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

Nos. 98-5399, -5400 (Consolidated)

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

MICROSOFT CORPORATION,

Defendant-Counterclaim Plaintiff-Appellant,

v.

STATE OF NEW YORK, *ex rel*
Attorney General DENNIS C. VACCO, *et al.*,

Plaintiffs-Counterclaim Defendants-Appellees,

THE NEW YORK TIMES COMPANY, *et al.*,

Intervenors-Appellees.

OPPOSITION OF THE UNITED STATES OF AMERICA TO APPELLANT MICROSOFT CORPORATION'S MOTION FOR A STAY PENDING APPEAL OF THE AUGUST 11, 1998 ORDER

The United States opposes Microsoft Corporation's ("Microsoft") motion for a stay of the court's August 11, 1998, order enforcing the Publicity in Taking Evidence Act, 15 U.S.C. 30 ("Motion"). The district court correctly read the Act to confer upon the public the right to attend

the depositions to be conducted in this case, and properly required the parties to propose procedures that implement the Act's purpose yet also ensure that commercially sensitive information is shielded from disclosure and that the proceedings in this case move forward in an expeditious and orderly manner. Microsoft's claim of irreparable harm is speculative and insubstantial. In contrast, to grant Microsoft's stay may irremediably deny intervenors the right of access that Congress conferred. Microsoft thus has not sustained its "heavy"[1] burden of showing entitlement to the extraordinary remedy of a stay pending appeal; accordingly, Microsoft's motion should be denied.

BACKGROUND

1. On May 18, 1998, the United States filed a Complaint charging Microsoft with, inter alia, unlawfully maintaining its monopoly in desktop operating systems in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1-2. The same day, twenty State Attorneys General, joined by the District of Columbia, filed a closely related suit. Shortly thereafter, a number of news organizations moved to intervene for the purpose of enforcing "the public's right of access" to certain documents filed under seal.[2] During briefing on that motion, the parties entered into a Protective Order designed to govern the taking and use of evidence in this action (Motion Ex. B), following the usual practice in antitrust actions brought by the United States.

The news organizations (intervenors here) at that time neither invoked the Publicity in Taking Evidence Act, 15 U.S.C. 30, nor sought to attend any depositions in this matter. The

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[1] FTC v. Weyerhaeuser Co., 648 F.2d 739, 741 (D.C. Cir. 1981); see also 11 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 2904, at 505 (1995).

[2] Motion of the New York Times et al. for Leave to Intervene 2 (June 8, 1998).

Publicity in Taking Evidence Act has seldom been invoked over the years, and the Protective Order was simply not crafted to deal with the possibility that a proper party might invoke it here, just as the Protective Order does not anticipate many other issues that might arise.[3]

2. The parties commenced expedited discovery. Both parties noticed a number of depositions; among them, the plaintiffs noticed the depositions of a number of Microsoft employees, including Microsoft Chairman and CEO Bill Gates. When Microsoft refused to make all of the requested individuals available for depositions and sought to limit Mr. Gates' availability to a single 8-hour period, the United States filed a motion to compel. The district court subsequently granted that motion in a hearing held on August 6, 1998. During that hearing, which was open to the public, it was revealed that Mr. Gates' deposition would commence on August 12, 1998, and that a number of other depositions of Microsoft personnel would also soon commence.

Four days later, the intervenors filed a motion to enforce 15 U.S.C. 30. The intervenors requested, among other things, an order "admit[ting] the public to all depositions taken in this case, including, particularly, the deposition on Bill Gates" (Motion Ex. C). The district court held a hearing on the motion the next day. The judge observed that he did not "think there is any question" that 15 U.S.C. 30 conferred upon the public "the right" to attend depositions in this matter (Tr. 8/11/98, at 3, attached as Ex. A). The court thus granted the intervenors' motion and

[3]Microsoft's childish assertion that the United States' position in this matter can be explained only by its purported "desire to protect Netscape . . . while seeking to subject Microsoft . . . to maximum media attention" (Motion at 11 n.4) is entirely baseless. Once the intervenors filed their motion to enforce 15 U.S.C. 30, the United States articulated what it believes to be the correct reading of that statute. The timing of the intervenors' motion, of course, was entirely outside of the United States' control.

stayed all depositions pending the establishment of a protocol that comports with the Act's terms yet "prevent[s] the unnecessary disclosure of trade secrets or other confidential information" (Order at 3; Motion Ex. A). On August 12, 1998, the district court, adhering to its reading of the statute, denied Microsoft's motion for a stay pending appeal. The same day, Microsoft filed an appeal in this Court and its instant motion for a stay.

ARGUMENT

The United States shares Microsoft's concern about the wisdom of the Publicity in Taking Evidence Act. Indeed, the Department of Justice recommended to Congress last year that the Act, which is uniquely applicable to civil antitrust actions brought by the United States, be repealed (a recommendation on which Congress did not act). The district court nevertheless correctly held that the Act by its express terms applies to the depositions at issue here; and it is "the duty of the courts to enforce the judgment of the Legislature, however much we might question its wisdom or fairness." Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 483-84 (1992). Because Microsoft lacks a likelihood of success on prevailing on its reading of the Act, the only substantial ground for its appeal, Microsoft's motion should be denied.[4]

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[4]The United States does not contest this Court's jurisdiction over this appeal. Although the authorities cited by Microsoft, see Motion at 5-6, do not definitely resolve the question, we believe that the collateral order doctrine applies in the circumstances presented by this case and, therefore, that jurisdiction exists pursuant to 28 U.S.C. 1291. The United States, however, disagrees with Microsoft's assertion that 28 U.S.C. 1292(b) may confer jurisdiction insofar as the Order was entered in the government's case. The Expediting Act expressly provides that interlocutory appeals in an action for equitable relief brought by the United States under the antitrust laws may be taken "pursuant to sections 1292(a)(1) and 2107 of Title 28 but not otherwise." 15 U.S.C. 29(a). Section 1292(b) might be available insofar as the court's Order was entered in the suit brought by the State Attorneys General. However, 15 U.S.C. 30 is relevant to the States' case only because of the consolidation of the States' case with the United States' case. It is accordingly doubtful whether, in these circumstances, Section 1292(b) may be invoked.

1. Microsoft does not contest that "the plain language of 15 U.S.C. § 30" (Order at 1; Motion Ex. A) compels the district court's reading of the statute. Rather, Microsoft contends that the term "depositions" in 15 U.S.C. 30 was intended to apply only to depositions taken by "masters or examiners in equity as a substitute for trial testimony, not to discovery depositions" (Motion at 8), and that the Court should read that limitation into the statute. As an initial matter, even if Microsoft were correct that the term "depositions" in 15 U.S.C. 30 excludes "discovery" depositions, that would not support the result Microsoft seeks. The depositions noticed in this case are not -- as Microsoft represents -- simply "discovery" depositions. Rather, the majority are being taken for the purpose of creating substantive evidence to be used in lieu of live trial testimony (Tr. 8/12/98, at 12, attached as Ex. B), a procedure both Microsoft and the plaintiffs recommended to the district court and which the court adopted in modified form.[5]

In any event, Microsoft' reading of the Publicity in Taking Evidence Act cannot withstand even casual scrutiny. The language is absolutely clear and unambiguous. Not surprisingly, then, 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. United Fruit Co., 410 F.2d 553, 555-56 (5th Cir. 1969) (assuming the Act's applicability not only to depositions, but also to documents); 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.,

[5]See Defendant Microsoft Corporation's Motion in Support of Proposed Pretrial Order No. 2, at 3-5 (Aug. 3, 1998) (attached as Ex. C); Pretrial Order No. 2 ¶ 4 (Aug. 6, 1998) (attached as Ex. D).

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).

Contrary to what Microsoft contends, the context in which the Publicity in Taking Evidence Act was enacted supports, rather than draws into question, this reading. Although Microsoft correctly observes that in 1913 depositions were taken principally to preserve testimony, Microsoft's conclusion that the term "depositions" must be limited to the type in use at the time of 15 U.S.C. 30's enactment does not follow. The use of depositions for discovery might have been uncommon in 1913; "[b]ut it is no bar to interpreting a statute as applicable that 'the question which is raised on the statute never occurred to the legislature.'" Eastern Air Lines, Inc. v. CAB, 354 F.2d 507, 511 (D.C. Cir. 1965) (quoting B. Cardozo, The Nature of the Judicial Process 15 (1921)). As the legislative history of 15 U.S.C. 30 makes clear, Congress understood a "deposition" to mean "a proceeding preliminary to a trial" during which, although objections might be raised, "the witnesses is bound to answer." 46 Cong. Rec. 4621, 4622 (Mar. 2, 1913) (statement of Rep. Kahn) (criticizing the proposed Act because it would permit the public to attend testimony taken prior to a court's ruling on objections), reprinted in 8 The Legislative History of the Federal Antitrust Laws and Related Statutes 6404 (Earl W. Kintner ed., 1984). Congress may not have foreseen the use of depositions purely as discovery devices; but Congress's understanding of "depositions" applies equally to "discovery" depositions and depositions taken to preserve testimony. Nothing in the legislative history "prove[s] that Congress intended" the term "deposition" "should be applied only" to the latter and not the

former. Patagonia Corp. v. Board of Governors, 517 F.2d 803, 811 (9th Cir. 1975) (emphasis in original).[6]

To the contrary, the circumstances that gave rise to 15 U.S.C. 30 tend to support the conclusion that the statute applies to pretrial depositions irrespective of the use to which such testimony is put. The Publicity in Taking Evidence Act was enacted to reverse United States v. United Shoe Machinery Co., 198 F. 870 (D. Mass. 1912), a case in which the court precluded the public's attendance of an examiner's taking of testimony in a Sherman Act case. The basis for the court's decision was that, although trials traditionally are open to the public, the same is not true of "the taking of depositions, either at law or equity" because "it is quite clear" that such proceedings are "in no proper sense a part of a judicial trial." Id. at 874. A deposition, the court reasoned, "does [not] become evidence in a case until it is offered by one of the parties; until there is an opportunity for a judicial hearing as to its competency." Id. at 872. Congress recognized that United Shoe accurately stated the law, even as to testimony taken by an examiner as a "traveling court." 49 Cong. Rec. 2511, 2512 (Feb. 3, 1913) (remarks of Rep. Norris), reprinted in Kintner, supra, at 6398. Congress nonetheless judged it appropriate to create a public right of access to the "pretrial" taking of testimony, even if that testimony subsequently were read at trial. See id. at 2513, reprinted in Kintner, supra, at 6400; cf. 49 Cong. Rec. 4621, 4622 (Mar. 2, 1913) (remarks of Rep. Kahn) (explaining that depositions, even if used to preserve trial testimony, are eventually made public), reprinted in Kintner, supra, at 6404; Equity R. 67, 210 U.S. 508, 532-33 (1907) ("[T]he court may, at its discretion, permit the

[6]Microsoft's reliance upon Richard L. Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1, 39 (1984), which simply notes that 15 U.S.C. 30 was not "designed" with discovery depositions in mind, is accordingly misplaced.

whole, or any specific part, of the [deposition] to be adduced orally in open court upon final hearing."). Congress, therefore, intended to extend a right of public access to pretrial depositions, where it had not existed before. There is no evidence, as Microsoft suggests, that Congress intended to restrict that right depending on the use to which the pretrial deposition was put.

Finally, the district court's reading of the Act draws support from Congress's 1976 amendments to the Antitrust Civil Process Act ("ACPA") in 1976, the provisions pursuant to which the United States conducts precomplaint discovery including the taking of depositions. Congress added to the ACPA that "[t]he provisions of section 30 of this title shall not apply to such examinations." 15 U.S.C. 1312(i)(2). There would have been no need to exempt depositions conducted pursuant to the ACPA from 15 U.S.C. 30 if, as Microsoft contends, that statute only applies to depositions taken in lieu of trial testimony. Cf. Red Lion Broadcasting v. FCC, 395 U.S. 367, 380-81 (1969) (construing the term "public interest" in light of its use in a subsequent enactment and explaining that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction").[7]

2. Microsoft's claim that it will suffer irreparable injury absent a stay is similarly unpersuasive. Microsoft's contention that "[i]t is inevitable that Microsoft's trade secrets . . . will be disclosed during the depositions" (Motion at 13) ignores that the parties are presently

[7]Microsoft suggests that Congress's understanding of 15 U.S.C. 30 as embodied in the ACPA is irrelevant because ACPA depositions are not taken pursuant to the Federal Rules (Motion at 10-11). But this argument is premised on Microsoft's contention that Rule 26(c)(5) supercedes 15 U.S.C. 30 (Motion at 10), a premise for which there is no foundation. The very treatise Microsoft cites explains that "[a] deliberate expression of congressional policy, such as the 1913 statute, should not easily give way to a very general provision of the rules." 8 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure § 2041, at 539 (1994).

engaged in the process of crafting procedures designed to avoid the disclosure of information over which a party legitimately may claim confidentiality. And although Microsoft asserts that any procedure devised will nonetheless result in the "serious[] disrupt[ion] of these important proceedings" (Motion at 14), Microsoft ignores the experience of the IBM litigation in which no appreciable disruption occurred despite the taking there, subject to 15 U.S.C. 30, of hundreds of depositions (Tr. 8/12/98, at 13, attached as Ex. B).

A stay may irreparably harm the intervenors. If this Court were to grant Microsoft's motion, and depositions resumed immediately, the intervenors would be deprived of the right of access that 15 U.S.C. 30 guarantees. Cf Apache Survival Coalition v. United States, 21 F.3d 895, 912 (9th Cir. 1994) (prejudice is measured by "what Congress defines as prejudice" (internal quotations omitted)).[8] Although there may be circumstances in which a valid protective order might permit the closing of certain depositions entirely, see United Fruit, 410 F.2d at 555-56 (holding that 15 U.S.C. 30 does not preclude entry of orders "sealing all or part of the record"), it is plainly premature to conclude that excluding the public from any or all of the depositions to be taken in this action will be warranted.[9]

[8]Although Microsoft contends that "edited video-tapes and transcripts" at a later date obviates this harm, in enacting 15 U.S.C. 30 Congress specifically rejected the argument that making a deposition available at a later date provided an adequate substitute for the public's presence at a deposition's taking. See supra p.7 (citing legislative history).

[9]Should the procedures adopted by the district court for accommodating the public result in significant disruption or prove unworkable, the court retains ample power to enter appropriate further orders to protect the integrity of its proceedings.

CONCLUSION

For the foregoing reasons, Microsoft's Motion for a Stay of the Court's August 11, 1998, Order should be denied.

Respectfully submitted.

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August 14, 1998

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 1998, I caused the foregoing OPPOSITION OF THE UNITED STATES OF AMERICA TO APPELLANT MICROSOFT CORPORATION'S MOTION FOR A STAY PENDING APPEAL OF THE AUGUST 11, 1998 ORDER to be served by hand upon:

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