, the States intend, out of an abundance of caution, to file a petition for writ of certiorari before judgment, pursuant to 28 U.S.C. 1254(1) and 2101(e) as an alternative. If the Supreme Court chooses to review the United States' action pursuant to the Expediting Act, then there is a substantial basis for it also to review the States' action under that Act, or else to issue a writ of certiorari before judgment because the States' action is "of such imperative public importance as to justify deviation from normal appellate practice." Sup. Ct. R. 11.

1. No provision of the Final Judgment takes effect until September 5. The district court has made clear its intent to facilitate a prompt appeal. Rulings by the district court are likely early next week on Microsoft's motion for stay pending appeal and on plaintiffs' motion to certify the case under the Expediting Act, 15 U.S.C. 29(b), which will determine which appellate court will have jurisdiction in the first instance over the appeal. Microsoft has suggested no basis for thinking otherwise.[1]

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[1] The district court is not yet in a position to make its statutorily mandated decision as to the appellate court that will exercise jurisdiction initially over the appeal because Microsoft

If the district court issues a stay, Microsoft's motion in this Court will be moot. If the district court refuses the stay, Microsoft can immediately seek a stay from the appropriate appellate court. In these circumstances, any action by this Court is simply premature.

2. Microsoft does not and cannot deny that if the district court grants plaintiffs' motion for certification under the Expediting Act, this Court will be deprived of jurisdiction to enter a stay, at least in the federal government's case, and that jurisdiction will be regained only if the Supreme Court declines to take the appeal and remands to this Court. Rather, Microsoft argues that the States' action is separate from the United States' action and cannot be appealed to the Supreme Court under the Expediting Act. Both of these arguments are wrong. In any event, they provide no basis whatsoever for this Court to enter a stay in No. 00-5212 if the appeal is certified, nor do they counsel in favor of a stay in No. 00-5213 after certification.

First, even if it were appropriate -- which it is not -- to treat the federal and state cases separately, it would make little practical sense for this Court to stay the judgment in only one case, if it lacked jurisdiction over the other case.

Second, Microsoft misapprehends the separability of the plaintiffs' case. The district court consolidated the two cases (at Microsoft's request) "for all purposes" and treated them as one. "Consolidation is aimed at moving cases forward as one procedural unit." Cablevision

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did not file its notice of appeal until June 13, six days after the court entered the Final Judgment. Microsoft has offered no reason for that delay. Plaintiffs filed their motion for certification the same day Microsoft filed its notice of appeal. Although the United States had attached a draft of the motion for certification to its response to Microsoft's stay motion on June 12, Microsoft has indicated that it will not file its response to the motion for certification until June 19.

Sys. Devel. Co. v. Motion Picture Ass'n of Am., Inc., 808 F.2d 133, 136 (D.C. Cir. 1987) (per curiam) (permitting appellant in non-government case to take advantage of extended period to appeal under F.R.A.P. 4(a)(1) because the district court had consolidated the case with the government case). The district court issued one set of Findings of Fact, one set of Conclusions of Law, and one Final Judgment. Plaintiffs filed a joint motion in the district court under the Expediting Act to certify Microsoft's appeal of the Final Judgment. Although Microsoft contends that the States' action presents issues unique to the States and involves state law, the fundamental issues Microsoft raises are the same, namely: (a) the validity of the findings that Microsoft violated federal antitrust law, and (b) the appropriateness of the divestiture remedy.

Microsoft points out that plaintiffs asked that the States be allowed separate cross-examination of witnesses during trial, but ignores its response to that request[2] and the fact that the district court did not grant that motion. At the time, the district court indicated it would consider separate cross-examination on a witness-by-witness basis if plaintiffs could show divergent interests between the United States and the States. Plaintiffs' interests never diverged; they never sought supplemental cross-examination again; and none was ever allowed. The trial was conducted throughout as one consolidated case.

[2] Microsoft argued that "only one lawyer on each side" should be permitted to examine a witness, that plaintiffs' interests were "identical," that plaintiffs had "fail[ed] to identify a single respect in which their interests diverge in any meaningful manner," and that the two sets of claims did not "differ in any substantive respect." Microsoft's Memorandum In Opposition To Plaintiffs' Joint Motion To Permit "Supplemental" Cross-Examination at 2, 3 (Dec. 3, 1998) (emphasis added) (attached hereto as Ex. A).

Third, Microsoft is incorrect that its appeal in the States' case will remain in this Court if the district court certifies the Final Judgment for immediate appeal to the Supreme Court. Under the Expediting Act, the district court certifies an "appeal from a final judgment." 15 U.S.C. 29(b). Because the district court entered but one Final Judgment, the entire Final Judgment should be certified for direct appeal under the terms of the statute and the Supreme Court's rules. See Plaintiffs' Motion For Certification Of Direct Appeal To The Supreme Court Under 15 U.S.C. § 29 (attached as Ex. A to Microsoft's Response).[3]

Rule 18.2 provides that once a direct appeal from a district court judgment is filed under a statute such as the Expediting Act, "[a]ll parties to the proceeding in the district court are deemed parties entitled to file documents in [the Supreme] Court." See also Secretary of the Interior v. California, 464 U.S. 312, 319 n.3 (1984) (taking jurisdiction of consolidated cases without requiring independent basis for Article III standing).[4] The Supreme Court's reference to "proceeding" rather than "case" or "action" reflects a decision to facilitate quick

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[3] Microsoft can take no comfort in the fact that the clerk of the district court required it to file separate notices of appeal. Resp. at 7. As this Court previously has commented, "[i]t so happens that the Clerk of the District Court for the District of Columbia requires such multiple filings, but we place no weight on that fact." Cablevision, 808 F.2d at 136. But for the district court clerk's requirement, one notice of appeal would have sufficed. See Barnett v. Petro-Tex Chemical Corp., 893 F.2d 800, 805 (5th Cir. 1990) ("when cases have been consolidated in district court and disposed of by entry of one final judgment, a single notice of appeal may be used by all the appealing parties").

[4] Federal courts have also recognized that where a rule or statute reflects a policy against piecemeal appeals and/or inconsistent appellate rulings, consolidated actions should be viewed as one proceeding if they are resolved together in the district court. See, e.g., Ivanov-McPhee v. Washington Nat'l Ins. Co., 719 F.2d 927, 930 (7th Cir. 1983) (party seeking to appeal dismissal of one of several consolidated actions must obtain certification under Fed. R. Civ. P. 54(b) where actions "are combined into one, lose their separate identity, and become a single action in which a single judgment is rendered").

and final review of all related issues arising in litigation that is subject to direct review. Separating or de-consolidating actions that have been treated as one proceeding for all purposes by the district court -- so that one part would be covered by the Expediting Act but the other part would not -- would result in a loss of judicial economy and expedited finality that direct review was designed to avoid.[5] Indeed, one judgment cannot simultaneously be appealed to two different courts. And no purpose would be served by having this Court review an appeal of a judgment that was simultaneously the subject of plenary review by the Supreme Court. Microsoft disagrees, and it is free to present its views to the district court and, if the district court certifies the judgment for a direct appeal, to the Supreme Court. Microsoft's bald assertion that this Court will retain jurisdiction of its appeal in the States' case regardless of the district court's decision on certification provides no reason, however, for this Court to consider Microsoft's premature motion for stay.

3. In any event, the Expediting Act is not the States' only direct avenue to the Supreme Court. If the district court certifies the Final Judgment for direct appeal under the Expediting Act, the States will, out of an abundance of caution, ask the Supreme Court to grant certiorari

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[5]Microsoft's attempt (Resp. at 7) to extend Johnson v. Manhattan Ry. Co., 289 U.S. 479 (1933), is misguided. Johnson was an unusual case because the district court ordered consolidation solely to ensure the parties' right to challenge the appointment of a receiver "directly," rather than "collaterally." In cases more analogous to ours, because they address fundamental jurisdictional questions, courts have relied on cases decided after Johnson in which the Supreme Court took jurisdiction of consolidated cases without requiring an independent jurisdictional basis for each case. See Sandwiches, Inc. v. Wendy's Int'l, Inc., 822 F.2d 707, 709-10 (7th Cir. 1987) (citing Secretary of the Interior and Synar v. United States, 478 U.S. 714 (1986)).

before judgment in their case. See 28 U.S.C. 1254(1), 2101(e); Sup. Ct. R. 11. The Supreme Court has the power to grant certiorari at any time before judgment in a court of appeals, as long as the case has been docketed and is properly "in" the court of appeals. Gay v. Ruff, 292 U.S. 25, 30 (1934); Stern, Gressman, Shapiro & Geller, Supreme Court Practice § 6.1, at 275 (7th ed. 1993) ("Stern & Gressman"). Though the case must be of "imperative public importance," Sup. Ct. R. 11, neither the statute nor the Supreme Court rules places any limitation on the parties, the status of the case, the matter at issue, or the nature or form of the decision below. Stern & Gressman, § 2.1, at 39. Indeed, the Supreme Court has granted certiorari before judgment to the federal government, which won in the district court, in several cases "because of the general public importance of the issues presented and the need for their prompt resolution." United States v. Nixon, 418 U.S. 683, 686 (1974); Reid v. Covert, 354 U.S. 1, 5 (1957) (where one case was before the Court by direct appeal, Court granted petition for certiorari before judgment in a separate action raising the same issue filed by the United States after prevailing in the district court); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); United States v. United Mine Workers, 330 U.S. 258 (1947); United States v. Bankers' Trust Co., 294 U.S. 240 (1935); see generally Stern & Gressman, § 4.20 at 199 & nn.64-66 (certiorari before judgment usually invoked for cases of "great constitutional significance" or "extraordinary national importance for other reasons").

We believe the "imperative public importance" standard of Supreme Court Rule 11 is plainly met. Following certification, the standard under the Expediting Act itself, Microsoft's own contention that resolution of this case "could have a significant adverse impact on the Nation's economy," Motion Of Appellant Microsoft Corporation For A Stay Of The Judgment

Pending Appeal, at 3 (June 13, 2000), and this Court's recognition of the "exceptional importance of these cases," Orders of June 13, 2000 in Nos. 00-5212, 5213, all mark this case as suitable for certiorari before judgment.

Even more significantly, given the impracticability, inefficiency, and confusion that would ensue from parallel appellate review in two courts of one litigation, it is unlikely that the Supreme Court would permit the States' case to proceed in the court of appeals at the same time it considered the United States' case. In this regard, Roe v. Wade, 410 U.S. 113 (1973), is instructive. There, defendants were entitled to a direct appeal to the Supreme Court from a three-judge district court's denial of an injunction, but the district court's denial of declaratory relief in that same action was not appealable under 28 U.S.C. 1253. The Supreme Court nevertheless reviewed the declaratory relief request along with the injunctive relief issues, stating that, while "[i]t might have been preferable if the defendant . . . had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief," review of both the injunctive and declaratory aspects were not foreclosed because "the arguments as to both aspects are necessarily identical." Id. at 123.

If the Supreme Court were to accept review of Microsoft's appeal in the United States' action pursuant to the Expediting Act but deny review of Microsoft's appeal in the States' action to await developments in this Court, the result would be a substantial delay in the ultimate resolution, and the risk of inconsistent disposition of issues that are of the utmost

public importance.[6] Prolonged uncertainty about the divestiture and Microsoft's liability that could be engendered by a lengthy or two-tracked appeals process would have significant adverse consequences.

Accordingly, Microsoft's premise that its appeal in the States' case will remain in this Court if the Supreme Court reviews the United States' case is most likely wrong and questionable at best. But even granting that premise arguendo, because there is only one Final Judgment, it would be imprudent, and likely futile, for this Court to attempt to prevent enforcement of that Final Judgment by the United States while the Supreme Court has jurisdiction under the Expediting Act.

Thus, this Court should dismiss Microsoft's motion or, in any event, defer further action until the district court has ruled on Microsoft's request for stay and the United States' request for certification under the Expediting Act.

Respectfully submitted,

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[6] See Clinton v. New York, 524 U.S. 417, 455 (1998) (Scalia, J., concurring in part and dissenting in part) (stating that review pursuant to 28 U.S.C. § 2101(e) made sense in that case "[i]n light of the public importance of the issues involved, and the little sense it would make for the Government to pursue its appeal against one appellee in this Court and against the others in the Court of Appeals").

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June 16, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2000, I served a copy of the foregoing Plaintiffs' Joint Reply On Their Motions For Summary Dismissal Of Microsoft's Motion For Leave To File A Motion For Stay Pending Appeal On The Ground That It Is Premature, Or To Defer Consideration Pending A Determination As To Jurisdiction, by Federal Express next-day delivery upon the following:

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