

# Media Update

**RE:**  
**IOWA COURT CASE**  
**Comes vs. Microsoft, Inc.**

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## Coverage Notes:

1. Former Microsoft OEM Sales Group Manager equates his defense of Microsoft vaporware with Richard Nixon's "I am not a crook" speech.
2. Former sales and marketing head of computer manufacturer Zeos testifies that Microsoft's licensing practices raised prices to consumers.

Trial continued today with the videotaped deposition testimony of Mark Chestnut of Microsoft and the prior trial testimony of Richard Apple of Zeos.

### **1. Former Microsoft manager Mark Chestnut testifies about Microsoft's successful "vaporware" campaign against competing products.**

The prior videotaped testimony of Mark Chestnut, former Group Manager in Microsoft's OEM Sales Group, continued today regarding Microsoft's use of "vaporware." Vaporware is a term used to describe Microsoft's pre-announcement of products that did not exist or otherwise were not ready for launch, to deceive the market into avoiding rival products while waiting for Microsoft's pre-announced product to become available.

Chestnut recalled an announcement by Microsoft's "major competitor" Digital Research, Inc. ("DRI") that its next version of DR DOS would ship in a couple of months. According to Chestnut, Microsoft responded by announcing that its next version of MS-DOS would ship within three months, even though MS-DOS was more than a year away from launch. Chestnut confirmed that Microsoft's vaporware campaign helped gain OEM enthusiasm for MS-DOS and undermined the threat from DR DOS.

At one point, Chestnut was enlisted to help defend Microsoft's vaporware campaign by giving interviews to potential critics in the trade press. After one such interview, Chestnut stated in an internal Microsoft email, "I am concerned that this article may make us look bad. Can you guys follow up and see if we need to do some damage control? This was the toughest interview I've done. I felt like Richard Nixon giving his 'I am not a crook' speech."

Chestnut also testified that Microsoft engaged in deceptive "fear, uncertainty and doubt" ("FUD") to exclude competitors from the operating system software market. For example, Chestnut described Microsoft's practice of providing OEMs with lists of so-called "incompatibilities" between DR DOS and Windows, even though an outside testing lab retained by Microsoft found DR DOS to be compatible with Windows.

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## **2. Former Zeos VP Richard Apple testifies that Microsoft's licensing practices raised prices and reduced consumer choice.**

Plaintiffs' counsel read to the jury the prior trial testimony of Richard Apple, former vice president of sales and marketing for OEM Zeos. Apple recounted an incident when Logitech offered Zeos a three-dollar discount on a computer mouse that was equivalent to the mouse Zeos had been purchasing from Microsoft. When Apple told Microsoft that Zeos wanted to switch to Logitech, Microsoft's account representative told him, "yeah, go ahead and buy mice somewhere else, but if you do that, your Windows cost is going to go up by five bucks."

Apple testified that this was an instance in which "instead of being a cheaper alternative, Microsoft, rather than lowering their price, actually figured out a way to make the competitor's product cost more." Apple testified that as a result, Zeos "had to walk away from Logitech and stay with Microsoft at the higher price."

Apple also testified that in the late 1980s and early 1990s, consumers had a choice of operating systems with different features and different prices. In 1990, however, Microsoft demanded all of Zeos' business and introduced Microsoft's "per-processor" licensing program, which required Zeos to pay Microsoft a fee for every computer Zeos shipped, regardless of whether the customer wanted MS-DOS. He said that the Microsoft fee was "built into" the price Zeos charged for every computer it sold, even if the consumer chose another operating system or no operating system at all. He analogized this to a department store customer having to pay for an entire aisle's worth of merchandise, instead of the specific items that the customer actually wants.

Apple said that Microsoft's "per processor" licensing prevented Zeos from offering alternatives to MS-DOS and was "detrimental" to consumers. He explained:

"Well, what it did was it took alternatives off our price list. . . . If Microsoft DOS cost a consumer \$50 from us or \$90 from us, or whatever it was, DR-DOS would have had to be less expensive to the consumer to compete, because it wasn't as well known a brand. If I had to pay the Microsoft cost and the DR cost, Digital Research, of course, we'd be more expensive and had no chance whatsoever."

Zeos attempted to change this feature of Microsoft's licensing, but Microsoft refused. The testimony of Richard Apple will resume tomorrow.

### **Case background:**

*Comes v. Microsoft* is an Iowa state court class action brought by consumers, small businesses, and other indirect purchasers of Microsoft software products. Plaintiffs allege that from May 18, 1994 through June 30, 2006, Microsoft engaged in illegal monopolization and other anticompetitive conduct in the markets for operating systems, word processing, spreadsheets, and office suite software. Plaintiffs contend that Microsoft charged higher prices than it would have charged had it not engaged in the

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anticompetitive conduct. Plaintiffs also contend that Microsoft's conduct caused its operating systems software to be more vulnerable to security breaches. Plaintiffs seek damages for their injuries. Trial is expected to continue until the spring of 2007.

**About the firms:**

Roxanne Conlin & Associates P.C. is owned by Roxanne Barton Conlin, a Plaintiffs' attorney whose practice is focused on personal injury and civil rights cases. Ms. Conlin is a former President of the Association of Trial Lawyers of America and a member of the Inner Circle of Advocates. She is co-editor of a 6-volume treatise, *ATLA's Litigating Tort Cases*, published by West Publishing Company (June, 2003). She has also served as United States Attorney for the Southern District of Iowa.

Zelle, Hofmann, Voelbel, Mason & Gette LLP is a national dispute resolution and litigation law firm with offices in Boston, Dallas, Los Angeles, Minneapolis, San Francisco and Washington, D.C. The Zelle Firm handles complex litigation and disputes on a national and international basis. The Firm has about 85 attorneys and represents both defendants and plaintiffs in its trial and dispute resolution practice. The Firm's broad litigation experience includes antitrust, banking, business torts, class action, commercial, employment, environmental, ERISA, financial services, insurance coverage, intellectual property, mass tort, mold claims, personal injury, product liability, professional liability, reinsurance, securities, subrogation third-party recovery, unfair business practice and unfair competition litigation. Co-Lead Counsel Rick Hagstrom has successfully pursued Microsoft in two other class actions. In 2004, Rick, as co-lead counsel, was successful in reaching a settlement with Microsoft of \$182 million on behalf of Minnesota businesses and consumers. In 2006 on behalf of Wisconsin businesses, consumers, school districts, and governmental entities, Rick and co-lead counsel reached a \$224 million settlement with Microsoft. In 2005, Rick was honored as a Minnesota Attorney of the Year.