

## INTERPLAY BETWEEN REGULATION, ANTITRUST LAWS STILL DEBATABLE



The question of how the market-opening requirements of the Telecommunications Act of 1996 affect potential antitrust claims against incumbent local exchange carriers has worked its way to the U.S. Supreme Court, and panelists at today's Phoenix Center telecom symposium in Washington demonstrated the heated differences of opinion on the issue.

Julian Epstein, principal of LawMediaGroup LLC and former chief minor counsel to the House Judiciary Committee during the debates that led to the 1996 Act, said the antitrust "savings clause" was deliberately added to ensure that antitrust laws weren't superceded by the legislation. Reviewing the history of the telecom industry while developing the legislation, it was clear that regulatory approaches to introduce competition into monopoly markets typically failed, while most gains were made using antitrust litigation, he said.

"We were explicit that we were not going to go back to what we saw as the paper tiger of regulatory enforcement," Mr. Epstein said. "We specifically intended for the peaceful coexistence [of regulation and antitrust enforcement] in a way that did not conflict."

But John Thorne, deputy general counsel at Verizon Communications, Inc., warned about the dangers of stretching the reach of antitrust laws, which is what he said the U.S. Court of Appeals for the Second Circuit (New York) did in its opinion in "Law Offices of Curtis Trinko v. Verizon." The U.S. Supreme Court is now considering challenges to that decision, which found that the 1996 Act didn't create an implicit immunity from antitrust claims.

"Antitrust applies to all industries, so if you expand antitrust duties, those don't just apply to telephone companies like the 1996 Act," Mr. Thorne said. He said United Parcel Service had been hit with a class action lawsuit challenging its ability to sell insurance for deliveries based on the "Trinko" reasoning.

Mr. Thorne added that the enforcement regimes already in place at the FCC and the state levels were "truly magnificent" in scope. States in Verizon's territory could levy as much as \$1.24 billion in fines for failing to provide adequate service to competitors, he said, noting that the figure doesn't include New Jersey, which has no cap on potential fines.

- Brian Hammond, [bhammond@tr.com](mailto:bhammond@tr.com) (6 November 2003)