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CONSUMER NEWS

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In May of 1998, the U.S. Department of Justice and the Attorneys General of twenty individual states sued the Microsoft Corporation alleging that the company abused its market power to the detriment of competitors and consumers.[1] On November 5, 1999, the United States District Court for the District of Columbia, Judge Thomas Penfield Jackson presiding, agreed and held that Microsoft exercises a monopoly over the operating systems market for Intel-based[2] personal computers ("PCs").[3] Judge Jackson's ruling is expected to have a tremendous impact on consumers and the PC industry.[4] Looking at the specifics of Judge Jackson's opinion is important if one wishes to understand the potential impact of this case.

Initially, the court found that Microsoft is able to maintain its control of the PC operating systems market by exploiting what the court termed the "applications barrier to entry."[5] Consumers purchase computer operating systems based on the availability of compatible software applications, like word processing and spreadsheet programs.[6] If there are few functional applications designed for a new operating system, consumers have little reason to invest in the product. Programmers, on the other hand, seek to make their products available to the broadest possible consumer base. Because Microsoft Windows is the most widely used operating system, most programmers choose to write their programs for Windows first, thereby ensuring the largest possible

market for their products.[7]

This, Judge Jackson found, leads to a self-perpetuating barrier that prevents consumers from investing in new operating systems. Programmers will not write applications for these new systems because they lack widespread consumer support.[8] Consumers will not purchase new operating systems because they lack a sufficient number of functional applications, which creates an insurmountable obstacle preventing would-be competitors from creating a viable alternative to Microsoft's Windows operating system. Accordingly, the court determined that there is little hope an attractive alternative to the Windows operating system will evolve in the current market.

In the court's opinion, the problem is further compounded by Microsoft's efforts to solidify this barrier through anti-competitive behavior. The court pointed to the company's decision not to produce a version of Windows without Microsoft's web browsing software, Internet Explorer, as evidence of the company's predatory tactics.[9] In failing to market a version of the Windows operating system without Internet Explorer, Microsoft hurt both competitors and consumers. The court found that Microsoft's primary competitor in the web browser business, Netscape, was damaged by this practice as consumers are not likely to remove the pre-installed Internet Explorer software in order to replace it with Netscape's browser.[10] The court determined consumers were harmed because those who did not want web browsing software – schools worried about irresponsible students accessing adult materials, for example – were forced to purchase an operating system with the undesired software and then spend additional sums to have it removed.[11]

This points to a theme that permeates Judge Jackson's ruling, namely that Microsoft's actions caused great harm to consumers. The court noted that "[m]any of these actions have harmed consumers in ways that are

immediate and easily discernible. They have also caused less direct, but nevertheless serious and far-reaching, consumer harm by distorting competition."[12] The court's declarations, therefore, elicited enthusiastic responses from Microsoft's adversaries. Attorney General Janet Reno described the judge's findings as a "great day for the consumer."[13] This sentiment may be premature, however, as Judge Jackson has yet to decide what will be done with Microsoft.

The findings of fact issued by Judge Jackson are actually the first installment of a two-part opinion. By dividing his opinion into two parts, Judge Jackson has given the parties some indication of how he will ultimately decide the case and may hope that doing so will prompt the parties to reach a settlement.[14] It is still unclear, however, if the parties will now settle the suit, or whether Judge Jackson will be forced to issue the final part of his decision. Microsoft Chairman Bill Gates said the decision was "just one step in the ongoing legal process,"[15] leading some to wonder how far the company is willing to take the case before settling.[16] Despite Microsoft's contentious behavior, however, recent reports indicate the company may be willing to make a deal. In fact, Microsoft's chief operating officer stated that "there's nothing we'd like more than to settle this case."[17]

If, on the other hand, the parties fail to reach an agreement, there are a variety of possible outcomes in this complex antitrust case. One possibility is that Judge Jackson could order Microsoft broken-up, as was done in the early antitrust cases involving Standard Oil and American Tobacco.[18] Most observers, however, feel that such a drastic remedy is unlikely and unwarranted.[19] More probable results include an order commanding Microsoft to halt its anti-competitive behavior or compelling the company to make available key aspects of the complex programming language that underlies its Windows operating systems.[20] Either possibility could loosen Microsoft's grip on the market for Intel-based PC operat-

ing systems by encouraging competitors to develop suitable alternatives to Windows, possibly at a lower cost.

Another important aspect of the ruling is that it was clearly written to withstand appellate scrutiny.[21] Although it is unusual for a court to bifurcate the findings of fact and conclusions of law usually contained in a decision, judges are permitted to structure their opinions how they see fit.[22] In this case, Judge Jackson is apparently trying to short cut an appeal by limiting his decision to factual findings. The opinion's two-part structure may discourage Microsoft from seeking an immediate appeal because the company's lawyers undoubtedly know factual findings are only overturned when the trial court makes a "clearly erroneous inference" regarding the evidence presented at trial.[23]

Judge Jackson is expected to release the second part of his opinion, which will include the court's conclusions of law and final judgment, in the early months of 2000.[24] Before doing so, however, the court will allow each party to submit briefs regarding the ultimate disposition of the case.[25] This will give both sides an opportunity to persuade Judge Jackson regarding the proper legal conclusions to be drawn from the facts and the appropriate remedy for Microsoft's violation. If the case is ultimately appealed, this judicial "two-step" may forestall an appellate reversal by lending credibility to the decision making process invoked by Judge Jackson. Professor Michael Kaufman, a corporate and securities professor at Loyola University Chicago School of Law, described Judge Jackson's approach as "very savvy."[26]

The final chapter in this saga, however, remains to be seen. Whatever the outcome may be, one thing is clear – the resolution of this case will undoubtedly affect consumers and the computer software industry.[27] By declaring Microsoft a monopoly, the court has opened the door to competition in the Intel-based operating systems market. Proponents of the suit believe their goal of help-

ing consumers will be fostered by such competition and feel certain their cause will prevail.[28]

Endnotes

1. *See* Andrew Zajac, *Microsoft's Defeat Opens Window to Suit Settlement*, CHI. TRIB., Nov. 7, 1999, § 1, at 1.

2. The phrase "Intel-based" means computers which use any one of the Intel Pentium family of microprocessors. *See* United States v. Microsoft, No. 98CV01232 and 98CV01233, 1999 WL 1001148, at *2 (D. D.C. Nov. 5, 1999).

3. *See id.* at *9.

4. *See* Zajac, *supra* note 1, at 1.

5. *Microsoft*, 1999 WL 1001148, at *8.

6. *See id.*

7. *See id.*

8. *See id.*

9. *See* Frank James, *Judge Rules Microsoft a Monopoly*, CHI. TRIB., Nov. 6, 1999, § 1, at 1.

10. *See Microsoft*, 1999 WL 1001148, at *113.

11. *See id.*

12. *Id.*

13. This statement is quoted in James, *supra* note 9, at 1.

14. *See* Janan Hanna, *Split Decision: Judge Leaves Most of Ruling for Much Later*, CHI. TRIB., Nov. 7, 1999, § 1, at 12.

15. James, *supra* note 9, at 1.

16. *See id.*

17. This statement is quoted in *Microsoft, U.S. Hint at Out-of-Court Settlement*, CHI. TRIB., Nov. 8, 1999, § 1, at 10.

18. *See* Rob Kaiser, *Nature of Antitrust Cases has Changed a Lot Since Standard Oil*, CHI. TRIB., Nov. 7, 1999, § 1, at 12.

19. *See* James, *supra* note 9, at 1.

20. *See id.*

21. *See id.*

22. *See* Hanna, *supra* note 14, at 12.

23. *Id.*

24. *See id.*

25. *See* Zajac, *supra* note 1, at 1.

26. Hanna, *supra* note 14, at 12.

27. *See* John R. Wilke, *Microsoft Hopes for GOP Savior, but States are Problem*, WALL ST. J., Nov. 9, 1999, at A28.

28. *See* James, *supra* note 9, at 1.

Debate Raging Over ATM Fees

A debate is beginning to heat up over the fee banks charge non-customers for using their Automated Teller Machines ("ATMs"). Last week, San Francisco citizens enacted the first ever voter-initiated public referendum banning the ATM surcharges banks levy against non-accountholders.[1] Other cities in California, including Santa Monica, have dealt with the public outrage over ATM fees by passing city ordinances banning them, while Iowa and Connecticut have passed statewide bans on the practice.[2] The new laws have roused the banking industry's opposition, however, and a lengthy legal battle is likely to ensue.

The problem, according to the U.S. Public Interest Research Group, stems from the current banking industry