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Trinko's ripple effect

Now that RBOCs are charged with anti-trust violations, will other industries get the same scrutiny?

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 By: [Shira Levine](#)
 America's Network



As appeals of the FCC's triennial review decision wend their way through the courts, a different sort of telecom case is under consideration at the Supreme Court-one that some warn could have significant ramifications that extend beyond the telecom industry.



Verizon v. Trinko began in 2000 when a lawyer named Curtis Trinko filed a class-action lawsuit against the former Bell Atlantic on behalf of AT&T customers, claiming that the RBOC's anticompetitive behavior was causing harm. The district court of New York ruled that Trinko lacked standing to sue for antitrust violations because he was not the directly affected party. However, the 2nd Circuit Court of New York overturned that decision, and Verizon appealed to the Supreme Court, which heard the case in October.

"If Verizon's position is affirmed by the Supreme Court, there will have to be a statutory remedy."
 -- Jim Sensenbrenner, Congressman

Verizon's arguments before the Court focused on the differences between the Telecom Act and the Sherman Antitrust Act, emphasizing that allowing competitive carriers to sue ILECs for antitrust violations would require expanding the scope of antitrust law. But antitrust experts point out that the Telecom Act includes a "savings clause" which states that nothing in the Act "should be contributed to modify, impair or supercede the applicability of the antitrust laws."

"The savings clause says antitrust laws apply to incumbent carriers-Congress wanted to make that very clear," says Tony Epstein, a partner in the antitrust and telecommunications practice at law firm Steptoe & Johnson.

And House Judiciary Committee Chairman James Sensenbrenner (R-Wisc.) drove that point home last month, warning at a Phoenix Center symposium that there would be a "swift and decisive response from the Judiciary Committee and Congress" if the Court rules in favor of Verizon.

"If Verizon's position is affirmed by the Supreme Court, there will have to be a statutory remedy to overturn that decision," he said.

Regulation vs. anti-trust

But at the same event, other speakers warned that there are dangers in relying on antitrust law to resolve competitive issues. For one thing, regulatory definitions can differ significantly from the definitions used on antitrust law, said Julian Epstein, principal at LawMedia Group and former Democratic Chief Counsel to the House Judiciary Committee. "A relevant market in antitrust may

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be different from a relevant market in the regulatory environment," Epstein said. "Regulatory policy by its nature is a forward-looking mechanism, while antitrust law is generally a backward-looking mechanism."

John Thorne, Verizon's deputy general counsel, cautions that resolving disputes through antitrust law could have significant consequences.

"As antitrust law changes, it creates new duties across the board-not just in telecom," he says. "The Trinko case is looking at whether a lawful monopoly has to turn over its facilities to its rivals. If the Court sides with Trinko, those duties could apply to anyone in a similar situation."

For example, Thorne says, United Parcel Services was hit with an antitrust lawsuit in 2000 that accused the company of violating antitrust laws by not giving customers a choice in insurance carriers when shipping packages. The plaintiff claimed that UPS owned essential facilities-i.e., its stores and software-and must make those facilities available to competing insurance carriers. UPS filed a motion to dismiss, but the New York district court ruled that the case must go forward because of the 2nd Circuit decision in Trinko.

But Epstein is skeptical that a ruling against Verizon in the Trinko case could create any major ripples in other industries.

"The court of appeals cases that led to the Supreme Court taking the Trinko case deal specifically with the effect of the Telecom Act of 1996," he says. "There's no analogue in other industries. The courts that rejected Verizon's position, and those of other RBOCs, are hardly making new antitrust law. I think we're pretty well settled."

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