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April 4, 2000

THE OVERVIEW

U.S. Judge Says Microsoft Violated Antitrust Laws With Predatory Behavior

A Microsoft Appeal Is Planned; Discussions of Remedy Are to Be Undertaken in Next Few Weeks

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By JOEL BRINKLEY

WASHINGTON, April 3 -- The Microsoft Corporation violated the nation's antitrust laws through predatory and anticompetitive behavior and kept "an oppressive thumb on the scale of competitive fortune," a federal judge ruled today.

The judge, Thomas Penfield Jackson of United States District Court, sided with the government on the most important points in its exhaustive antitrust suit, though he surprised lawyers on both sides by ruling for Microsoft in one area.

The Justice Department and the 19 states pressing the suit contended that Microsoft had hurt consumers by stifling competition in the software marketplace, particularly at the expense of the Netscape browser. Judge Jackson's findings of fact in the case, issued in November, overwhelmingly supported that view.

Several experts said today's ruling, applying the antitrust laws to those findings, laid the foundation for a powerful remedy. That will be decided in a separate proceeding to begin within a few weeks.

Options range from imposing restrictions on Microsoft's conduct to breaking up the company. Senior government officials close to the state and federal officers who are pursuing the case said many were interested in requesting a breakup, though no decision had been made.

The ruling, which Microsoft said it would appeal, came just 48 hours after settlement talks collapsed. On Saturday a court-appointed mediator announced that despite four months of mediation and after consideration of almost 20 drafts of a settlement offer, the gulf between the two sides remained unbridgeable.

Judge Jackson issued his judgment at 5 p.m., after the stock markets had closed. But reacting to the failure of the settlement talks and in anticipation of the judgment, Microsoft's stock plunged today, losing almost 14 percent of its value. That helped fuel a broad decline in the Nasdaq composite index, which fell 8 percent.

In his 43-page conclusions of law, Judge Jackson's final judgment on the evidence, the judge wrote that "the court concludes that Microsoft maintained its monopoly power by anticompetitive means and attempted to monopolize the Web browser market," as well as



AFP

'An Unlawful Campaign'

Judge Jackson ruled that Microsoft violated the Sherman Antitrust Act in these ways:

- The company used anti-competitive means to maintain a monopoly for its PC operating system software.
- It attempted to monopolize the Web-browser software market, making "a deliberate and purposeful choice to quell incipient competition."
- It tied its Internet Explorer Web browser to the Windows operating system as "part of a larger campaign to quash innovation."

The judge ruled in Microsoft's favor on one of the antitrust charges:

- Its marketing contracts with other companies did not deprive Netscape of the ability to distribute its Web browser.

"unlawfully tying its Web browser to its operating system" -- all in violation of the Sherman Antitrust Act.

At the same time, the judge ruled that Microsoft's marketing arrangements with other companies to promote its Web browser at Netscape's expense did not have sufficient effect to violate the law.

Microsoft seemed to take little solace from prevailing on that point. William H. Gates, the company's chairman, did not even refer to that point when he announced that Microsoft would appeal.

"This ruling turns on its head the reality that consumers know -- that our software has helped make PC's more accessible and more affordable to millions," Mr. Gates said. "We believe we have a strong case on appeal."

Attorney General Janet Reno and other officials seemed delighted.

"Microsoft has been held accountable for its illegal conduct by a court of law," the attorney general said. "We are pleased that the court agreed with the department that Microsoft abused its monopoly power, that it violated the antitrust laws and that it harmed consumers."

Tom Miller, the attorney general of Iowa, said, "Judge Jackson's decision is a broad-based and compelling finding of liability, of law-breaking." Mr. Miller leads the efforts of the 19 states that are partners with the Justice Department in the case.

And another plaintiff, Attorney General Richard A. Blumenthal of Connecticut, said the remedy should be "as far reaching and fundamental as Microsoft's abuse of its monopoly power."

The suit against Microsoft was filed almost two years ago. It accuses the company of using a monopoly in personal computer operating systems to stifle innovation and bully competitors.

The trial opened in October 1998, and from the opening moments, the government presented a case that embarrassed and damaged Microsoft. Then, when the company offered its own case several months later, many of Microsoft's witnesses were humiliated on the stand.

Testimony ended last spring. And when the judge issued his findings of fact in November, he found that Microsoft had "demonstrated that it will use its prodigious market power and immense profits to harm any firm that insists on pursuing initiatives that could intensify competition against one of Microsoft's core products."

With those findings, everyone involved with the case realized that his

final judgment -- which would be called a verdict in a criminal case -- was likely to fall heavily against Microsoft, as it did today.

Still, many lawyers were less certain that the judge would find the company in violation of the provision of the Sherman Act that bears on combining one product with another.

A central conclusion in the government's case -- and in the judge's findings of fact -- was that Microsoft tied its Web browser to the Windows operating system to gain market share for its browser and put Netscape at a disadvantage.

But a finding of fact does not necessarily lead to a similar conclusion of law, which says that the action violates antitrust laws. That is particularly so in this case because a three-judge panel of the Court of Appeals, overturning an order by Judge Jackson requiring Microsoft to offer a version of Windows without the browser, decided 2 to 1 in 1998 that Microsoft had every right to tie the browser to the operating system, if the company could demonstrate a plausible consumer benefit.

The Court of Appeals judges also suggested, however, that their opinion might change once they saw the evidence record from a trial. Judge Jackson devoted the largest section of his ruling to defending his judgment of liability on this count.

The Court of Appeals opinion, he wrote, "appears to immunize any product design (or at least software product design) from antitrust scrutiny, irrespective of its effect upon competition, if the software developer can postulate any 'plausible claim' of advantage to its arrangement of code."

He cited several Supreme Court decisions that support his view and called them "indisputably controlling." He concluded: "Microsoft's decision to tie Internet Explorer to Windows cannot truly be explained as an attempt to benefit consumers and improve the

What Comes Next: Deciding the Penalty

Now that the decision is in, the Microsoft trial shifts to a new phase during which the penalty, or remedy, will be decided.

Judge Thomas Penfield Jackson has told the parties to the case that he wants to hold a separate hearing as part of his deliberations over a remedy. He has not said how it will be structured or when it will begin. But Microsoft and the government will at least be asked to file written proposals describing their proposed remedies. The 19 state attorneys general and the Justice Department together are to file a single proposal.

After that, the judge may want to hear testimony from witnesses offered by both sides, though he has not said if that is his plan. But in anticipation that he might, over the last few months the Justice Department, the states and Microsoft all have been trying to recruit potential witnesses for the remedy hearings.

Finally, some time this summer, the judge will issue his remedy and close the case. Only then can Microsoft file its appeal.

efficiency of the software market generally, but rather as part of a larger campaign to quash innovation that threatened its monopoly position."

On other counts, he ruled that Microsoft's campaign against Netscape, as well as its decision to develop its own version of the Java programming language and encourage other companies to use it instead of the authorized version, prevented Netscape and Java from competing on the merits.

"Because Microsoft achieved this result through exclusionary acts that lacked procompetitive justification," the judge wrote, "the court deems Microsoft's conduct the maintenance of monopoly power by anticompetitive means."

He found in favor of Microsoft on the charge that the company had tried to block Netscape from the market by making exclusive agreements for its browser with computer companies, online services and Internet service providers.

Judge Jackson wrote: "The evidence does not support a finding that these agreements completely excluded Netscape from any constituent portion of the worldwide browser market," as the law requires for a finding of illegality.

But the heavy weight of the ruling was against Microsoft, and it included some extraordinarily damning language in parts.

"Microsoft's anticompetitive actions," he wrote, "trammelled the competitive process through which the computer software industry generally stimulates innovation" to "the optimum benefit of consumers."

Some experts said the ruling made it likely that the government would ask for a remedy that would break up the company.

"It boxes them in," said Robert Litan, a former senior official in the Justice Department's antitrust division who dealt with the department's last suit against Microsoft, in 1994.

In the mediation effort that ended on Saturday, "Microsoft already made it clear that they would not accept a conduct remedy" acceptable to the government, he said. And this suggests that, if one were imposed, the government might face difficult enforcement questions.

"With this strong validation of the case, we now know that only a breakup will address the operating system monopoly" that is at the heart of the case, Mr. Litan said. He is now with the Brookings Institution and has said he favors breaking up the company into several autonomous parts.



This evening, representatives of both Microsoft and the government said they remained open to the idea of restarting settlement talks. But when the judge's decision was entered, Microsoft's options narrowed considerably.

Judge Jackson's findings of fact in November gave plaintiffs' lawyers who were pursuing private suits against Microsoft useful ammunition for their cases. But the findings had only an ambiguous legal standing without the conclusions of law, entered today.

One of Microsoft's strongest incentives for reaching a settlement before today was that it would have removed the threat of a legal ruling and vacated the findings of fact. But should the litigants reach a settlement in the weeks or months ahead, it is not at all clear that the decision, including its legal conclusion that Microsoft holds a monopoly in personal computer operating system, can be wiped from the records.

"It's an interesting and unsure question," said Andrew I. Gavil, a professor of law at Howard University. "There's no clear precedent for vacating a ruling after it has been issued." But even if Judge Jackson were to agree to vacate his ruling as a condition of a settlement agreement, Mr. Gavil noted that other judges might not feel bound by that.

"Once the ruling is entered, you lose containment," he said.

Mr. Gavil and other lawyers said they believed private suits against Microsoft would multiply.

"It gives powerful new ammunition to lawyers pursuing class-action cases," said Stephen Houck, who was the chief lawyer for the 19 states that filed suit against Microsoft. He is now in private practice. Mr. Gavil added, "I think we may well see a new wave of them."

MICROSOFT ON TRIAL

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