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Microsoft Confronted by Crucial Legal Test

■ **Technology:** Judge to define guidelines for rash of civil suits alleging company's monopoly status drives up software prices.

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WASHINGTON—The first step in a massive civil antitrust assault against Microsoft will come today in Baltimore when a federal judge lays the ground rules for trying more than two dozen cases against the technology giant.

The civil class-action suits, brought by some of the same powerful liability lawyers who targeted the big tobacco companies and breast-implant maker **Dow Corning**, represent only one-fifth of the more than 130 cases that have been filed against the software giant. They contend that as a result of Microsoft's software monopoly, millions of computer users are being overcharged for its Windows operating system.

The private antitrust suits represent a crucial test of the financial and legal resources of Microsoft. The company already is fighting a big breach of contract suit brought by archrival **Sun Microsystems Inc.** and 23 class-action suits that have been consolidated in San Francisco Superior Court. This comes as it pursues an appeal of last week's ruling by U.S. District Judge Thomas Penfield Jackson that ordered the breakup of the company and other antitrust sanctions.

Because Windows runs more than 90% of all personal computers, the potential pool of plaintiffs is huge and the financial liability for Microsoft could be enormous.

"The potential exposure for them is catastrophic if everybody wins every lawsuit," said Herbert Hovenkamp, a University of Iowa law professor whose treatise on antitrust law was frequently cited in the government's antitrust trial against Microsoft. While Hovenkamp said that is unlikely to happen, federal and state laws give aggrieved consumers and rivals strong legal advantages against Microsoft.

Today, U.S. District Judge J. Frederick Motz is expected to determine how to coordinate pretrial

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work for 27 lawsuits—which have been consolidated into one for the time being—that are expected to seek billions of dollars in damages against Microsoft for overcharging consumers.

Jackson's finding that Microsoft is an abusive monopoly can be used as grist for allegations by computer users and other potential plaintiffs that Microsoft overcharged them for its flagship Windows software.

The federal Clayton Act allows direct purchasers to recover three times their actual damages. In addition, 16 states including California allow consumers to sue on antitrust grounds if they purchased Microsoft software through an intermediary—such as a computer maker like **Dell Corp.**—rather than from a retailer.

In effect, the laws give private antitrust plaintiffs a huge tactical advantage. To avoid any financial liability for its antitrust transgressions, experts say, Microsoft must win the antitrust case on appeal and dispatch its lawyers across the country to win each of the more than 130 private antitrust lawsuits, which have been filed in such widespread locations as Tierra Amarilla, N.M., and Howell, Mich.

"There is no margin for error," said William E. Kovacic, a law professor at George Washington University.

Microsoft disputes allegations that it overcharged customers and expressed confidence that plaintiffs will be unable to prove the charges.

"The lawsuits are simply an effort to go after a successful company for money; they fly in the face of our high-volume, low-cost software business model," said Microsoft spokesman Jim Cullinan. "Any reliance these lawsuits have on Judge Jackson's ruling is misplaced."

Microsoft is well-armed financially to combat the suits, having amassed about \$21 billion in cash. And company executives are buoyed by recent court rulings against private antitrust suits.

An Oregon judge this week threw out a lawsuit against Microsoft that claimed the company overcharged for its Windows 98 operating system. The decision came almost a year after a Connecticut jury said that Microsoft did not break antitrust laws in its dealings with a small software technology rival called **Bristol Technologies Inc.**

But some legal analysts and officials familiar with the cases discount their effect on the 27 lawsuits being organized in federal court in Baltimore.

Experts say the Oregon decision was based on a U.S. Supreme Court ruling that consumers cannot sue a company under antitrust laws if they did not purchase a product directly from the company. Oregon does not specifically allow such lawsuits. Consumers suing in states like California, which do allow such claims, may get more favorable judicial review.

Bristol lost its case largely because of the timing. "People filing cases now definitely enjoy an advantage because of Judge Jackson's ruling," said Keith Blackwell, the company's president. "We didn't have the luxury of waiting."

Several high-profile class-action lawyers are involved in the suits. They include Cincinnati attorney Stanley M. Chesley, whose firm fought Dow Corning in breast implant cases, and Michael D. Hausfeld, whose Washington firm got oil giant **Texaco Inc.** to settle the

largest racial discrimination suit in corporate history. Also involved is Christopher Lovell, whose New York law firm helped negotiate a \$1-billion settlement of claims that Wall Street firms conspired to fix the price of stocks traded on Nasdaq. And Robert Lief and his San Francisco firm have handled lawsuits against the tobacco industry.

Still, the lawyers face a tough legal battle.

Many experts back Microsoft's contention that there was little evidence presented by the government at the antitrust trial that proved that the company overcharged consumers. However, Jackson did write in 207 pages of factual findings that "a Microsoft study from November 1997 reveals that the company could have charged \$49 for an upgrade to Windows 98" instead of the actual "revenue-maximizing price" of \$89.

Thomas T. Chan, a Los Angeles lawyer who has faced off against Microsoft in 15 cases over the past 10 years, said the wild card for plaintiffs' lawyers will be finding jurors sympathetic to their cause. With Microsoft running TV ads extolling the company's virtues and with polls showing strong public support for the company, finding impartial jurors may be a tall order.

"I would want a jury that's not easily influenced by Microsoft's public relations campaign," Chan said. "The more sophisticated the jury pool, the more likely I want them to sit on the case. . . . The more you know about Microsoft, the less favorable you are" toward it.