

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

**JOE COMES, RILEY PAINT, INC., an
Iowa Corporation, SKEFFINGTON'S
FORMAL WEAR OF IOWA, INC., an
Iowa Corporation, and PATRICIA ANNE
LARSEN,**

Plaintiff/Petitioner,

vs.

**MICROSOFT CORPORATION, a
Washington Corporation,**

Defendants/Respondent.

Case No. CL 82311

**RULING AND ORDER ON
DEFENDANT'S MOTION TO
DECERTIFY THE CLASSES**

FILED
POLK COUNTY, IOWA
2006 OCT 26 PM 2:44
IOWA DISTRICT COURT

This matter came before the court on October 11, 2006 for a contested hearing in regard to the defendant's motion to decertify the classes. The plaintiffs were present by their counsel Mr. Richard Hagstrom, Mr. Kent Williams, Ms. Elizabeth Kniffen, and Mr. Michael Jacobs. The defendants were present by their counsel, Mr. Chris Green, and Mr. Charles Casper.

In September 2003 this court, by the Honorable Judge Artis I. Reis, granted the Plaintiffs' motion for class certification. The certification of the classes was appealed to the Iowa Supreme Court which entered a decision on May 13, 2005 affirming the decision of the district court. (See Comes v. Microsoft Corporation, 696 N.W.2d 318 (Iowa 2005). The Defendant now seeks to decertify the class for what it terms are three independent reasons. The first reason argued by the Defendant is that individual issues and not common ones will predominate on the questions of whether all class members suffered any identifiable harm and damages which is a prerequisite to recovery. As to this first reason the Defendant states that additional evidence and testimony attached to

their motion "show irrepleatably that plaintiff's experts cannot demonstrate that *all* class members were injured by the alleged anti-competitive conduct." (Microsoft Memorandum in Support of its Motion to Decertify the Classes, page 7). The Defendant argues that the record, which is now more fully developed, demonstrates that the Plaintiffs cannot prove their claims with common proof and that the methods of proof that the Plaintiffs propose to use at trial will not result in a fair and efficient adjudication of their claims.

Secondly, the Defendant argues that the Plaintiffs' Fourth Amended Petition introduced new factual and legal questions which are not capable of class wide litigation. Thirdly, the Defendant argues that the named Plaintiffs in this matter cannot represent large organizations in Iowa that licensed large quantities of Microsoft software at discounted, negotiated prices.

Countering this argument the Plaintiffs assert that the Defendant's motion to decertify the classes is merely a renewal of their previous argument before the district court and later the Iowa Supreme Court which was rejected.

Iowa Rule of Civil Procedure 1.261 and 1.262 allows for the commencement of class actions and the certification of same when a class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable and there is a question of law or fact common to the class. If a court finds that these two requirements are satisfied and that a class action should be permitted for the fair and efficient adjudication of the controversy and that the representative parties fairly and adequately will protect the interest of the class it can order that the action is to be maintained as a class action and therefore certify the class. Iowa Rule of Civil

Procedure 1.263 further sets out the criteria that the court is to consider and give appropriate weight to along with other relevant factors.

In the certification issue that went before the Iowa Supreme Court in 2005 the Defendant challenged the district court's findings on four of the criteria. These were whether common questions of law or fact predominate over any questions affecting only individual members; whether a class action offers the most appropriate means of adjudicating the claims and defenses; whether management of the class action poses unusual difficulties; and whether a joint or common interest exists among members of the class. (Iowa Rule of Civil Procedure 1.263(1)(a)(e)(g)(k); Comes v. Microsoft Corporation, 696 N.W.2d 318, 321 (Iowa 2005).

In regard to question of predominance of common questions of law or fact the Iowa Supreme Court disagreed with the Defendant's contention that a showing of predominance is a condition precedent to certification. Comes v. Microsoft Corporation, 696 N.W.2d 318, 322 (Iowa 2005). The Iowa Supreme Court stated that this is only one of the thirteen factors to be considered and further, that in the trial court's discretion it may weigh the competing thirteen factors and decide which factors may outweigh other factors which support certification. Id.

The Iowa Supreme Court further rejected the Defendant's argument that the Plaintiffs must demonstrate at the time that certification is sought that there is a method that can show through common proof that each class member suffered impact and each suffered damages. The Iowa Supreme Court disagreed with this argument stating that it is not necessary that the individual claims be "carbon copies of each other". Comes v. Microsoft, 696 N.W.2d 318, 322 (Iowa 2005) (quoting Luttenegger v. Conseco Fin. Serv.

Corp., 671 N.W.2d 425, 437 (Iowa 2003). The Iowa Supreme Court found that class actions can be brought even though there is not a complete identity of facts as to all class members as long as there is a "common nucleus of operative facts" present. Id. The Iowa Supreme Court identified five questions of law or fact that the district court found were common to all members of the class in this action. These were:

[1] whether Microsoft is monopolist in the markets for operating systems and applications software and the definition of those markets;

[2] whether Microsoft engaged in anticompetitive conduct in order to unlawfully maintain or acquire its monopoly power in those markets;

[3] whether Microsoft's conduct violated the Iowa Competition Law;

[4] whether Microsoft's conduct harmed a proposed class; and

[5] whether Plaintiff's and the putative class members are entitled to damages and the appropriate measure of such damages.

Comes v. Microsoft, 696 N.W.2d 318, 323 (Iowa 2005).

Of these five questions the Iowa Supreme Court found that on the first three alone the district court's findings were sufficient to justify a finding of predominate issues. Id.

The Defendant further contended in its appeal to the Iowa Supreme Court that the district court's determination that common issues predominate was based, in part, on the court's improper findings that the two issues of impact of harm and damages were common to the class. The Defendant claimed the district court abused its discretion by using to lax a standard. Microsoft argued to the Iowa Supreme Court that the district court should have conducted a "rigorous analysis" of the evidence. Comes v. Microsoft, 696 N.W.2d 318, 322 (Iowa 2005). The Iowa Supreme Court disagreed and found that

the district court's conclusion that the method of proving injury-in-fact on a class wide basis proposed by the Plaintiffs was based on "sound and accepted economic theory" and presented a viable method for showing the difference between the prices that Microsoft would have been able to charge for the products at issue for a competitive environment and the prices that Microsoft actually charged." Id.

The Iowa Supreme Court further found that it is not necessary that the district court make a class certification and ruling based upon the merits of the case. Comes v. Microsoft, 696 N.W. 2d 318, 325 (Iowa 2005). The focus is to be directed at whether the class members have common complaints that can be presented by designated representatives in a unified proceeding. Id. Thus, the Iowa Supreme Court found that it is inappropriate at the certification stage to resolve battles between experts. Id.

The Iowa Supreme Court also considered the adequacy of the class representation by the representative members of the class. In particular, the focus was upon Joseph Comes and Riley Paint. Pursuant to Iowa Rule of Civil Procedure 1.263(2) in making the determination whether the representative parties fairly and adequately will protect the interest of the class the court must find all of the following:

- a. The attorney for the representative parties will adequately represent the interest of the class.
- b. The representative parties do not have a conflict of interest in the maintenance of the class action.
- c. The representative parties have or can acquire adequate financial resources, considering Rule 1.276, to ensure that the interests of the class will not be harmed.

On all three of these factors the Iowa Supreme Court found that the district court was correct and did not abuse its discretion in making its finding of adequate representation.

The court also stated that if class certification is improperly granted “a safety net” exists for such an occurrence in that the court may decertify the class at a later time. Comes v. Microsoft, 696 N.W.2d 318, 324 (Iowa 2005). Iowa Rule of Civil Procedure 1.265 allows the court to amend the certification order at any time before entry of judgment on the merits. Such an amendment may establish subclasses, eliminate from the class any member that was included in the class as certified, provide for an adjudication limited to certain claims or issues, change in the relief sought, or make any other appropriate change in the order. Iowa Rule of Civil Procedure 1.265(1).

The Defendant contends that decertification is warranted because class wide impact and damages cannot be shown with common proof and that a vastly expanded factual record shows that the Plaintiffs cannot prove impact and damages without individualized inquiry into the circumstances of each class member. Class actions can continue to be maintained as long as there is a “common nucleus of operative facts” present. Luttenegger v. Conseco Fin. Serv. Corp., 671 N.W.2d 425, 437 (Iowa 2003). It is not necessary that every issue involved in this case be amenable to class wide proof.

“When common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than an individual basis.” Comes v. Microsoft, 696 N.W.2d 318, 322 (Iowa 2005) (citing Luttenegger v. Conseco Fin. Serv. Corp., 671 N.W.2d 425, 437 (Iowa 2003))

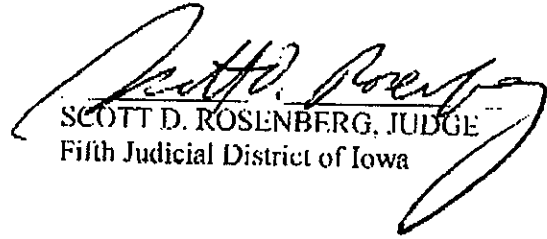
Microsoft asserts that new issues brought forth by the Plaintiffs' Fourth Amended Petition and further discovery have changed significantly this class action requiring a decertification of the class. The court finds, however, that there has been no significant change and that the further discovery and the Fourth Amended Petition have merely focused and clarified the Plaintiffs' claims of how Microsoft allegedly exercised its monopolistic power, engaged in anticompetitive conduct in order to maintain or acquire its powers in the relative markets, and allegedly violated the Iowa Competition Law. Common questions do remain as found by the Iowa Supreme Court in Comes v. Microsoft, 696 N.W.2d 318 (Iowa 2005).

There is no question that significant discovery has taken place since 2003 and since the Supreme Court's decision on May 13, 2005. The fact that more discovery has taken place and that some or all of this discovery may be presented at trial does not impact the certification already conducted by the district court and affirmed by the Iowa Supreme Court. To engage in such an exercise as the Defendant wishes this court to do would require the court to determine the merits of the case based upon affidavits and argument without the benefit of evidence and testimony being presented in open court, under oath and subject to cross examination and the rules of evidence.

This court can discern no change in circumstances which prohibits this class action from proceeding forward to trial. Those factors which the Iowa Supreme Court previously found in its ruling of May 13, 2005 still exist at this time. Further, nothing presented by the Defendant shows any need for an amendment of the certification order.

Therefore, for the reasons stated the court finds that the motion to decertify the class action is denied.

Dated this 26th day of October 2006.


SCOTT D. ROSENBERG, JUDGE
Fifth Judicial District of Iowa

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