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A Practice Focus: **ANTITRUST LAW**

No Fool for *Microsoft*

High Court's Refusal Highlights Flaws With Case and With Antitrust Generally

BY JAMES V. DELONG

Next February, the U.S. Court of Appeals for the D.C. Circuit will sit *en banc* for two days to hear the appeal of *United States v. Microsoft.* It has already tripled the normal page limit on briefs, giving each side 150 pages for openers and adding 75 more for the appellant's reply. A technical briefing for the judges on the fundamentals of automation was in the works until it was derailed by the parties' opposition.

These extraordinary steps highlight the perceived importance of the Microsoft case, of course.

They illustrate the reasons why the Supreme Court, wisely, refused to touch it, voting 8-1 to give the D.C. Circuit first dibs. Any matter needing this intensive a process is a poor candidate for the high court, which prefers to see issues narrowed and honed, and extraneities stripped out.

But the unusual nature of the appellate procedures also highlights some points that are even more fundamental, not only about *Microsoft,* but about the nature of big antitrust cases in general.

'SORTA, KINDA LIKE' LAW

The first is that such inquisitions are not really *trials* in any ordinary sense. They are not matters in which facts can be determined and then measured against known legal rules, allowing for a little uncertainty at the margin over the precise scope of the law. Instead, they are rule-making proceedings. They are directed at determining what the law *should* be.

The edifice of antitrust law is built on the Sherman and Clayton acts, both of which rely on operative terms that are murky to the point of opacity. As has often been pointed out, a prohibition on all contracts that "restrain trade" is potentially limitless. Two lawyers forming a partnership are "restraining trade." Indeed, any agreement requiring *any* performance in the future restrains trade if one chooses to press the point.

The response of the legal system to this logical conundrum is, as has been pointed out equally often, the rule of reason—only "unreasonable" restraints are illegal—together with an elaborate theology that divides the antitrust world into offenses that should be made illegal per se vs. practices that are declared illegal only after intensive inquiry into their effects.

Inquiries into whether offenses are illegal per se or into whether their net effects are "anti-competitive" (another chameleon term) hinge only in part on specific facts of the kind determinable by a jury or judge at trial—facts of the "John went through the red light" variety. Such inquiries also turn on what the administrative lawyers call "legislative facts." These are a complicated brew of specific facts intermixed with generalizations about the world, calculations of social policy, economic theories, and predictions about future developments with and without some newly proposed "rule."

Now, rule making has always been regarded as the province of executive agencies, which, in theory at least, bring resources of expertise to the task. (That agencies are often inhabited by political hacks whose only expertise is in appeasing interest groups is a different problem.) Courts embrace the concept that rule-making proceedings are beyond their institutional competence, and judicial review of these matters has always been limited to correcting only the most blatant abuses. Except in antitrust.

In antitrust, courts claim authority to make the rules. And, as if to prove the point about lacking institutional competence, they have often made a royal hash of it. Robert Bork documented this quite well in his 1978 classic *The Antitrust Paradox,* and nothing since should change anyone's mind. Whether one agrees or disagrees with the results of such later cases as *Aspen Skiing v. Aspen Highlands Skiing* or *Eastman Kodak v. Image Technical Services,* the grasp of commercial, industrial, and economic realities demonstrated in the judicial opinions is weak.

LOOK AT THE DECISION

Microsoft falls in this rule-making tradition. Among the judge's 412 findings of fact, covering 140 pages of text, are

some specific conclusions about who did what when. But they are overshadowed by complex technical assessments about the results of these actions, by conclusions about the economics of the high-tech world, and by predictions about the future.

The Justice Department is now spinning this as an Old Economy case involving dominant-firm behavior prosecuted under clear, existing standards, not as a New Economy matter. But the spin doesn't take. Even if the rules on dominant-firm behavior were clear, which they are not, and even if the assessment of when a firm is dominant were straightforward, which it is not, the computer and communications revolutions have so changed the context that the proper application of the antitrust rules has become a matter of considerable bafflement.

A reviewing court will have a tough time determining which of the findings in *Microsoft* are real, factual findings to which it must defer, which are conclusions of law disguised as facts, and which are legislative facts. Findings of legislative fact by an agency would usually also receive deference based on the "expertise" theory. But why should one set of judges assume that another judge has greater expertise?

In any situation, the Supreme Court prefers to look at clearly posed questions of law based on trial records that settle a case's factual uncertainties. It also prefers to work with issues that have been addressed by the various courts of appeal so that the justices have a feel for the sentiments of the federal judiciary as a whole. And it wants to avoid cases rife with traps that can lure the Court into stupid mistakes.

Taking *Microsoft* directly would have violated all of these rules of thumb. As to uncertainties, for example, the trial judge's findings on such issues as "middleware" and the "applications barrier to entry" have already been subject to serious scoffing. The Supreme Court was surely not eager to decide whether these findings are, in fact, "facts," whether it is bound by them, or under what standard it would re-examine them.

The case also has great potential for making reviewing judges look foolish in short order. The pace of change in the computer industry is such that a decision reached today could be stupendously silly before the ink on the opinion dries. The chances of looking wise are correspondingly thin.

It Ain't Over Till the Remedy

The need for quick resolution would have had to be enormous for the Supreme Court to take on the perplexing question of the factual findings in a context where new developments could quickly render its opinion a joke. But even high court review would not have guaranteed finality because of the problem of the remedy ordered.

Microsoft started as a fast-track trial of a limited number of issues. It morphed into vivisection without benefit of anesthesia. And this was done without any proceedings focused on the question of remedies. That was the *real* lawmaking—restructuring the computer industry on the basis of no record except the Justice Department's recommendations.

No lawyers not in thrall to Justice, the state plaintiffs, or Microsoft's competitors think that the decision to split up the company has more than the wispiest chance of surviving appellate review. One cannot set the prospect at zero; the willingness of the legal system to act imperially has grown in recent decades. But upholding the remedy would be a stretch even under the standards of contemporary jurisprudence. Indeed, a new administration of *either* party may well choose to confess error on the remedies portion of the case, contesting the appeal only on the liability issue and conceding the need (if the government wins) to remand for more proceedings on the proper remedy.

When remand is almost certain even if the liability verdict stands, why would the Supreme Court rush to get involved? On the ground that speed was essential?

Hustling Justice

A final reason for the justices to deny direct review may well have been precisely the urgency with which it was sought by the Justice Department and the states.

Trial lawyers are a strange breed. They gloat more over victories won in bad cases than in good ones. Anyone can win a good case, but winning a bad one shows *real* legal talent. To the true pit-bull litigator, the worse the underlying case, the sweeter the triumph. If, a year later, everyone starts commenting on what a silly decision it was, that only makes the win more satisfying. To bamboozle a court completely, especially the Supreme Court, proves that *you* are a top-notch lawyer—and now everyone knows it.

The justices are veterans of the legal system. They know this mind-set well. And the government's push for quick review may well have rung loud alarms, as indeed it should have. Could it be that Joel Klein and company thought their victory rested on a foundation of sand and wanted to solidify it before reality caught up?

Only a naïf would neglect this line of thought, especially considering the unlikelihood that this messy case would be finished. The institutional interest of the Supreme Court would not have been served by allowing itself to be coaxed along. Quite the reverse—the Court should want to give reality every chance to catch up before it commits itself on this one.

If the justices are lucky, *Microsoft* will be resolved either by the D.C. Circuit or by events, and the Supreme Court will never need to hear it. But the basic problems of antitrust law and the questions about the institutional ability of the judicial system to make antitrust laws for a dynamic economy will remain. ■

James V. DeLong is a senior fellow at the Competitive Enterprise Institute in Washington, D.C., where he works with the Project on Technology and Innovation. Between 1978 and 1981, he was research director of the Administrative Conference of the United States.