# OPINION

THE NATIONAL LAW JOURNAL

**www.NLJ.com**
**www.VerdictSearch.com**
**www.NLJExperts.com**

**Publisher** *Joseph Calve*
**Editorial Director** *Robert J. Ambrogi*
**Associate Publisher** *Harry J. Alba Jr.*

**Managing Editors** *Jonathan Barrett, Charles Carter*
**Associate Editors** *Sam Adler, Peter Aronson, Andrew R. Dunn, Steven Fromm, Ruth Singleton*
**Associate Editors/Legal** *Andrew Harris, Carla Main, Dawn Markowitz*
**Associate Editors/Verdicts** *Gary Hardin, Marcie Kosciuski, Clare Papanastasiou*
**Staff Reporters** *Elizabeth Amon, Margaret Cronin Fisk, David Hechler, David E. Rovella, Bob Van Voris*
**Bureau Chiefs** *Marcia Coyle* (Washington, D.C.), *Gail Diane Cox* (Los Angeles), *Michael D. Goldhaber* (London), *Victoria Slind-Flor* (San Francisco)
**Assistant Editors** *Nancy DeLuca, John Hadler, David Horrigan, Annie Hsia, Jan Oliver, Pam Peaco, Mari Pham, Jo Powell, Michael Ravnitzky, John Schneider, Randi Stewart, Gary Young*
**Editorial Administrator** *Dee McAree*
**Chief Copy Editor** *Peter Dolack*
**Copy Editors** *Roger Adler, George Szamuely*
**Proofreader** *Jeremy Novak*
**Contributing Writers** *Mark Ballard, Matt Fleischer, Emily Heller, Susan Mandel*

**Editor, Electronic Publishing** *Laura Noueihed*
**Database Manager** *Bob Benjamin*
**Database Project Manager** *Shannon Holman*
**Associate Editor** *Joseph Phalon*

**Design Director** *Doug Hunt*
**Associate Art Director** *Mark Winterford*
**Assistant Art Director** *Roberto Jimenez*

**General Manager** *Kristin Colbert*
**Director of Marketing** *Monika Schreiner*
**Marketing Manager** *Gwen Tomasulo*
**Circulation Marketing Manager** *Patty Cassidy*
**Promotions Coordinator** *Bill Ulmer*
**Fulfillment Coordinator** *Grace Waugh*
**Office Administrators** *Shelia Segundo, Teri Wetter*
**Fulfillment Assistant** *Tracy Walsh*
**Administrative Assistant** *Trevor Henry*
**Reprints** *Syndia J. Torres* (reprints@amlaw.com)

**Director of Research Operations** *Russell Moran Jr.*
**Research Director** *Kathy Giannone*
**Research Assistants** *Joanne Cotignola, Michelle Meier*

**Group Publisher** *Kevin J. Vermeulen*
**Group Associate Publishers** *Michaela Apruzzese* (Corporate Advertising), *Jeffrey Morgan* (Law Firm Marketing)
**Director of Advertising** *Rebecca Berman* (Directories) *Diane Edwards* (Consumer Advertising), *Drew Dix* (Classified), *Rod Oshins* (Law Firm)
**Marketing Consultants** *Jeff Goldner, Alexandra Sheppard, Richard Tuorto*
**Law Firm Account Managers** *Karen Carvelli, Julie Duffy, Austin Holian, Annette Planey, Raj Selvadurai*
**Classified Consultants** *Marcia Hershkowitz, Dawn Pfister, Bernard Smith, David Walker*
**Directory Consultants** *Karen Dispo, James Gault Michael Johnson*

**Chief Technology Officer** *Iain Murray*
**Project Managers** *Elizabeth Difrancisco, Alexander Charles Winter*

**Director of Manufacturing** *Glenn Filippone*
**Production Manager** *Jim DeAngelis*
**Production Coordinator** *Samuel Wong*

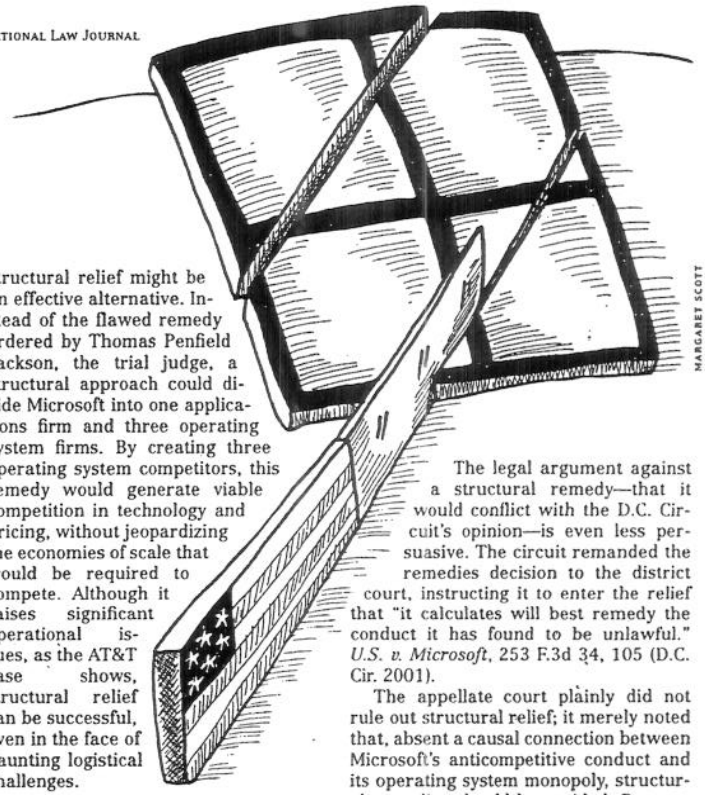
**American Lawyer Media Inc.**
Chairman, *Bruce Wasserstein*
President/CEO, *William L. Pollak*
Vice President/Strategic Planning *Jack Berkowitz*
Vice President/CFO, *Stephen C. Jacobs*
Vice President/Litigation Services *Joseph Calve*
Vice President/Books & Newsletters *Sara G. Diamond*
Vice President/General Counsel *Allison C. Hoffman*
Vice President/Finance *Eric F. Lundberg*
Vice President/Group Publisher *Kevin J. Vermeulen*

**Editorial** 105 Madison Avenue, New York, N.Y. 10016 (212) 313-9000.

■ **THE MICROSOFT DEAL**

# Another, better course

*By Jeffrey I. Shinder* SPECIAL TO THE NATIONAL LAW JOURNAL



MARGARET SCOTT

IF THE MICROSOFT case is a test of antitrust's relevance to the "new economy," the antitrust laws are failing.

An effective remedy in a monopolization case should accomplish three objectives: terminate the illegal monopoly, deny the defendant the fruits of its illegal conduct and ensure that it is prevented from engaging in future acts of monopolization. *U.S. v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

Yet, after the U.S. Court of Appeals for the D.C. Circuit found Microsoft to be a recidivist monopolist, the Antitrust Division of the Justice Department put its name on a settlement that achieves none of these goals. And the more stringent remedies proposed by the nine states that refused to settle with Microsoft—while an improvement—will not breathe competitive life into the operating systems market.

The criticisms of the proposed settlement with Microsoft often avoid the tough questions that need to be addressed: Can alternative remedies do better? Would structural or licensing remedies create viable competition in operating systems? Or would the benefits of creating operating system competition be shortlived because the market inevitably will "tip" and create a new monopoly platform? And, if "tipping" is inevitable, is the operating system a natural monopoly that should be regulated?

While these questions raise difficult issues, several alternative remedies promise to introduce real competition into the operating systems market. For example, one remedy would be to hold a one-time licensing auction for fully paid-up licenses to Microsoft's operating systems and key applications like Microsoft Office. Licensees would have the right to modify, resell and sublicense the intellectual property.

This approach could create a competitive operating systems market without dismembering Microsoft. Its primary virtue, however, could prove to be its undoing. The source code is long and complex, and Microsoft could easily undermine the remedy by providing incomplete documentation to interpret the data. To compete effectively, licensees probably will need access to Microsoft's programmers, who will be unwilling to help them. While licensees could be given the opportunity to hire Microsoft employees, the question remains whether they could attract them quickly enough to become viable competitors.

If these issues prove intractable, structural relief might be an effective alternative. Instead of the flawed remedy ordered by Thomas Penfield Jackson, the trial judge, a structural approach could divide Microsoft into one applications firm and three operating system firms. By creating three operating system competitors, this remedy would generate viable competition in technology and pricing, without jeopardizing the economies of scale that would be required to compete. Although it raises significant operational issues, as the AT&T case shows, structural relief can be successful, even in the face of daunting logistical challenges.

*Jeffrey I. Shinder is a partner at Constantine & Partners, an antitrust and complex commercial litigation firm in New York.*

## 'Fragmentation'

Critics will argue that a structural remedy will lead to a harmful "fragmentation" of the Windows standard, causing software incompatibilities or the costly porting of programs to multiple operating systems by developers. In essence, this argument contends that Microsoft's operating system is a natural monopoly. But this contention is belied by the facts, including Java's cross-platform potential and the competitive server operating systems market.

Moreover, concerns about fragmentation are likely overstated. Operating system competitors would have every incentive to remain interoperable in order to satisfy consumers and applications developers. And because they would be starting from the same base code, maintaining compatibility would not be difficult.

Furthermore, the argument that divergence in operating systems is necessarily harmful to consumers cannot withstand scrutiny. What some criticize as fragmentation should more accurately be described as the type of "product differentiation" we expect from our market economy. The antitrust laws have long disfavored arguments that competition is too messy or costly. *National Society of Professional Engineers v. U.S.*, 435 U.S. 679 (1978). There is no reason to abandon this bedrock principle in this context.

The legal argument against a structural remedy—that it would conflict with the D.C. Circuit's opinion—is even less persuasive. The circuit remanded the remedies decision to the district court, instructing it to enter the relief that "it calculates will best remedy the conduct it has found to be unlawful." *U.S. v. Microsoft*, 253 F.3d 34, 105 (D.C. Cir. 2001).

The appellate court plainly did not rule out structural relief; it merely noted that, absent a causal connection between Microsoft's anticompetitive conduct and its operating system monopoly, structural remedies should be avoided. Because that nexus can be inferred from the D.C. Circuit's holding that Microsoft's anticompetitive conduct unlawfully maintained its operating system monopoly, a structural remedy is consistent with the D.C. Circuit's decision.

Instead of breeding cynicism about antitrust law's ability to restore competition in the software industry, the Microsoft case should provide a clear example of how bold antitrust enforcement can make a difference. Contrary to popular opinion, concerns about the software industry's stability and vitality favor resorting to structural relief or a licensing auction.

Reports have already surfaced about the industry's disillusionment with the antitrust process. Executives and firms who took risks to provide critical evidence against Microsoft have now resigned themselves to Microsoft's continuing dominance. These firms will be less willing to take risks, or come forward with evidence, against Microsoft. And, given Microsoft's past contempt for antitrust consent decrees, it can be expected to exploit the proposed settlement's numerous loopholes. In short, the current solution is a prescription for chilled innovation and future antitrust proceedings against Microsoft. Judged against that depressing landscape, a far-reaching structural or licensing remedy seems a gamble worth taking. NLJ