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SHUGHART THOMSON & KILROY'S TELECOMMUNICATIONS AND NEW TECHNOLOGIES PRACTICE GROUP TELECOM REPORT

Shughart Thomson & Kilroy, P.C.'s Telecommunications and New Technologies Practice Group has substantial experience in regulatory and enforcement proceedings before the Federal Communications Commission ("FCC") and state regulatory agencies, and in litigation involving telecommunications matters in the federal and state courts. We present below for your information various recent regulatory and court rulings affecting the telecommunications industry. We are available to assist you in such matters.

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Shughart Thomson & Kilroy, P.C.'s Telecommunications and New Technologies Practice Group's Telecom Report is intended to provide general information about regulatory and legal developments in the telecommunications industry, and does not constitute legal advice. Our distribution of this Telecom Report does not create an attorney-client relationship between any recipient and Shughart Thomson & Kilroy, P.C.

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U.S. Court of Appeals for the District of Columbia Circuit Rules in Favor of National Railroad Passenger Corporation Against Three Percent (3%) Federal Excise on Tolled Communication Service

The U.S. Court of Appeals for the D.C. Circuit, in a unanimous decision, ruled in favor of the National Railroad Passenger Corporation ("Amtrak") in which Amtrak sought a refund on amounts it paid the Internal Revenue Service ("IRS") under the three percent (3%) federal excise tax on tolled telecommunication services.

The D.C. Circuit affirmed the decision of the U.S. District Court for the District of Columbia, which had held that Amtrak was entitled to a refund because 26 U.S.C. §4253(b)(1) requiring a three percent (3%) excise tax on toll telephone service which varies in amount with the distance and elapsed transmission time of each individual communication, was inapplicable to Amtrak's three percent (3%) excise tax charges, because Amtrak's charges do not vary by distance. Amtrak had initially paid the tax, but believing its service to be non-taxable under that section of the U.S. Code, filed a refund claim with the IRS. Having waited six months for the IRS to respond, and receiving no response, Amtrak filed suit in U.S. District Court for the District of Columbia. 26 U.S.C. §6532(a)(1) requires a taxpayer to file a claim for refund of overpayment of taxes before filing suit in federal court for the refund.

The U.S. Court of Appeals for the D.C. Circuit determined that 26 U.S.C. §4252(b)(1) imposes a tax only when there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication. Amtrak's toll charges did not vary by both time and distance, and accordingly, the court determined that Amtrak was not required to pay the three percent (3%) excise tax. The court answered the IRS' claim that the statute was ambiguous, because Congress sometimes uses the word "and" disjunctively, and the court should interpret the statute to require only that the charges vary with distance or elapsed transmission time. The court held that it could not do so, because the statute in question was not ambiguous, and the IRS' interpretation of the word "and" as disjunctive would lead to an absurd result. Thus, the court held that section §4252(b)(1) is unambiguous, and the IRS owed a refund to Amtrak. Significantly, the U.S. Court of Appeals for the D.C. Circuit joined two other U.S. Circuit Courts of Appeal in determining that the three percent (3%) federal excise tax on toll telephone service which does not vary by distance and elapsed transmission time is not applicable. These courts are the U.S. Court of Appeals for the Eleventh Circuit in *American Bankers Insurance Group v. U.S.*, and the U.S. Court of Appeals for the Sixth Circuit in *Office Max, Inc. v. U.S.* In addition, four U.S. District Courts and the Federal Court of Claims have held that the three percent (3%) federal excise tax on toll telephone service which does not vary by distance and lapsed transmission time is inapplicable.

As we informed you in our November 2005 newsletter (Vol. II, Issue 8), this is an excellent time for users of toll telecommunications services who have paid the three percent (3%) excise tax on charges which do not vary by distance and elapsed time, especially large users, to seek a refund from the IRS, or if it has already done so and not heard from the IRS, to file a complaint in U.S. District Court (or Federal Court of Claims) seeking the refund. The IRS has challenged the U.S. District Court rulings in three instances in the U.S. Court of Appeals, and has lost each of these appeals. Although the IRS could seek an appeal of the Sixth Circuit opinion in *Office Max, Inc. v. U.S.*, and/or an appeal in the Amtrak case from the U.S. Court of Appeals for the D.C. Circuit to the U.S. Supreme Court, we believe it is clear that such an appeal would not delay the IRS' processing a refund claim, or delay a complaint in the appropriate federal court for a refund.

Please let us know you have an interest in seeking a refund for these excise taxes.

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FCC Initiates Proceeding to Implement the Junk Fax Prevention Act, Which Became Law on July 9, 2005

The FCC has initiated a rulemaking proceeding to implement the requirements of the Junk Fax Prevention Act ("JFPA"), which became law on July 9, 2005. The FCC also delayed the effective date of the requirement that a sender of facsimile advertisements obtain prior written permission from the recipient, which is currently scheduled to go into effect on July 9, 2006.

As you will recall from our July newsletter (Vol. II, Issue 5), we informed you that Congress had passed a junk fax prevention act in July 2005, which the president signed into law on July 9, 2005. The JFPA requires the FCC to issue regulations to implement the provisions of the JFPA no later than April 5, 2006. Specifically, the JFPA provides for the following:

1. Codifies an established business relationship ("EBR") exemption to the prohibition on sending unsolicited facsimile advertisements;

2. Provides a definition of an EBR to be used in the context of unsolicited facsimile advertisements. The definition is as follows:

> EBR means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within eighteen (18) months immediately preceding the date of the telephone communication or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

3. Requires the sender of facsimile advertisements to provide specified notice and contact information on the facsimile that allows recipients to "opt-out" of future facsimile transmissions from the sender.

4. Specifies the circumstances under which a request to "opt-out" complies with the JFPA. The JFPA allows the FCC, after a period of three (3) months from the day of enactment of the Act, to consider limits on the duration of an established business relationship.

In its Notice of Proposed Rulemaking ("NPRM"), the FCC requests comments on how to implement the JFPA's requirements and update the FCC's rules.

The FCC has specifically requested comments on how to implement the JFPA's requirements and what steps are necessary to update the FCC's rules be filed thirty (30) days after publication of the FCC's NPRM in the *Federal Register*, and reply comments forty-five (45) days after such publication. The FCC's NPRM was published in the *Federal Register* on December 9, 2005. Comments are due on January 18, 2006, and reply comments are due on February 2, 2006.

If any of you wish to file comments in response to the NPRM or have questions about the definition of EBR, please let us know.

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FCC Requests Comments on Petition for Declaratory Ruling Relating to FCC's Jurisdiction Over Interstate Facsimile Communications, Filed by the Fax Ban Coalition ("Coalition")

The Coalition's Petition raises issues concerning the scope of the FCC's jurisdiction over interstate communications under the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. §227. Specifically, the Coalition requests the FCC to:

1. Affirm that, under the FCC's general grant of exclusive authority to regulate interstate communications, the FCC has exclusive authority to regulate interstate commercial fax messages; and

2. Determine that §17538.43 of the California Business and Professions Code, and all the state laws that purport to regulate interstate facsimile transmissions, are preempted by the TCPA.

In support of the Coalition's Petition, the Coalition asserts that states lack jurisdiction to regulate interstate facsimile communications, because Congress granted exclusive jurisdiction to the FCC over all interstate and foreign communications under the Communications Act of 1934, as amended. The Coalition asserts that exclusive federal regulation of interstate commercial fax transmissions is consistent with Congressional intent as expressed in the TCPA, and with prior FCC decisions. Moreover, the Coalition contends that individual states' attempts to regulate interstate communications have resulted in varying fax regulation that is not only inconsistent with Congressional intent and the goals of the TCPA, but has become burdensome to individuals, companies and other organizations that rely heavily on facsimile technology to conduct business. Thus, the Coalition requests the FCC to preempt all state laws purporting to regulate interstate facsimile transmission and assert exclusive jurisdiction over such regulation.

The Coalition also pointed out to the FCC that the State of California enacted a law on October 7, 2005, that conflicts with the facsimile regulation in the TCPA. The Coalition claims that California's new law contains the text of §227 of the Communications Act, without the provisions of the Junk Fax Prevention Act of 2005, which amended §227, and applies that language to any person sending facsimiles in or out of the State of California. Consequently, the Coalition contends that the California law effectively eliminates the established business relationship exception to the prohibition on unsolicited facsimiles which exception is contained in the Junk Fax Prevention Act of 2005. The Coalition therefore urges the FCC to declare that the FCC has exclusive jurisdiction to regulate interstate commercial facsimile messages, and all state efforts to do so are preempted.

The U.S. Chamber of Commerce and Xpedite Systems, a fax company, obtained an injunction in U.S. District Court for the Eastern District of California in Sacramento on December 21, 2005, staying the effective date of the California law until January 31, 2006. The Court will hold a hearing on this issue on January 23, 2006.

Comments on this Petition are due to be filed with the FCC on January 13, 2006, with reply comments to be filed on February 2, 2006.

Please let us know if you're interested in commenting on this petition.

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U.S. Court of Appeals for the Second Circuit Reverses a Lower Court's Decision on Siting of Communications Tower

The U.S. Court of Appeals for the Second Circuit (the "Second Circuit") in *OmniPoint Communications, Inc. v. The City of White Plains,* reversed a decision of the U.S. District Court for the Southern District of New York which had granted summary judgment in favor of OmniPoint which had violations of §332 of the Communications Act, 47 U.S.C. §332. OmniPoint's complaint arose from the City of White Plains' denial of OmniPoint's application for permission to construct a 150' cellular communications tower on a local golf course.

The U.S. District Court for the Southern District of New York ruled that the City of White Plains Planning Board's ("Planning Board") denial of OmniPoint's application was not supported by substantial evidence, and therefore, violated §332 of the Communications Act. In addition, the District Court ordered the City of White Plains to pay OmniPoint a judgment of $1,327,665.24 in actual damages, plus post-judgment interest, and $231,152.84 in attorneys' fees, because the Planning Board's decision was supported by substantial evidence, and therefore violated OmniPoint's right to due process in violation of Section 1983 of the Civil Rights Act, 28 U.S.C. §1983. That statute generally allows a litigant to recover attorneys' fees if he or she proves a violation of a constitutional right by government or persons sitting under color of government authority.

On appeal, the Second Circuit concluded that the Planning Board's decision was supported by substantial evidence, and reversed the lower court's decision. Thus, the Second Circuit found that the Planning Board did not violate §332 of the Communications Act. This section limits state and local regulation of the placement, construction and modification of personal wireless service facilities. Moreover, this section provides that such local and state regulations cannot unreasonably discriminate among providers of functionally equivalent services, and cannot prohibit or have the effect of prohibiting the provision of personal wireless services. Finally, this section states that state and local governments must act on applications for the construction of wireless facilities within a reasonable period of time and may not deny such applications except in a written decision supported by substantial evidence contained in a written record. This section of the Act also provides that local governments retain express control over the zoning of wireless service facilities. Thus, §332 has two purposes – to facilitate nationally the growth of wireless telecommunications services and to maintain substantial local control over the siting of towers.

In this case, OmniPoint, a wireless cellular provider, proposed to build a 150' telecommunications tower on a golf course in White Plains, NY, for the purpose of eliminating a coverage gap. The tower would be disguised as an evergreen tree. OmniPoint signed an agreement with the golf course to lease a site for the tower. OmniPoint then applied for a special permit – on the golf course's behalf – to erect the camouflaged tower. The Planning Board held public hearings on OmniPoint's application, after which the Planning Board denied OmniPoint's application. The Planning Board found that the tower would have an unfavorable visible impact, lower property values in the area around the golf course and was not needed. OmniPoint then sued the City of White Plains, alleging violation of §332 of the Communications Act. The U.S. District Court granted OmniPoint summary judgment, applying that the Planning Board's decision was not supported by substantial evidence. The District Court also awarded OmniPoint damages and the attorneys' fees referred to above.

The Second Circuit reviewed the District Court's decision *de novo*, and the Planning Board's decision for substantial evidence. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Court found that the Planning Board's decision focused on three considerations:

1. adverse visible impact;
2. diminished property values; and
3. lack of public necessity.

The Second Circuit court found that the Planning Board received substantial evidence on these three points. Given the fact that the tower would be 150 feet tall, more than three times the height of the tallest evergreen tree on the golf court, the court found that the Planning Board could reasonably conclude that the tower would have an adverse visible impact. The Court also found that the Planning Board gave proper deference to community opposition, which was based upon aesthetic concerns. The Court also held that the evidence before the Board showed that the tower would result in a decline in marketability of homes in the neighborhood.

Finally, the Court held that the Planning Board properly concluded that OmniPoint had failed to demonstrate public necessity for the tower, because OmniPoint had to show there was a gap in cell service, and that building the proposed tower on the golf course was more feasible than other options. The Court said that the record before the Planning Board's demonstrated that OmniPoint had other potential sites but had claimed only in a conclusionary fashion that they were unfeasible, and had failed to document that it was not able to build a less-intrusive structure or combination of structures on the golf course. Accordingly, the Court reversed the District Court's decision.

Moreover, the court vacated the District Court's damages awarded in attorneys' fees, based upon the Supreme Court's decision in *City of Rancho Palos Verdes v. Abrams,* 554 U.S. ____ 125 Sup.Ct. 1453 (2005), which held that damages under 28 U.S.C. §1983 are not available for violations of the Communications Act. We informed you of this Supreme Court decision in *City of Rancho Palos Verdes v. Abrams* in our April 2005, newsletter (Vol. II, Issue 2).

If you have any questions about the Second Circuit's opinion in *OmniPoint,* please give us a call.

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Billing Practices and Errors of Local Exchange and Interexchange Carriers

We have been asked to review a number of rates and practices of incumbent local exchange carriers ("ILECs") and interexchange carriers (IXCs") with respect to their billing practices. In our review, we have found a number of billing errors made by both ILEC and IXCs, for local exchange and interexchange services, respectively.

Some of these errors are inadvertent, but others are questionable, and in any event, all of the errors we have reviewed constitute overcharges to users, whether end users or a carrier purchasing wholesale services. Some examples of the errors we have found include excessive (or non-applicable) charges for both interstate and state taxes, network charges for CENTREX and other access services, failure to apply or improper calculation of liquidated damages or performance assurance refunds, and failure to apply discounts and waivers of charges pursuant to contracts for telecommunication services.

We would be pleased to speak with you about our review, or answer any questions you may have about billing errors or billing practices of both ILECs or IXCs, or about unwarranted charges or overcharges for telecommunication services. As you know, we have litigated the issue of carrier bulling practices for both user and wholesale purchasers in federal and state courts.

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For more information about Shughart, Thomson & Kilroy, P.C. and its Telecommunications Practice and New Technologies Practice, please consult our websites at www.stklaw.com and www.telecomattorneys.com.

If you have any questions about this Report or prior Reports, or other recent FCC or state regulatory rulings, or federal or state court decisions affecting telecommunications, or any of our services, please don't hesitate to contact us.

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