

No. 00-5212
(Consolidated with No. 00-5213)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE,
VERSUS
MICROSOFT CORPORATION,
APPELLANT.

STATE OF NEW YORK, EX REL., ET AL.
APPELLEES,
VERSUS
MICROSOFT CORPORATION,
APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMICUS CURIAE BRIEF
OF THE
CENTER FOR THE MORAL DEFENSE OF CAPITALISM
IN SUPPORT OF DEFENDANT MICROSOFT CORPORATION
AND IN SUPPORT OF REVERSAL OF THE JUDGMENTS BELOW

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CORPORATE DISCLOSURE

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CMDC is incorporated under the laws of the District of Columbia and is exempt from tax under Section 501(c)(4) of the Internal Revenue Code. CMDC’s mission is to make political leaders, the judiciary, and policy analysts aware of the relationship between reason, individualism, individual rights, limited government and economic prosperity. CMDC provides both empirical studies and theoretical commentaries on the impact of legal, regulatory, economic, and educational institutions upon American citizens’ individual rights.

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GLOSSARY

Throughout this brief, the abbreviation “CMDC” refers to the Center for the Moral Defense of Capitalism.

IDENTITY AND INTEREST OF AMICUS CURIAE; SOURCE OF AUTHORITY TO FILE BRIEF

CMDC is a District of Columbia non-profit corporation whose mission is to make policy-makers, policy analysts, and the judiciary aware of the relationship between reason, individualism, individual rights, limited government and economic prosperity. CMDC provides both empirical studies and theoretical commentaries on the impact of legal, regulatory, economic, and educational institutions upon American citizens’ individual rights.

The source of the authority to file this amicus curiae brief is an order of this Court dated December 18, 2000, granting leave to CMDC to file its own amicus brief.

INTRODUCTION

A fundamental requirement of man’s life in society is freedom from the initiation of force by other men. This is the central fact identified by the concept of an “individual right”: man can only live and succeed insofar as he is free to use his mind and advance his life in accordance with his own rational judgment. Thomas Jefferson understood this when he declared “eternal hostility against all forms of tyranny over the mind of man.” The Founding Fathers understood this when they broke free from the arbitrary coercion of King George III and created a nation dedicated to protecting the right of every man to his life, liberty, and property. Thus, the United States of America became the first country in history explicitly founded upon a moral principle—the moral principle of individual rights.

This principle supplies the standard by which America can “burn pure” its legal system, paraphrasing the well-known metaphor describing how the natural-rights philosophy of Grotius,

Pufendorf, and Locke influenced the common law. Because the purpose of government is to protect individual rights, any law can be assessed objectively by determining whether it protects rights or violates them. Since rights can be violated only by the initiation of force, a proper legal system limits government's use of force to retaliation against criminals, foreign invaders, and any others who initiate the use of force. But if a government is not restricted to protecting rights, it may misuse its monopoly on the legal use of force to coerce its own citizens, and thereby become a much more dangerous threat than any criminal. The only means of restricting government to its legitimate functions is: objective law.

The central features of "objective law" are twofold. First, laws must be objectively defined so that citizens know ex ante which actions are proscribed by the government. Second, laws must be derived objectively from the principle of individual rights, permitting only retaliation against those who have initiated force, or its indirect variant, fraud, against innocent citizens. In other words, laws must be clear, concise, and understandable to the citizens who live under them, and the laws must also be directed only at persons who initiate force against others. Without the first condition, men are unable to live without knowing when, how, or why they have violated a law; citizens live, in essence, according to government fiat. Without the second condition, the law escapes the objective boundaries that should cabin in the government's use of force; government bureaucrats are left free to coerce citizens at whim.¹

It is CMDC's position that the antitrust laws—broadly speaking, the Sherman Antitrust Act of 1890, the Clayton Act of 1914, the Federal Trade Commission Act of 1914, the Robinson-Patman Act of 1936, and the Hart-Scott-Rodino Act of 1976—violate these two central tenets of

¹ See generally Harry Binswanger, Objectivist Philosophy of Law, in 2 The Philosophy of Law: An Encyclopedia 609 (Christopher B. Gray, ed., 1999).

objective law. The antitrust laws bring the coercive force of the government to bear against businessmen on the grounds that they have “restrained trade,” “monopolized” business in a so-called “relevant market,” or have engaged in “price discrimination,” to name but a few of the business activities criminalized by such statutes. However, the relevant statutes have not defined these terms objectively, and the courts have engaged in an ad hoc construction of the statutory language. The result is that no successful businessman can know whether or not he is exposing himself to prosecution under the antitrust laws; the vague language of the statutes and the contradictory case law leaves average citizens without any guidance.

More important, the antitrust laws invert the proper role of government, authorizing bureaucrats and lawyers to initiate force against businessmen who have not themselves engaged in force or fraud. The essential activity of a businessman is to engage in free and voluntary trade with his customers and fellow businessmen. A businessman offers an uncoerced choice: trade with me, or do not trade with me. All acts are consensual. No one is harmed. No rights are violated.

The antitrust laws thus conflate the businessman with the criminal, and thus obfuscate the central distinction between (1) a person who offers his own values in a voluntary trade and (2) a person who offers no value while threatening to take or destroy another’s values by force. The businessman does not violate anyone’s rights when he contracts and sells on the free market. Thus, the predicate for the government’s legitimate use of force—an initiation of force against an innocent citizen—is absent in the antitrust context. Instead, antitrust laws require the government to initiate force against its own innocent citizens. This vicious injustice is the logical, inevitable result of enforcing the non-objective antitrust laws.

The antitrust case against Microsoft is a paradigmatic example of both the non-objectivity and the injustice of America's antitrust laws. Microsoft is a hugely successful firm that has revolutionized the computer industry. Precisely because it has achieved such success, Microsoft was targeted for antitrust prosecution. The unjust result reached by the District Court was dictated by the non-objective nature of the statutes being applied. For the reasons that follow, CMDC believes that the Court should use this opportunity to strike down the antitrust laws as an unconstitutional violation of every American citizen's rights.²

ARGUMENT

The ostensible purpose of the antitrust laws is to prevent the exercise of "monopoly power," which has been defined by the United States Supreme Court as "the power to control prices or exclude competition." U.S. v. E.I. Du Pont De Nemours & Co., 351 U.S. 377, 391 (1956). See also Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 464 (1992) (quoting Fortner Enter., Inc. v. U.S. Steel Corp., 394 U.S. 495, 504 (1969)) (defining monopoly power also as "the ability of a single seller to raise price and restrict output.").

Contrary to the contemporary understanding of "monopoly power," however, the common-law courts recognized that such power could be derived from only one source: a government grant. For instance, the famous Case of Monopolies, Darcy v. Allen, arose out of Queen Elizabeth's 1598 grant of a letter patent to Edward Darcy, providing for the complete monopolization of the playing card industry in England. See 77 Eng. Rep. 1260, 11 Co. Rep. 84 (K.B. 1603). Thus, Lord Coke's well-known censure of monopolies as "odious," 3 Inst. 181, rang true only for firms that received from "the King by his grant, commission, or otherwise, . . .

² The antitrust laws violate the Due Process Clause of the Fifth Amendment, U.S. Const. amend V. U.S. Const. art. IV, § 2, cl. 1.

the sole [power of] buying, selling, making, working, or using of anything, whereby any [other] person . . . [is] restrained of any freedom or liberty that they had before, or hindered in their lawful trade.” Id.

These early jurists recognized that a “monopoly” is a firm protected by the coercive power of the government.³ In the modern era, however, this term no longer identifies a company capable of coercing its competitors through government action. According to Senator Sherman, a private firm that acquired a substantial portion of the market through its business acumen possessed a “kingly prerogative,” and a country that refused to “submit to an emperor . . . should not submit to an autocrat of trade.” 21 Cong. Rec. 2,456 (1890).

The enactment of the Sherman Antitrust Act was thus predicated upon an equivocation between the economic power of the businessman and the political power of the government.⁴ Lord Coke understood why a “monopoly” was “odious.” The firm that used the coercive power of the English crown to stifle its competition was, strictly speaking, violating the “freedom or liberty” of the hapless businessmen who suffered under the Crown’s compulsion. This violation of an Englishman’s right to engage in “lawful trade” was certainly “odious,” i.e., a moral perversion. In conflating the coercive power of government with the peaceful, free relations between businessmen, the Sherman Antitrust Act turned Lord Coke’s moral indignation on its head. According to Sherman, the man who succeeds in business and thus gains the economic power to offer better values to his customers is acting in the same manner as a

³ See Alan Greenspan, Antitrust, in Capitalism: The Unknown Ideal 63, 68 (1967) (“Without government assistance, it is impossible for a would-be monopolist to set and maintain his prices and production policies independent of the rest of the economy.”).

⁴ The distinction between economic power and political power is easily summarized as the distinction between the dollar and the gun. See Ayn Rand, America’s Persecuted Minority: Big Business, in Capitalism: The Unknown Ideal 44, 46-47 (1967).

government bureaucrat who threatens to imprison a man unless he ceases competing with the U.S. Post Office.

The Sherman Antitrust Act is thus a house that lacks a foundation. It reflects neither the common-law definition of “monopoly” nor the Founding Fathers’ conception of individual rights that animates the Declaration of Independence and the U.S Constitution. The Sherman Antitrust Act was without precedent—either legally or morally.

1. The Antitrust Laws Are Non-Objective Because They Fail To Provide Businessmen with Clear and Concise Guidance Necessary To Avoid Sanctions Under the Law.

Reflecting its inherent antagonism to the actual nature of businessmen’s actions and to the principle of individual rights, the Sherman Antitrust Act speaks in sweeping terms that broadly condemn all commercial business practices. The Act declares that “[e]very contract, combination in the form of trust or otherwise . . . in restraint of trade or commerce . . . is declared to be illegal,” 15 U.S.C. § 1 (2000), and that “[e]very person who shall monopolize, or attempt to monopolize . . . any trade or commerce . . . shall be deemed guilty of a felony.” 15 U.S.C. § 2. The Sherman Antitrust Act’s successor statutes also reflect the same type of sweeping language, see, e.g., Clayton Act, 15 U.S.C. § 14 (2000) (“it shall be unlawful for any person . . . to lease or make a sale or contract . . . [that] may . . . substantially lessen competition or tend to create a monopoly in any line of commerce.”).

A statute that condemns all business practices in broad, abstract language cannot meet the first prong of objective law, which requires statutes to be enacted in clear, meaningful language that provides objective guidance to citizens living under these statutes. Notably, all contracts “restrain trade” in some manner. All firms seek to capture as much market share as possible, and thus the essence of successful business practices is an “intent to monopolize.” All successful

business agreements necessarily have the effect of “substantially lessening competition.” On their face, the language of the antitrust laws is unavoidably vague and, most important, undefined within the statutes themselves.

The courts are thus left with the unavoidable necessity of having to distinguish between allegedly “proper” business activities and those commercial enterprises that “monopolize” a market or “restrain trade.” The Supreme Court has acknowledged the need to draw this distinction: “In the absence of any purpose to create or maintain a monopoly, the [Sherman Antitrust Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.” Lorain Journal Co. v. U.S., 342 U.S. 143, 155 (1951) (quoting U.S. v. Colgate & Co., 250 U.S. 300, 307 (1919) (emphasis added)). Given that the language of the statute does not provide any guidelines for drawing this distinction, however, the courts are left with extensive discretion to rewrite the antitrust statutes themselves. See Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 20 (1978) (“Antitrust is, first and most obviously, law, and law made primarily by judges.”).⁵

This discretion has led to contradictory case law on every subject within the ambit of the antitrust laws. With respect to price-fixing agreements, for instance, the Supreme Court has at times adopted a reasonableness standard. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1968) (finding an efficiency justification for BMI’s blanket licensing arrangement); Appalachian Coals, Inc. v. U.S., 288 U.S. 344, 374 (1933) (recognizing an explicit

⁵ For additional, and often conflicting, judicial statements on the goal of the antitrust laws, and the standards for adjudicating these statutes, see National Soc’y of Prof’l Eng’r v. U.S., 435 U.S. 679, 688 (1978); Brown Shoe Co. v. U.S., 370 U.S. 294, 344 (1962); Northern Pacific Ry. Co. v. U.S., 356 U.S. 1, 4-5 (1958).

price-fixing arrangement as reasonable given its purpose to “foster[] fair competitive opportunities”); Chicago Bd. of Trade v. U.S., 246 U.S. 231, 239 (1918) (recognizing that call rules that restrict competition and control prices are a “reasonable regulation of business”). However, the federal courts have also adopted a per se rule of illegality in other cases. U.S. v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940) (holding that price-fixing agreements among competitors are per se illegal); National Macaroni Mfg. Ass’n v. FTC, 345 F.2d 421 (7th Cir. 1965) (holding that price-fixing agreements among buyers are per se illegal). Private businessmen are thus left with no clear guidance under the antitrust laws as to whether their commercial agreements will be criminally sanctioned as illegal horizontal restraints.

The same point may be made with respect to tying arrangements, another business activity deemed to be “improper” under the antitrust laws. Compare Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (applying a pseudo-reasonableness standard in holding that appellant lacked the requisite “market power” for its tying practice to be illegal) with Northern Pacific Ry. v. U.S., 356 U.S. 1, 6 (1958) (holding that tying arrangements are “unreasonable in and of themselves” regardless of whether defendant possesses any “economic power”). See also U.S. v. Microsoft Corp., 147 F.3d 935, 951 (1998) (holding no illegal tying arrangement, given the additional economic factors that “integration brings benefits” and that Microsoft had a valid business reason for combining its products). The lack of clear statutory standards to provide objective guidance to the courts results in continually protean applications of the antitrust laws.

Businessmen are thus the unfortunate victims of a legal doctrine that provides them no objective limits for determining how to act so as to avoid criminal or civil liability. The ad hoc development of antitrust law by the judiciary, and the ex post rationalization of this legal doctrine by the law and economics movement, see Herbert Hovencamp, Antitrust Policy After

Chicago, 84 Mich. L. Rev. 213 (1985), have produced a chaotic and often contradictory mountain of shifting legal precedents.⁶ In such circumstances, it is impossible for a successful businessman to determine objectively whether his actions will be punished or not. In sum, the antitrust laws fail the first prong of the definition of objective law, i.e., laws objectively formulated such that they provide clear, concise and understandable guidance to the citizens living under them.

2. The Antitrust Laws Are Non-Objective Because They Require the Government To Initiate Force Against Innocent Citizens.

In adjudicating the antitrust laws, courts have enunciated the standard of “consumer harm” as the basis for distinguishing between illegal versus legal business activity. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 606-08 (1985) (holding that the evidence indicated that “consumers were adversely affected” and that defendant failed “to offer any efficiency justification whatever for its pattern of conduct”); Data General Corp. v. Grumman Systems Support Co., 36 F.3d 1147, 1183 (1st Cir. 1994) (“In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare.”). In applying this standard, and its corollary of “protecting competition,” the antitrust laws superficially appear to be aimed at the protection of citizens’ economic interests. However, as CMDC has indicated above, if a businessman does not engage in force or fraud, then he cannot, and will not, infringe the rights of his fellow men. Thus, when the courts have sanctioned businessmen under the auspices of the antitrust laws, they have in fact brought to bear the coercion of the government against innocent individuals.

⁶ But see The Federalist No. 78, at 471 (Clinton Rossiter ed., 1961) (Alexander Hamilton) (insisting that “[t]o avoid an arbitrary discretion in the courts, it is indispensable that (Footnote continued on next page)

The evidence for this proposition within antitrust case law is manifest. Judge Learned Hand's opinion in U.S. v. Aluminum Co. of America (ALCOA), 148 F.2d 416 (2d Cir. 1945), for instance, exposed the true meaning of holding businesses accountable to these standards. Judge Hand acknowledged that the “[t]he successful competitor, having been urged to compete, must not be turned upon when he wins.” Id. at 431. However, Judge Hand concluded that ALCOA was guilty of “monopolization,” violating § 2 of the Sherman Antitrust Act, because ALCOA “effectively anticipated and forestalled all competition.” Id.

How did ALCOA do this? ALCOA did not coerce its competitors. The record was devoid of any allegations that ALCOA engaged in any act of violence or fraud. To the contrary, ALCOA was an exemplar of successful business management, as Judge Hand recognized:

Nothing compelled [ALCOA] to keep doubling and redoubling its capacity before others entered the field. . . . [W]e can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections, and the elite of personnel.

Id. For these reasons—for its long-term business model, its capital investment, its ability to attract the best employees—ALCOA was found guilty of violating the antitrust laws. Judge Hand, strictly applying the logic of the antitrust laws, acknowledged the virtues of a successful businessman—and then “turned upon [him] when he [won].” In so doing, the Second Circuit did not protect the property rights of ALCOA, it violated them.

The significance of the ALCOA decision lies in its explicit recognition of the inherent contradiction within the antitrust laws. In subordinating a businessman's use of his property rights to the inherently indeterminate notions of “consumer harm” or “protecting competition,”

they should be bound by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them”).

the antitrust laws logically result in the violation of individual rights. When laws are severed from the objective requirements of determinate language and the protection of individual rights, the force of the government will be used arbitrarily and without moral justification.⁷

The Department of Justice's successful prosecution of Microsoft represents the latest, and arguably the most egregious, injustice perpetrated by the government under the auspices of the antitrust laws.

The alleged "consumer harm" identified by the District Court does not so much as rise to the level of an "injury in fact," which is the principal indicia of an actual violation of one's rights. Although the District Court asserted that Microsoft's business practices allegedly "harmed consumers in ways that are immediate and easily discernible," U.S. v. Microsoft, 84 F. Supp.2d 9, 111 (D.D.C. 1999), it could only find such things as "confusion and frustration for consumers," id., and that end users had "to carry software . . . providing them with no benefits," id. at 53. In other words, the District Court sanctioned the most successful computer company in history—because new computer users may be frustrated or ignorant in how to use their new (and free) products. Nowhere in the District Court's findings of fact is there a single identification that Microsoft did anything other than provide values to customers.

The District Court did not find any violation of another person's right to life, liberty or property. There was no finding of coercion initiated by Microsoft. As with ALCOA, the District Court sanctioned Microsoft for its successes—for developing innovative technology and engaging in entrepreneurial commercial activities.

⁷ See, e.g., U.S. v. Aluminum Co. of America, 148 F.2d 416, 424 (1945) (Judge Hand asserted the 90-60-30 percentage of market share standard as the basis for determining the existence of a monopoly, but provided no explanation for why these percentages are legally determinative or evidence a colorable argument for or against a monopoly).

The District Court's arbitrary discretion under the antitrust laws to unjustly coerce Microsoft in violation of its rights was best indicated by the District Court's own admission that Microsoft has not acted as if it were a "monopolist." The District Court wrote:

It is not possible with the available data to determine with any level of confidence whether the price that a profit-maximizing firm with monopoly power would charge for Windows 98 comports with the price that Microsoft actually charges. Even if it could be determined that Microsoft charges less than the profit-maximizing monopoly price, though, that would not be probative of a lack of monopoly power

Id. at 27 (emphasis added). Thus, the District Court acknowledged that it is not possible to tell whether Microsoft is in fact a "monopolist," i.e., whether it is charging exorbitant prices that allegedly "harm" consumers.

Yet the District Court dismissed this lack of evidence as irrelevant to its determination as to whether to sanction Microsoft as a "monopolist." In other words, Microsoft is a monopolist if it charges prices that are deemed "too high"—but it is also a monopolist if it charges prices that are "too low." By virtue of its dominant position in the industry—that is, by virtue of its successful business practices—Microsoft is guilty if it does and guilty if it does not. This is a perfect catch-22. As such, the District Court's judgment constitutes an initiation of force against Microsoft, an innocent corporate citizen acting within the bounds of its rights.

Finally, the District Court's conclusion of its finding of fact reveals the inherent contradiction between the enforcement of the antitrust laws and the recognition of every individual's right to life, liberty and property. The District Court concluded that "[t]he ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest." Id. at 112 (emphasis added). However, the development of the concept of "individual rights" was to prevent the punishment of individuals for acting in their own self-interest. In 1625, Hugo Grotius, the father of the modern

concept of rights, wrote that “it is not contrary to the nature of society to look out for oneself and advance one's own interests, provided the rights of others are not infringed.” Hugo Grotius, The Law of War and Peace (trans. F.W. Kelsey, 1964) (1625), quoted in Stephen Buckle, Natural Law and the Theory of Property: Grotius to Hume 31 (1991).

Whether Microsoft acted selfishly or not is irrelevant for a court of law. The court’s determination properly should be restricted to whether an individual has initiated force and thus violated another man’s rights. The fact that the District Court regarded the moral status of Microsoft’s actions to be relevant in its findings under the antitrust laws is prima facie evidence of the injustice of the antitrust laws. The Sherman Antitrust Act and its related statutes require the government to look beyond whether a defendant has respected the rights of its fellow citizens, and as such, it authorizes the government to initiate force itself. The antitrust laws are thus a palpably unjust legal doctrine, and respect for individual rights demands that the District Court’s judgment against Microsoft be reversed and the antitrust laws held invalid and unconstitutional.⁸

CONCLUSION

Therefore, CMDC respectfully requests that this Honorable Court reverse the ruling of the United States District Court for the District of Columbia, and hold the antitrust laws as non-objective laws that, accordingly, are invalid and unconstitutional.

Dated: December 27, 2000

Respectfully Submitted,
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⁸ See Federalist No. 78, supra, at 470 (“[Court cases] sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.”).

CERTIFICATE OF SERVICE

I, David R. Burton, Esq., hereby certify that on this 27th day of November 2000, I caused a true and correct copy of the foregoing amicus curiae brief of the Center for the Moral Defense of Capitalism to be served upon the following:

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