

Jackson's Dilemma

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Judge Thomas Penfield Jackson has presided over the Microsoft trial for more than two years. He has policed the government's actions against Microsoft for five. He has worked hard to speed this latest phase to closure. And he has released two substantial opinions -- one making findings of fact in the case, the other offering his conclusions of law -- that together have found that Microsoft violated the nation's antitrust laws.

But now Judge Jackson faces a dilemma: How best to proceed? He is a district court judge. There are still two layers of appellate review to go, and it will take a long time for the case to work its way through those layers. A decision concluded this week would not be resolved by the Supreme Court before 2001, and more likely, the process would continue into 2002. This delay, as Jackson and everyone else realizes, creates great uncertainty in the market. It is an immense burden both for Microsoft and for the economy generally. So is there a way to speed resolution while respecting obligations to process?

The bulk of Jackson's work so far has focused on questions of liability -- on whether Microsoft in fact violated the nation's antitrust laws. He has not taken testimony on the question of remedy; he has not had a trial on what response makes most sense. He has instead been presented with a fairly complete plan by the government about how to break the company up. That plan has been countered with strong opposition by Microsoft.

To resolve this conflict properly could take months of additional hearings. It might make sense to divide the company, but the wisdom of a division, or of any particular division, is not obvious. Prudence alone might suggest an extensive opportunity for investigation, where both sides have a chance to present their case. The stakes -- for Microsoft in particular, and for the economy generally-- in finding the proper remedy are huge.

But Jackson obviously feels the pressure to exercise a different kind of prudence. If, as Supreme Court Justice Jackson said, the Supreme Court is infallible only because it is final, then as District Court Judge Jackson knows, district court judges are fallible if only

because not final. They know the virtue of humility. Especially in a case like this, Judge Jackson's judgment, however wise, will be reviewed by at least one other court. Everything will hang upon what he has done so far: upon, that is, his finding of liability. If that is reversed, any remedy is moot. If it is upheld, there is a strong likelihood that the parties might find a sensible solution on their own.

Ideally, then, the finding of liability should be reviewed now. But our system doesn't make it easy for judgments about liability to be reviewed separately from judgments about the proper remedy. The "final judgment rule" requires that both be presented together before an appellate court will review anything. This rule makes great sense in the vast majority of cases. But in cases like this, it plainly creates costly pressures. Should a judge hurry the second stage, so that the appellate court can finally settle the crucial question of liability? Should he simply adopt the government's remedy to push the case along? Or perhaps, to avoid tricky questions of due process, should he adopt the defendant's proposed remedy and force the government to appeal? Or should he scrap both proposals for conduct remedies, and simply enter a large fine against the company (large enough to make it think twice in the future), leaving either or both sides to appeal that?

What's odd in this case is that the government did nothing to help Jackson through this dilemma. Had the government asked for an injunction after liability was found, the judge, after a hearing, could have issued an injunction against Microsoft premised upon his finding of liability. That injunction could be appealed immediately, and that appeal would resolve the questions of liability. In the meantime, the trial court could consider the question of remedy, so that by the time the appellate courts resolved the question of liability, the district court could have resolved the question of remedy. Multi-tasking, judicial style.

This bifurcation would make good sense in this case. In theory, by invoking a seldom used technical rule to certify questions to the appellate court, Jackson might be able to achieve it on his own. But certification is not encouraged, and it may be blocked in this case by a timing problem. In any case, there is no guarantee that an appellate court would take the question. They are as likely simply to leave it until the case is pressed upon them finally.

Which leaves Jackson with his dilemma: To speed the resolution of the real question in this case, he risks reprimand for an abbreviated review of remedies. But to give the question of remedies the same care he gave the questions of liability, he risks further costly delays in resolving the primary dispute. Either way he faces costs that the government could easily, and should properly, have spared him.