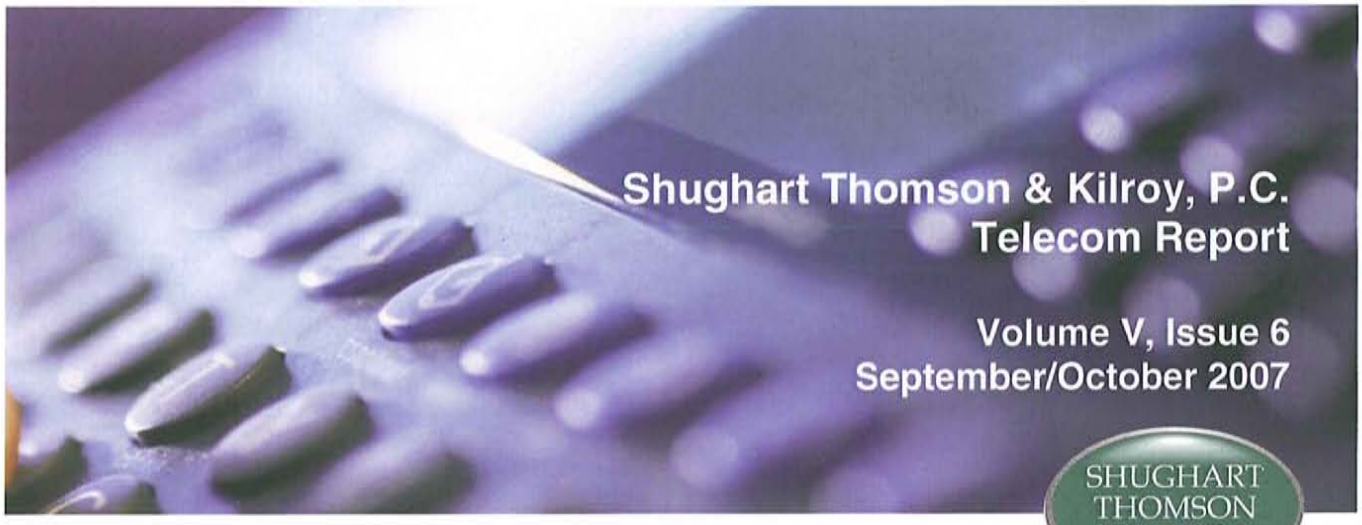

SHUGHART THOMSON & KILROY'S TELECOMMUNICATIONS AND NEW TECHNOLOGIES PRACTICE GROUP TELECOM REPORT

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.

What's in this edition:

COLORADO COURT OF APPEALS REVERSES LOWER COURT'S RULING THAT A TELEPHONE NUMBER USED FOR BOTH PERSONAL AND BUSINESS PURPOSES IS NOT COVERED BY THE TELEPHONE CONSUMER PROTECTION ACT OR THE COLORADO NO-CALL LIST ACT

In *Holcomb v. Steven D. Smith, Inc.*, the Colorado Court of Appeals reversed and remanded Holcomb's case to a Colorado District Court which had ruled that Holcomb's residential service telephone number that was used for both personal and business purposes is not covered by the Telephone Consumer Protection Act ("TCPA") or the Colorado No-Call List Act ("No-Call Act").

In rendering this ruling, the Court overturned the District Court's summary judgment in favor of defendants Steven D. Smith, et al., who argued that a residential telephone service number that had been registered under the No-Call Act but which is also used for business purposes is not covered by the TCPA or the No-Call Act. In this case, Holcomb registered his home telephone number on the No-Call Act in 2003, but also used the telephone number as a residential number and published it as a business number in advertisements. Defendants, without Holcomb's consent, called his telephone number for purposes of telemarketing. Thereafter, Holcomb filed suit under the TCPA and the No-Call Act, claiming damages. The District Court granted partial summary judgment for the defendants – noting that if used for both personal and business purposes is not covered by the TCPA or the No-Call Act. The Court noted that if Holcomb had not published his telephone number as a business number, the ruling might have been different.

The Colorado Court of Appeals, while noting that the Colorado Supreme Court will review the issues raised in this case, in another case, decided that the No-Call Act's language is clear and unambiguous, and that if a person subscribes to a residential telephone service and has registered the number with the Colorado No-Call List, that telephone number is protected from receiving telephone solicitations. The Court of Appeals stated that the No-Call Act contains no exceptions or qualifying language whereby a residential subscriber home telephone number loses the protection of the No-Call Act if that telephone number is also used for business purposes or published as a contact telephone number for a persons business. The Court of Appeals also held that the No-Call Act does not provide that using a residential home telephone number for business purposes transforms the telephone number classification from a residential listing to a business listing. Rather, the No-Call Act clearly provides that if a person registers a residential subscriber home telephone number on the No-Call List, that number is *per se* protected under the No-Call Act.

Until the Colorado Supreme Court rules otherwise, this Court of Appeals ruling stands in Colorado. Telephone marketers should check the No-Call List laws in the states where they telemarket, and particularly Colorado, to determine whether the language of those state laws reflect the intent on the part of the Legislature in those states to protect a residential subscriber without inquiry into how the home telephone is being used.

If you have any questions about this ruling or its impact, please give us a call.

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FCC APPROVES NEW LONG DISTANCE RULES GOVERNING THE PROVISION OF IN-REGION LONG DISTANCE SERVICES BY THE BELL OPERATING COMPANIES

The Federal Communications Commission ("FCC") has adopted new rules which govern the provision of in-region long distance services by the Bell Operating Companies ("BOCs") and their independent local exchange carrier affiliates. The old rules had a requirement that the BOCs separate their

local telephone long distance operations, which is contrary to the current market environment where local long distance services are marketed and rendered on a bundled basis.

The new rules do not require separation, but require the BOCs to carry out their commitment to offer special rate plans for three years to end users who make relatively few long distance calls. The BOCs also committed to provide end users to bundled rate local/long distance plans adequate information regarding their monthly usage in order to ensure that such end users can make more informed choices concerning their options for making long distance calls. The FCC incorporated these BOCs commitments in the new rules. We will report on the Order in a later newsletter.

The FCC has not yet made public its Order adopting these new rules but is expected to do so within the next several weeks.

If you have any questions about these new rules or their impact, please let us know.

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FCC ISSUES ORDER ON ENHANCED 911, PHASE II RULES FOR WIRELESS CARRIERS

The FCC has adopted a Report and Order on September 11, 2007, which clarifies that wireless carriers must meet the enhanced 911, Phase II ("E911-Phase II") location accuracy requirements at the Public Safety Answering Point ("PSAP") service area level. The Order requires carriers to meet interim, annual benchmarks over the next five years in order to ensure that that they achieve PSAP-level compliance no later than September 11, 2012.

The FCC has established the following interim requirements for wireless carriers to meet E911- Phase II location accuracy requirements at the PSAP level. Wireless carriers must:

- Fulfill the FCC's location accuracy requirements within each economic area in which that carrier operates by September 11, 2008;
- Satisfy the location accuracy requirements within each metropolitan statistical area and rural service area that the carrier serves;
- Demonstrate significant progress towards compliance at the PSAP level, including achieving this requirement within at least 75% of the PSAP the carriers service, by September 11, 2010; and
- Achieving full compliance with the PSAP-level location accuracy requirements by September 11, 2012.

Wireless carriers must also account for only those PSAPs in the service area that are capable of receiving E911-Phase II location data.

If you would like more information about this FCC Order, please give us a call.

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U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT RULES THAT A CLASS ARBITRATION WAIVER IN CINGULAR'S WIRELESS SERVICE CONTRACT IS UNENFORCEABLE

The U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit"), issued an Opinion in *Shroyer v. New Cingular Wireless Services, Inc.*, an AT&T Corporation ("AT&T"), in Case No. 06-55964, that a class arbitration waiver in New Cingular Wireless Service, Inc.'s ("Cingular") standard contract for cellular phone services is unconscionable under California law, and that the waiver is unenforceable. The Ninth Circuit also held that the invalidation of the class arbitration waiver provision is not preempted by the Federal Arbitration Act ("FAA"). Accordingly, the Ninth Circuit reversed the federal District Court for the Central District of California's ruling that plaintiff Shroyer had to arbitrate his class action claim against Cingular and AT&T.

Shroyer's class action complaint alleged injury as a result of the 2004 merger between Cingular Wireless, LLC and AT&T Wireless Services, Inc. which created New Cingular Wireless Services, Inc. Specifically, the complaint alleged inferior service at excessive charge after Cingular induced AT&T customers to convert to Cingular with promises of better quality service. The complaint also alleged that certain conduct of Cingular after the merger also contributed to the injury. Shroyer specifically made seven claims based on California's state statutes: (1) unfair competition, (2) untrue and misleading advertising, (3) violations of the Consumer Legal Remedies Act, (4) breach of contract, (5) breach of the covenant of good faith and fair dealing, (6) fraud and deceit, and (7) unjust enrichment. Shroyer asked for damages for the class, declaratory relief and injunctive relief.

Shroyer's contract with Cingular for wireless services contained a provision which states:

> YOU AND CINGULAR AGREE THAT YOU AND CINGULAR MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, and not as a plaintiff or class member in any purported class or representative proceeding. Further, you agree that the arbitrator may not consolidate proceedings of more than one person's claims, and may not otherwise preside over any form of representative or class proceeding, and that if this specific proviso is found to be unenforceable, then the entirety of this arbitration clause shall be null and void.

After Shroyer filed his complaint in the state court, Cingular removed it to the federal district court in Los Angeles, and filed a motion to compel arbitration and stay further proceedings under the FAA. Cingular asserted that the arbitration clause was valid and enforceable. Cingular also asserted that a holding that the clause was unconscionable would be expressly preempted by the FAA as well as impliedly preempted, because such a holding would frustrate the purpose of the FAA. The District Court granted Cingular's motion to compel arbitration and dismiss the action without prejudice. Shroyer then appealed the case to the Ninth Circuit.

The Ninth Circuit found that the waiver of class action in the Cingular contract was both procedurally and substantively unconscionable, and therefore unenforceable. Thus, the Ninth Circuit reversed the lower court's ruling. Under California law, a contract provision is unenforceable due to unconscionability only if is both procedurally and substantively unconscionable. The Ninth Circuit held that the class action waiver provision was procedurally unconscionable because of the adhesive nature of the contract, the imposition of a one-sided and oppressive nature of the class action waiver. Cingular's cellular wireless agreement was a contract of adhesion because it was a standardized contract which imposed upon the subscribing party no opportunity to negotiate the terms. Second, the Cingular wireless agreement occurred in a setting in which disputes between the contracting parties predictably involve a small amount of damages. For example,

plaintiff Shroyer alone only had a claim against Cingular for under $70.00. Third, Cingular had superior bargaining power which it used to force its customers to enter into its wireless services agreement containing the waiver provision. The contract was substantively unconscionable for the same reasons.

The Ninth Circuit also concluded that the FAA did not bar a federal or state court from applying generally applicable state contract law principles in refusing to enforce an unconscionable class action waiver in an arbitration clause. The basis for this holding was that unconscionability is a generally applicable contract defense, and may be applied to invalidate an arbitration clause without contravening the FAA. State law may be applied if that law arises to govern issues concerning validity, revocability, and enforceability of contracts generally, and that generally applicable contract defenses such as fraud, duress and unconscionability may be applied to invalidate arbitration agreements without contravening the FAA.

Based on this Ninth Circuit decision, federal and state courts in states other than California may also take the same view and invalidate any wireless contract provision (or even wireline contract provision) that contains a waiver of class action provision. You should note that the Ninth Circuit has applied the same principal in at least two other cases in which it held that class arbitration waivers are contracts of adhesion and are both procedurally and substantively unconscionable. One case involved an employment agreement, and the other case involved a contract for AT&T telephone services.

If you would like additional information about this court decision, please let us know.

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FCC ANNOUNCES PROCEDURES AND MINIMUM OPENING BID AMOUNTS FOR THE AUCTION OF LICENSES FOR SERVICES IN THE 700 MHZ BAND

On October 5, 2007, the FCC announced procedures and minimum opening bid amounts for the auction of licenses for services in the 700 MHz band. The auction is scheduled to begin on January 24, 2008, and is designated as Auction No. 73.

In this auction, the FCC will auction licenses in the 698-806 MHz band, which is currently occupied by television broadcasters. These radio frequencies are being made available for new commercial and public safety services as a result of the digital television ("DTV") transition. In prior proceedings, the FCC considered the 700 MHz band in two parts, 698-746 MHz, designated as a lower 700 MHz band, and 746-806 MHz, designated as the upper 700 MHz band. The lower 700 MHz band was divided into blocks A through E, and the upper 700 MHz band was divided into blocks A through D. The FCC previously assigned licenses for blocks C and D in the lower 700 MHz band and for blocks A and B in the upper 700 MHz band. Auction No. 73 is to auction licenses for blocks A, B and E in the lower 700 MHz band, and blocks C and D in the upper 700 MHz band.

Among the procedures announced by the FCC are the following:

- Anonymous bidding, to enhance competition by safeguarding against potential anticompetitive auction strategies;
- Package bidding, to enable bidders attempting to combine multiple C block licenses to place bids on packages of those licenses;
- Block-specific aggregate reserve prices, to help assure that the public recovers a portion of the value of the radio spectrum resource being auctioned; and

- Prompt subsequent bidding in a new auction designated Auction No. 76, for licenses for spectrum associated with any initially offered licenses or which the Auction No. 73 results do not satisfy applicable reserve prices.

The procedures announced for Auction No. 73 will also apply for Auction No. 76.

If you would like information on how the procedures described above will apply, do not hesitate to contact us. Likewise, if anyone has any questions on the opening bid amounts, please let us know.

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FCC ISSUES REPORT AND ORDER CONCERNING VIDEO PROGRAMMING DISTRIBUTION

On October 1, 2007, the FCC issued its Report and Order and Notice of Proposed Rule Making ("R and O and NPRM") in MB Docket Nos. 07-29 and 07-198, concerning the implementation of the Cable Television Consumer Protection and Competition Act of 1992, the Development of Competition and Diversity in Video Programming Distribution under Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition; and Review of the FCC's Program Access Rules and Examination of Programming Tying Arrangements.

As many of you know, in areas served by a cable television operator, Section 628(c)(2)(D) of the Communications Act of 1934, as amended, (the "Act") generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between vertically integrated programming vendors and cable television operators (the "Exclusive Contract Prohibition" or "Prohibition"). In the R and O and NPRM, the FCC decided that the extension of the Exclusive Contract Prohibition is necessary to preserve and protect competition and diversity in the distribution of video programming, and accordingly, retains the prohibition for an additional five years, or until October 5, 2012. The FCC declined to narrow the scope of the Exclusive Contract Prohibition based on the popularity of the programming network, on the competitive circumstances in individual geographic areas served by cable operators, or by precluding certain competitive multi-channel video programming distributors ("MVPDs"), from benefitting from the Prohibition. The FCC also refused to expand the Exclusive Contract Prohibition to apply to non-cable affiliated programming, and concluded that terrestrially delivered programming is beyond the scope of the Exclusive Contract Prohibition in Section 628(c)(2)(D).

In the NPRM, the FCC requested public comment on revisions to the FCC's Program Access and Retransmission Consent Rules and whether it may be appropriate to preclude the practice of programmers to tie desired programming with undesired programming. In this regard, the FCC requested comment on whether it can establish a procedure that would shorten the term of the five year extension of the Exclusive Contract Prohibition if, after two years, or after October 5, 2009, a cable operator can show competition from new entrant MVPDs has reached a certain penetration level in a designated market area. Second, the FCC requests comment on whether it would be appropriate to extend the FCC's Program Access Rules to all terrestrially delivered cable affiliated programming pursuant to various provisions of the Act. Third, the FCC requests comment on whether to expand the exclusive contract prohibition to apply to non-cable affiliated programming that is affiliated with different MVPDs, principally a direct broadcast satellite ("DBS") provider. Fourth, given the problems associated with programming tying arrangements, the FCC requests comment on whether it may be appropriate for the FCC to preclude such arrangements. Accordingly, the NPRM seeks comment on how retransmission consent negotiations are impacted when broadcasters tie the carriage of their broadcast signals to carriage of other owned or affiliated broadcast stations in same or a distant market or one or more affiliated non-broadcast networks. The FCC also seeks comment on whether Section 628(b) of the Act requires satellite cable programmers to offer each of their programming services on

a standalone basis to all MPVDs at reasonable rates, terms and conditions; and whether the FCC should require terrestrially delivered cable programming networks and programming networks affiliated with neither a cable operator nor a broadcaster to be offered on a standalone basis for all MPVDs at reasonable rates, terms and conditions. The FCC also requests comment on whether and how the FCC should address additional program access concerns raised by small and rural MPVDs regarding allegedly onerous and unreasonable conditions imposed by some programmers for access to their content.

Finally, the FCC asks for comment on whether to establish a process whereby a program access complainant may seek a temporary stay of proposed changes to its existing programming contract pending resolution of a complaint, and require parties to submit to the FCC, once requested, a final offer proposal as part of the remedy phase of a complaint process. The FCC also modified certain procedures for resolving program access disputes and made other procedural changes.

The R and O and NPRM is a comprehensive document, and requests comments on the issues in the NPRM portion 30 days after publication of the document in the federal register. Reply comments are due 45 days after date of publication in the federal register.

If you have any questions about the dates comments are due on the NPRM, the Exclusive Contract Prohibition or the Program Access Complaint procedures, please give us a call.

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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.

For your convenience, we also have placed our Telecom Reports from 2004 to the present under the "Newsletters" tab on our www.telecomattorneys.com website.

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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