

**COMMENTS OF STEPHEN D. HOUCK AND KEVIN J. O’CONNOR  
ON THE STATES’ ROLE IN THE MICROSOFT CASE  
RE: WORKING GROUP ON ENFORCEMENT INSTITUTIONS**

**Summary**

One of the issues adopted for study by the Antitrust Modernization Commission is “[w]hat changes, if any, should be made to the enforcement role that the states play with respect to the antitrust laws?” The States’ role in the *Microsoft* case, while central to consideration of this question, has not always been accurately portrayed. The goal of this comment is to clarify the States’ role in the case: from its inception through the investigation, trial, mediation, settlement, remedies, appeals and enforcement phases of the litigation. The authors of this comment believe that they are uniquely situated to provide this information, having served successively as lead counsel to the plaintiff States for more than four years, from the investigation through many of the key events in the litigation.<sup>1</sup>

The government enforcement action against Microsoft was commenced by the simultaneous filing, on May 18, 1998, of two separate complaints, one by the Antitrust Division of the Department of Justice (“DOJ”) on behalf of the United States, and the other by the chief law enforcement officers of 20 States and the District of Columbia suing *parens patriae* on behalf of their citizens. The case represents the most extensive collaboration between state and federal antitrust enforcers since the passage of the Sherman Act in 1890. Their joint effort endured without significant disagreement for

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three and a half years, through a lengthy trial and initial appeal. Then, in November, 2001, following a change in federal administrations, DOJ and half the States entered into a settlement with Microsoft while the remaining States continued to litigate to obtain additional remedies. Today all government plaintiffs are again reunited in a joint effort to enforce their respective Final Judgments.

As described more fully in this comment, an overview of the States' role in *Microsoft* demonstrates that:

- the States' pre-complaint investigation, conducted for the most part independently of DOJ's, was staff-driven, thorough and extensive;
- the States' decision to sue was based on the merits after an exhaustive analysis of the relevant facts and law, not on lobbying by Microsoft's competitors;
- the States decided to file a complaint before DOJ did and were prepared to proceed without DOJ;
- the States' complaint was filed by a bipartisan coalition of twenty-one Attorneys General that included conservative Republicans and liberal Democrats representing approximately 57% of the country's citizens;
- after consolidation of the two actions, DOJ assumed the principal role at trial, but the States made an important contribution to the trial effort;
- Judge Richard A. Posner's attempt to mediate the case in 2000 failed because he was unable to bridge the gap between Microsoft and all plaintiffs, DOJ as well as the States;
- the subsequent appeal, argued by John G. Roberts, Jr. on behalf of the States, resulted in a unanimous *en banc* opinion by an ideologically diverse D.C. Circuit Court of Appeals upholding the monopoly maintenance claim at the heart of the States' case;
- the partial settlement with Microsoft in 2001 that included DOJ and some of the States was significantly influenced and strengthened by the States through their participation in the negotiating process;
- the decision by the non-settling States to seek additional relief was legally appropriate, principled and supported by many respected legal scholars

and economists across a wide political spectrum, including prominent conservative lawyers like Robert H. Bork and Kenneth W. Starr; and

- the remedies hearing afforded the courts an opportunity, that otherwise would not have been fully realized, to fulfill their role in our legal system: to act as the final arbiter of the appropriate relief in important antitrust cases like *Microsoft*.

## **I. Investigation**

Some critics advocate a reduced role for the States in antitrust enforcement based on their contention that State Attorneys General are susceptible to lobbying by a prospective defendant's competitors.<sup>2</sup> There is no empirical evidence, however, to support such a claim. Rather, this criticism seems to be motivated, at least in part, by an animus towards officials, like many State Attorneys General, who are elected rather than appointed.<sup>3</sup> Why a State Attorney General – who is sworn to uphold the law as a State's chief law enforcement officer – should be more likely to forsake his or her oath of office to pursue a non-meritorious action than the U.S. Attorney General, who, after all, is appointed by and answers to an elected official, is by no means clear.<sup>4</sup> In any event, such criticism is totally unwarranted with respect to the genesis of the States' investigation of Microsoft.

What eventually became the Microsoft multistate investigation was initiated by Texas in 1997. The impetus was press reports about the so-called browser wars. Texas commenced its inquiry by issuing civil investigative demands to Microsoft and Netscape.

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<sup>2</sup>See, e.g., Richard Posner, "Is Federalism Overrated?", Keynote Address, American Enterprise Institute for Public Policy, April 21, 2003, available at [www.federalismproject.org/masterpages/Antitrust/Posner.pdf](http://www.federalismproject.org/masterpages/Antitrust/Posner.pdf), at 6.

<sup>3</sup> *Id.*

<sup>4</sup> The unwarranted aspersions as to the integrity of State Attorneys General vis-a-vis their federal counterpart are, at the very least, somewhat ironic given the genesis of the Tunney Act in Congress's concern about the impact of undue political influence on DOJ's prosecution of the IBM antitrust case in the 1960's.

Based on its analysis of the resulting documentation, Texas concluded that further investigation was warranted. Recognizing the desirability of additional resources in conducting an investigation of such potential scope and magnitude, Texas enlisted the aid of its sister States. Eventually, a working group of ten States was assembled. Texas and New York were the co-lead States, joined by California, Connecticut, Illinois, Iowa, Ohio, Massachusetts, Minnesota, and Wisconsin. Even at this early stage of the investigation, the State coalition was strongly bipartisan. Of the ten members of the working group, four major States that made significant contributions had Republican Attorneys General: New York, California, Illinois and Ohio.

The investigation was initiated from the staff up, not from the top down. Indeed, the investigation was completely staff driven. Microsoft's conduct was scrutinized not because elected officials had been lobbied by Microsoft's competitors, but because career staff attorneys had concluded that there was evidence that Microsoft had acted unlawfully. For example, although co-lead State New York was home to one of Microsoft's major competitors (IBM), that company had no influence whatsoever on New York's decision either to initiate an investigation or to file a complaint.

The States' investigation was the product of several factors. First and foremost was the staff attorneys' determination that Microsoft appeared to have violated state and federal antitrust laws that they are charged with enforcing. Another important factor was the potentially enormous impact of Microsoft's conduct on consumers.<sup>5</sup> Microsoft's Windows operating system was (and still is) virtually ubiquitous, present on more than

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<sup>5</sup> State Attorneys General, like other law enforcement officials, are vested with prosecutorial discretion and, in deciding whether to exercise their prosecutorial discretion, they typically consider the extent to which the potentially unlawful conduct impacts consumers and businesses in their respective States.

90% of all PCs. Predatory conduct that had the purpose and effect of protecting Microsoft's Windows monopoly undoubtedly meant many millions of dollars in overcharges to consumers and harm to others.<sup>6</sup> Of particular concern was the locus of the predatory conduct – the web browser. Microsoft's domination of the on-ramp to the Internet, if achieved by anticompetitive means rather than by superior foresight, skill and industry, would mean a profound – and unwarranted - loss of consumer choice.<sup>7</sup> In addition, if, as seemed likely, Microsoft had stifled other companies' efforts to innovate in order to protect its monopoly, start-up software companies in the investigating States would have been adversely impacted.<sup>8</sup>

By Congressional design, federal and state antitrust enforcement officials have overlapping jurisdiction. Congress expressly authorized State Attorneys General to sue *parens patriae* to redress violations of the Sherman Act, in the belief that it was a good thing to have multiple cops on the beat to ensure that threats to the free market system – the cornerstone of the American economy – are identified and prosecuted.<sup>9</sup> Although entitled to proceed independently, federal and state antitrust prosecutors customarily consult with each other on an investigation of mutual interest.<sup>10</sup> Indeed, extensive

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<sup>6</sup> Indeed, Microsoft has agreed to pay at least \$4.5 billion (with several cases still pending) to settle follow-on consumer class actions and claims made by competitors injured in whole or in part by the conduct at issue in the DOJ/States lawsuit. See "Update: Microsoft to Pay IBM \$775M in Antitrust Settlement," Computerworld, July 1, 2005, available at [www.computerworld.com/governmenttopics/government/legalissues/story/0,10801,102916,00.html](http://www.computerworld.com/governmenttopics/government/legalissues/story/0,10801,102916,00.html).

<sup>7</sup> In fact, the district court found that Microsoft's unlawful conduct did result in loss of consumer choice. *United States et al. v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (Findings of Fact, ¶¶ 408-412).

<sup>8</sup> The district court also found that Microsoft's unlawful conduct had stifled innovation by its competitors. *Id.*

<sup>9</sup> See 15 U.S.C. § 15c.

<sup>10</sup> They do so to avoid unnecessary expenditure of scarce resources, to prevent inconsistencies that might aid potential defendants, and to minimize the burden on the subjects of the investigation.

federal/state coordination has become the norm over the years, particularly in recurrent types of matters like merger investigations.<sup>11</sup>

The States did, in fact, consult with DOJ in the early stages of the Microsoft investigation. The Microsoft investigation, however, was complex and far from routine. From DOJ's perspective, given the extraordinary sensitivity of this unique, high profile investigation, there was reluctance to engage in the type of extensive collaboration that is common in most joint federal/state merger investigations. From the States' perspective, there was reason to question whether DOJ would take any action at all since it had just settled a lawsuit against Microsoft involving an earlier version of Windows on terms that were widely perceived to be ineffectual.<sup>12</sup>

After careful deliberation, then, the States decided to proceed with their investigation, and to do so independently, based i) on their determination that there was evidence of serious antitrust violations with significant consumer impact and ii) the uncertainty as to what, if any, action DOJ might take. The State and DOJ teams conducted what amounted to separate, largely independent investigations on parallel tracks. There was very little sharing of substantive analysis or legal theories until DOJ decided to file a complaint in the spring of 1998 – after the States had already decided to sue. The state and federal teams, however, did coordinate procedurally to minimize the burden on Microsoft. Drafts of *subpoenae duces tecum* and civil investigative demands were shared so that Microsoft was not subject to differing discovery obligations. Likewise, depositions were conducted jointly so that witnesses had to testify just once.

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<sup>11</sup> See Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,420 (Mar. 11, 1998).

<sup>12</sup> The State were also mindful that DOJ had recently rejected New York's request to file a challenge to the Bell Atlantic/Nynex merger.

The States' investigation was thorough, designed to allow the States to proceed on their own should DOJ ultimately decide not to go forward. The States certainly did not "free ride" on the DOJ investigation, as has been suggested by one critic.<sup>13</sup> On the contrary, the State working group (consisting of at least one assistant attorney general from each participating State and several from the co-lead States) spent considerable time and effort reviewing the enormous number of e-mail and other documents produced by Microsoft, indexing them, computerizing them, analyzing them and assessing their legal significance. To assist their analysis, the States retained knowledgeable, nationally prominent experts like Dr. Frederick R. Warren-Boulton, the former chief economist in the Reagan Administration's Antitrust Division, to advise on economic issues; Professor Peter S. Menell, a leading authority on the intersection between antitrust and intellectual property law, and a professor at Boalt Law School of the University of California, to advise on legal issues; and Ronald S. Alepin, a well-known computer industry consultant, to advise on technical issues.

Based on their investigation, the State working group concluded that Microsoft had engaged in anticompetitive conduct in violation of state and federal antitrust laws. Microsoft was given an opportunity to explain its conduct, and its representatives met with various Attorneys General and their staffs before a final enforcement decision was made. Whether or not to join a lawsuit was a decision made by each State in its sovereign capacity. To inform and assist that decision-making, the working group prepared analytical memoranda that were made available to all States, not just those that had contributed resources to the investigation, and a draft complaint was circulated.

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<sup>13</sup> Posner, *supra* note 3.

Ultimately, 20 States and the District of Columbia (representing 57% of the nation's citizens based on 1990 census data) became signatories to the complaint. The States' decision to commence an enforcement action was made before DOJ had reached its own decision.<sup>14</sup> While they hoped DOJ would join their effort, the state antitrust enforcement officials were prepared to proceed on their own, based on their conviction that Microsoft had transgressed antitrust laws they were charged with enforcing.<sup>15</sup> The States informed DOJ of their decision to file a complaint, and shortly thereafter DOJ made its own decision to take action against Microsoft.

The States considered briefly, in light of DOJ's decision, whether to cease their own efforts. They decided to stay the course based on: 1) their unequivocal right, if not obligation, to seek redress for violations of laws they were responsible for enforcing; 2) their enormous commitment of time and effort to the investigation; 3) their desire to have a voice in fashioning relief, especially given the resources expended in their investigation and the recent inconclusive resolution of DOJ's first case against Microsoft; and 4) their conviction that they would bring value to a joint effort, both symbolically and practically. As far as the States were aware, DOJ welcomed their participation.

The two draft complaints were exchanged and proved remarkably similar given the paucity of substantive analysis that had been shared during the investigation. Indeed, the theoretical underpinnings of the two complaints were virtually identical. There were only two differences of any significance. The States' complaint contained a monopoly leveraging theory which was good law in the Second Circuit (and almost nowhere else),

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<sup>14</sup> See John Wilkie, "States Ready Action Over Microsoft," *Wall Street Journal*, April 4, 1998.

<sup>15</sup> The States fully appreciated the magnitude of their undertaking and welcomed DOJ's cooperation and participation. Indeed, the States were hopeful that their decision to sue might spur DOJ to make the same decision.



where the States were considering filing given New York's role as lead plaintiff.<sup>16</sup> The States' complaint also contained a count based on Microsoft's pricing of Office, which the States voluntarily dismissed after the District Court, in Pretrial Order No. 1, limited each side to a total of 12 witnesses – barely enough to present evidence on the central theories of monopoly maintenance, tying and attempted monopolization that were common to both complaints.

## **II. Liability Trial**

DOJ and the States agreed to file their separate complaints simultaneously in federal court in Washington DC, where DOJ had litigated its first case against Microsoft.<sup>17</sup> Just four days after the filing, in response to Microsoft's motion, Judge Jackson entered an order consolidating the two cases "for all purposes." At the initial pretrial conference, held shortly thereafter, Judge Jackson took a number of steps on his own initiative that substantially expedited the proceedings. He collapsed the preliminary injunction hearing into a trial on the merits to commence in just three months; he limited each side to a total of 12 witnesses; and he required direct examination to be submitted in the form of written declarations to be filed by September 3, 1998.<sup>18</sup>

The court's procedural rulings at the very outset of the case impacted the States' participation in the litigation. The States thought it likely that the court would hold a relatively quick preliminary injunction hearing of limited duration, followed by discovery over a more extended period of time and trial on the merits at a much later date. While

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<sup>16</sup> The monopoly leveraging theory was eventually dismissed. *U.S. v. Microsoft*, 1998 WL 614485 (D.D.C. 1998).

<sup>17</sup> The two cases were assigned, under the "related cases" rule, to the Hon. Thomas Penfield Jackson, who had presided over DOJ's first case against Microsoft.

<sup>18</sup> Pretrial Order No. 1, dated June 12, 1998.

the States had always anticipated that DOJ would be the “senior” partner in their joint undertaking, Judge Jackson’s acceleration of the complex case on such a fast track – intensive discovery and trial preparation in just three months – magnified DOJ’s relative resource advantages.<sup>19</sup>

Another ruling by Judge Jackson also affected allocation of trial responsibilities between the States and DOJ. At the pretrial conference on October 9, 1998, shortly before commencement of the trial, Microsoft’s counsel made an oral motion to limit plaintiffs’ cross-examination of each witness to one lawyer on behalf of all government plaintiffs. The court assented without giving plaintiffs’ counsel an opportunity to be heard, and denied a subsequent motion for reconsideration filed by the States and joined by DOJ.<sup>20</sup> It had been plaintiffs’ intention to have a lead lawyer from either DOJ or the States do the principal cross-examination, followed by a lawyer from the other government plaintiff group to do any supplementary cross-examination it thought appropriate.

Pursuant to the court’s pre-trial rulings, the States and DOJ filed a joint witness list and allocated the responsibility for introducing each witness and handling the re-direct examination.<sup>21</sup> Ultimately, seven of the witnesses on the government’s direct case

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<sup>19</sup> DOJ also had the benefit of the knowledge it obtained during the course of its first litigation against Microsoft.

<sup>20</sup> *See* Plaintiffs’ Joint Memorandum of Law in Support of Their Motion to Permit Limited Supplemental Cross-Examination, dated November 19, 1998. Plaintiffs argued that consolidation does not extinguish the rights of individual litigants to cross-examine, which is a fundamental aspect of a fair trial. The motion also noted that the court had ample discretion to limit cross-examination should it be duplicative or harassing. The court, however, denied the motion based on its belief that it would be unfair to subject a witness to cross-examination by more than one attorney.

<sup>21</sup> It is noteworthy that, although the list was limited to twelve witnesses, it included two economists – one retained by the States (Dr. Warren-Boulton) and the other by DOJ (Professor Franklin Fisher of MIT).

were handled by David Boies, the outside counsel retained by DOJ, three by DOJ attorneys and two by State attorneys.

At the conclusion of the government's case-in-chief, Mr. Boies indicated that he wished to do all the cross-examination himself rather than allocate witnesses among himself, the DOJ staff attorneys and State attorneys as had been done on the direct case. Despite concerns about the appearance of a diminished profile, especially since Judge Jackson had prohibited supplementary cross-examination, the States acceded to Mr. Boies' wishes given his role as DOJ's lead trial lawyer and his formidable skill at cross-examination. In this decision, as in others, the States' overriding goal was not to seek the limelight, but to win the litigation, which they believed could be accomplished most effectively through a cooperative, unified effort with DOJ. Both the closing and opening statements on behalf of the plaintiffs were divided between Mr. Boies and counsel for the States.

Shortly after he left DOJ, Joel I. Klein, who headed the Antitrust Division during the Microsoft investigation and trial, was asked whether he needed the State Attorneys General to sue Microsoft. He responded:

We did not need them, but we were happy to have them. Whether they had come in or not, we would have prosecuted the case. I think they contributed several things in terms of public perception and the legitimacy of the case. In terms of working with us, I thought they were very effective and helpful in bringing their talent and resources to bear on a very hard problem. There were times when I hoped they learnt things from us, and times when we learnt things from them.<sup>22</sup>

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<sup>22</sup> "Joel Klein on Microsoft: Breaking Up Is Hard To Do," Center for Communication, October 3, 2000, available at [www.cencom.org/INDEX.HTM/ARCHIVES/transcripts/KleinMicrosoft.htm](http://www.cencom.org/INDEX.HTM/ARCHIVES/transcripts/KleinMicrosoft.htm).

The bench trial lasted from October 19, 1998 to June 24, 1999, (78 trial days). The court heard testimony from 26 witnesses, admitted depositions of 79 other witnesses and admitted 2,733 exhibits. On November 5, 1999, the court entered 412 findings of fact.<sup>23</sup>

### **III. Mediation, Appeal and Settlement**

Almost immediately after issuing findings of fact, Judge Jackson strongly encouraged the parties to engage in mediation before Judge Richard A. Posner. Because the mediation process was conducted under a vow of secrecy, there are constraints on what can be said about it.<sup>24</sup> Although Judge Posner initially included the States in face-to-face meetings he held with DOJ, he later excluded the States from these meetings and apparently focused on achieving an agreement between DOJ and Microsoft. Unlike the mediator who subsequently achieved a partial resolution of the case, Judge Posner adopted a process in which he (a) controlled all drafting himself and (b) did not allow the parties to communicate directly with each other during the mediation, instead funneling all communications through himself. Because the mediation was conducted in this atypical manner, it is difficult to assess how close any of the parties – Microsoft, DOJ or the States – were to accepting what turned out to be Judge Posner’s final proposed draft settlement agreement.

What is clear is that, because they were not included in the discussion of the particular terms of these agreements, the States were at a disadvantage in evaluating the

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<sup>23</sup> *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (“*Findings of Fact*”).

<sup>24</sup> Notwithstanding the confidentiality of the mediation, some of the participants (including Judge Posner) have discussed various aspects of the failed mediation effort. *See, e.g.* Richard Posner, “Federalism and the Enforcement of Antitrust Laws by State Attorneys General,” *COMPETITION LAWS IN CONFLICT* (AEI Press 2004), at n.7.; Harry First, “Delivering Remedies: The Role of States in Antitrust Enforcement” 69 *GEO. WASH. L. REV.* 1004, 1032-34 (2001); and Ken Auletta, *World War 3.0: Microsoft and its Enemies*, 307-16, 340-62 (2001).

terms of the prospective agreement or in offering alternatives. The mediation, despite Judge Posner's hard work, ultimately proved unsuccessful because Microsoft and DOJ were unwilling to accept the terms contained in his final draft settlement agreement. At the conclusion of the mediation, Judge Posner issued a press release expressing his disappointment at its failure to achieve a settlement, in which he praised DOJ and Microsoft but pointedly left out any reference to the States. In subsequent statements, Judge Posner has left no doubt that he views the States as a disruptive influence on the process.<sup>25</sup>

When asked why the mediation had failed, DOJ's chief negotiator Joel I. Klein stated that "[i]n the end, I don't think the parties were very close."<sup>26</sup> Responding specifically to Judge Posner's criticism of the States' role in the mediation process, Mr. Klein observed:

My sense throughout my over six years with the Department of Justice is the State Attorneys General work very effectively and collaboratively with us in antitrust enforcement. This case in particular is a model for how we work together. I have a great deal of respect for Judge Posner. I disagree with his view on this particular issue.<sup>27</sup>

Subsequent to the conclusion of the failed mediation effort, the district court entered its conclusions of law on April 3, 2000. 87 F. Supp. 2d 30 (D.D.C. 2000). After further proceedings on remedy, the district court entered its final judgment, which judgement included provision for the break up of Microsoft and interim conduct relief. 97 F. Supp. 2d 59 (D.D.C. 2000) ("Initial Final Judgment"). It is noteworthy that, during the remedy phase of the trial, both the DOJ and the States relied primarily on the expert

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<sup>25</sup> See, e.g., Posner, *supra* note 24.

<sup>26</sup> Klein, *supra* note 22.

<sup>27</sup> *Id.*

testimony of Professor Carl B. Shapiro, an economist retained by the States to devise and defend the remedy ultimately accepted by the court.

After extensive briefing and oral argument, the *en banc* Court of Appeals issued a unanimous (7-0) and comprehensive decision affirming in part, reversing in part and remanding in part for proceedings before a different district judge. *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001), (*en banc*). The oral argument before the Court of Appeals was conducted both by representatives of the appellate division of the Antitrust Division as well as by the States' advocate, John G. Roberts, Jr., who is now a member of that court and President Bush's nominee to be Chief Justice. Mr. Roberts argued, *inter alia*, that the district judge's conclusions of fact and law ought not to be rejected wholesale because of his contacts with reporters while the case was pending.

The Court of Appeals affirmed the district court's principal ruling that Microsoft unlawfully had maintained its operating system monopoly by a series of acts that eliminated two "middleware" threats that would have eroded Windows favorable position. *Id.* at 50-80. The Court of Appeals reversed the district court's conclusions regarding Microsoft's attempt to monopolize the Web browser market and vacated the district court's judgment on Section 1 tying claim as well, but remanded that claim to the district court for reconsideration under the rule of reason. *Id.* at 84-97. Finally, the Court of Appeals concluded that the district judge's contacts with press did not warrant reversing or vacating the underlying conclusions of fact and law although the court did vacate the remedy and remanded the case for additional proceedings before a new judge. *Id.* at 117.

After remand, on September 28, 2001, the new trial judge (the Hon. Colleen Kollar-Kotelly) ordered the parties into another round of intense settlement negotiations. In the resulting mediation, unlike the earlier effort, the States were full participants in detailed, face-to-face discussions that included the mediator, DOJ and Microsoft. Specific concerns the States had were accommodated and are reflected in various portions of the consent decree that ultimately was entered.<sup>28</sup> On November 2, 2001, DOJ, Microsoft and nine States entered into an agreement to settle the litigation. The settling States concluded that, in the circumstances, especially given DOJ's decision to settle, they did not want to expend the additional resources necessary to try to obtain relief beyond that contained in the settlement agreement.

#### **IV. Remedies Proceedings**

The non-settling States, as independent sovereigns and litigants, had an absolute right to seek additional remedies. Indeed, it was their obligation to do so, if, as they believed, the proposed consent decree was insufficient to remediate the harm caused by Microsoft's conduct found to be anticompetitive by both the district court and court of appeals. Their dissatisfaction with the proposed settlement was hardly unique or extreme. DOJ reported to the court that, of the public comments received during the Tunney Act process, those opposing entry of the proposed consent judgment were roughly double those in favor (15,000 to 7,500).<sup>29</sup>

In addition, the 47 public comments denoted as "major" by DOJ included detailed substantive criticisms of the settlement by respected academics, economists and lawyers.

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<sup>28</sup> The second mediation also differed from the first in that it was preceded by DOJ's public announcement that it would not seek certain significant types of relief.

<sup>29</sup> Joint Status Report, available at [www.usdoj.gov/atr/cases/fl0100/10145.htm#1](http://www.usdoj.gov/atr/cases/fl0100/10145.htm#1).

For example, Einer Elhauge, a professor of antitrust law at Harvard Law School, stated that although he was “a strong supporter of the Bush Administration and its Antitrust Division,” he had concluded that “it would set a terrible precedent contrary to public interest if [Microsoft] received only the largely meaningless enforcement provided by the proposed settlement . . .”<sup>30</sup> The comments questioning the adequacy of the settlement ran the ideological gamut, from Roger E. Litan of the liberal Brookings Institution<sup>31</sup> to noted conservative lawyers Robert H. Bork and Kenneth W. Starr.<sup>32</sup> The concerns of these commentators – and the non-settling States – were hardly fanciful. As recently as the February 9, 2005 status conference, when the district court inquired about the remedies’ impact, DOJ responded that “there’s been, as far as we are able to observe in the marketplace, no demonstrable change in the operating system market.”<sup>33</sup>

That the non-settling States were well within their rights to proceed on their own was confirmed by the district court, which denied Microsoft’s motion to dismiss their request for additional relief as a matter of law. Microsoft argued in its motion, *inter alia*, that the non-settling States lacked standing to seek additional remedies and could not displace DOJ in its purported role of establishing national competition policy. The district court rejected Microsoft’s arguments, noting that it had discretion to fashion appropriate relief in the States’ case under § 16 of the Clayton Act, and that it “borders on

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<sup>30</sup> Available at [www.usdoj.gov/atr/cases/ms\\_tuncom/major/mtc-00027209.htm](http://www.usdoj.gov/atr/cases/ms_tuncom/major/mtc-00027209.htm).

<sup>31</sup> The comments of Mr. Litan, a former Deputy Assistant Attorney General of the Antitrust Division, were submitted jointly by him, Roger G. Noll, professor of economics at Stanford University, and William D. Nordhaus, professor of economics at Yale University. Available at [www.usdoj.gov/atr/cases/ms\\_tuncom/major/mtc-00013366.htm](http://www.usdoj.gov/atr/cases/ms_tuncom/major/mtc-00013366.htm).

<sup>32</sup> Messrs. Bork and Starr submitted comments on behalf of the Project to Promote Competition & Innovation in the Digital Age. They began their critique of the settlement, as follows: “The proposed consent decree . . . is so ineffective that it might as well have been written by Microsoft itself.” Available at [www.usdoj.gov/atr/cases/ms\\_tuncom/major/mtc-00030608.htm](http://www.usdoj.gov/atr/cases/ms_tuncom/major/mtc-00030608.htm).

<sup>33</sup> Tr., 2/9/05, at 17.



frivolous” for Microsoft to suggest that the existence of a proposed consent decree in the DOJ case precluded it from providing such relief.<sup>34</sup>

Implicit in some of the criticism of the non-settling States’ effort to seek additional relief is the notion that DOJ is the supreme czar of national competition policy. That notion is wrong. In our legal system it is the judiciary, not the executive branch, that is the final arbiter of relief in an antitrust case – whether fashioning remedies in a litigated case or reviewing the adequacy and fairness of a settlement. The States and other litigants have a statutory right, under § 16 of the Clayton Act, to obtain injunctive relief for violations of the antitrust laws provided they satisfy ordinary rules of standing. Indeed, the Supreme Court specifically has held that a State may sue for equitable relief greater than that already obtained in a settlement by a federal enforcement agency.<sup>35</sup> And, in fact, the States have succeeded in obtaining relief where the federal enforcement agencies declined to take any action at all. *See, e.g., Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).<sup>36</sup> *See also New York v. St. Francis Hospital*, 94 F. Supp. 2d 399 (S.D.N.Y. 2000). Moreover, it is worth noting that many of the DOJ’s

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<sup>34</sup> *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 155 (D.D.C. 2002). In an *amicus* brief submitted at the court’s request, DOJ stated that “it has not been, and is not, the position of the United States that the agreement by the United States to a settlement . . . requires dismissal of the non-settling State’s [sic] action as a matter of law.” Memorandum of Amicus Curiae of the United States Regarding Microsoft Corporation’s Motion For Dismissal Of The Non-Settling States’ Demand For Equitable Relief, dated April 15, 2002, at 15.

<sup>35</sup> *California v. Arc America*, 490 U.S. 93 (1989).

<sup>36</sup> The federal enforcement agencies failed to investigate the conduct challenged by the States because “collusion is highly unlikely in unconcentrated industries like the property and casualty industry.” Michael F. Brockmeyer, *State Antitrust Enforcement*, 57 *Antitrust L.J.* 169, 170 (1988), quoting letter from Assistant Attorney General Douglas H. Ginsburg to Jay Angoff (Apr. 22, 1986).

international cartel cases are premised on the precedent established by *Hartford Fire Insurance*, a case brought by states *only after* DOJ refused even to investigate.<sup>37</sup>

The non-settling States were represented at the remedies hearing by the Washington, D.C. law firm Williams & Connolly, assisted by state assistant attorneys general and other lawyers, including AMC member and former head of the Antitrust Division, John H. Shenefield. Following a 32-day hearing, the district court entered a final judgment identical in most respects to the consent decree that was a product of the prior settlement.<sup>38</sup> The final judgment in the States case, however, was strengthened in certain particulars: it prevented Microsoft not only from retaliating, but from “threatening” to retaliate, against companies that use competing products; reduced the circumstances in which Microsoft can restrict the ability of PC makers to launch competing software; required Microsoft to establish a Compliance Committee of independent members of its board of directors; and directed Microsoft to appoint a Compliance Officer with greater responsibilities and more independence than his counterpart under the consent decree.<sup>39</sup> All the non-settling States except Massachusetts decided not to prosecute an appeal. The Court of Appeals, on Massachusetts’ appeal, held that the district court had not abused the broad discretion it has in fashioning equitable relief.<sup>40</sup>

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<sup>37</sup> See Kevin J. O’Connor, “Federalist Lessons for International Antitrust Convergence” 70 *Ant. L. J.* 413, 427-28 (2002); Robert Skitol & James Meyers, “Ten Milestones in Twentieth-Century Antitrust Law and Their Importance to the Decade Ahead,” *ANTITRUST REP.*, Aug. 2000, at 6 (listing *Hartford Fire Insurance* as a “milestone case” in the field of antitrust law).

<sup>38</sup> *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002).

<sup>39</sup> *Id.*

<sup>40</sup> *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

Since the entry of the two Final Judgments, which have terms of five years, the States and DOJ have resumed their unified effort with respect to enforcement. They meet periodically together and with Microsoft to discuss enforcement issues, share information, and submit joint status reports to the court on an approximately quarterly basis.

In 2008, the California Group of States moved to extend a critical portion of the Final Judgment that was about to expire which was related to disclosure of APIs (Application Programming Interfaces) necessary for interoperability with Windows. The motion was joined by members of the New York Group of States and was opposed by both Microsoft and DOJ. On January 29, 2008, the Court granted the motion, extending the decree period for an additional 18 months. Since DOJ had allowed its Final Judgment with respect to these provisions to lapse during the pendency of the motion, they were enforced solely by the states for the remainder of the decree period.

## **V. Conclusion**

Concurrent and cooperative antitrust enforcement is a strength of the American system of antitrust enforcement, not a weakness. In fact, it is a cornerstone of a healthy, competitive economy. What is remarkable about the history of this case is that state and federal antitrust enforcers, operating under common case law in a federal court, were able to litigate the case as cooperatively and professionally as they did. At several points in this process, the States made tactical litigation decisions that enhanced the governments' case even as it lessened the States' role or perceived role. Although there was disagreement concerning appropriate remedies between some states and DOJ -- and multi-party cases are often rife with far more numerous and rancorous tactical and

strategic disputes among co-litigants -- the *Microsoft* litigation, on the whole, has been a model of federal-state cooperation.

But beyond the reality of federal-state cooperation, the importance of our system of concurrent enforcement is reflected in the answer to the basic “what if?” question: what if DOJ had *not* in fact brought a broader case against Microsoft in 1998 and the states had not been prepared to proceed? The short answer is that Microsoft’s most egregious conduct would likely not have been checked at all to the detriment of consumers everywhere and there would have been little deterrent effect on the conduct of other dominant high-technology firms.

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