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To: All Broadcast Clients

March 6, 2008

FCC ISSUES SEPARATE INDECENCY FORFEITURE ORDERS AGAINST CERTAIN ABC AND FOX-OWNED STATIONS AND AFFILIATES FOR AIRING EPISODES OF "NYPD BLUE" AND "MARRIED BY AMERICA"

The FCC recently issued two Forfeiture Orders for the broadcast of indecent programming. In both cases, a relevant 5-year statute of limitations that was about to expire was exerting pressure on the FCC to act. The FCC assessed forfeitures only on those stations against which an indecency complaint had been filed with the FCC.

First, the FCC assessed \$27,500 forfeitures against each of 45 ABC Television Network affiliates, including certain ABC owned and operated stations, in connection with their broadcast of the February 25, 2003 episode of "NYPD Blue." In the Forfeiture Order, the FCC rejected arguments that the material broadcast was not actionably indecent. The FCC's Notice of Apparent Liability ("NAL") in this proceeding was previously summarized in this firm's February 6, 2008 *All Broadcast Client Memo*, which can be found at <http://www.lsl-law.com/assets/attachments/97.pdf>. ABC has paid the forfeitures, totaling \$1,237,500, but this payment was a necessary predicate to ABC's filing of an appeal with the U.S. Court of Appeals for the Second Circuit challenging the FCC's decision, and seeking a refund of the forfeiture. Had the ABC affiliates simply refused to pay, the Department of Justice would have been required to initiate a comprehensive trial *de novo* in an effort to collect.

Next, the FCC assessed \$7,000 forfeitures against each of 13 Fox Television Network affiliates, including certain Fox owned and operated stations in connection with their

broadcast of the April 7, 2003 episode of "Married By America."

The "Married By America" program at issue depicted scenes from bachelor and bachelorette parties in Las Vegas. The FCC found that the program contained a "myriad of activities designed to stimulate sexual arousal," including the thrusting of a clothed male stripper's crotch into a woman's face, a topless stripper performing a lap dance, a man in his underwear on all fours being spanked by two topless strippers and two topless female strippers kissing while straddling a shirtless man. Although the sexual organs of the strippers were obscured (pixilated) and scenes were edited using camera cutaways, the FCC determined that the overall graphic character of the depiction was sufficient to support an indecency finding. Specifically, the FCC found that "[d]espite a few missing pieces of the visual jigsaw puzzle, a child watching this program easily could discern that partially nude adults are attending a party and participating in sexual activities." In ordering the fines, the FCC also rejected arguments that Fox affiliates should not be fined for Fox network program and that the FCC's indecency standard is unconstitutional.

The NAL in this proceeding was released in October 2004. Notably, the FCC stated that it considered the \$7,000 fines to be unduly low and that if it were issuing the NAL for the first time today, it would propose a significantly higher fine. The FCC concluded there was not sufficient time to issue a new NAL.

These forfeitures, although both subject to further legal challenge on a variety of grounds, should remind broadcasters to exercise extreme care when airing any material that is

even arguably indecent or profane. If you have any questions concerning questionable programming material, please contact our office before such material is broadcast.

This memorandum is intended only as a general discussion of these issues and should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired. To discuss any of the issues presented here, please contact any attorney in our office.