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Finality in the Struggle Between NextWave and the FCC?

The U.S. Supreme Court, in an 8-1 decision, issued a long-anticipated opinion in *Federal Communications Commission v. NextWave Personal Communications Inc., 123 S.Ct. 823 (2003),* holding that section 525 of the Bankruptcy Code prohibits the Federal Communications Commission (FCC) from revoking licenses held by a bankruptcy debtor upon the debtor's failure to make timely payments to the FCC for purchase of the licenses. Narrowly construed, the Supreme Court's opinion stands for the proposition that Section 525(a) of the Bankruptcy Code means what it says—that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license" to a debtor solely because the debtor has failed to pay a dischargeable debt. But, in the context of a four-year dispute rooted in the FCC's chosen methods of diversifying the communications industry, the Supreme Court's opinion also marks a decisive victory for the integrity of the Bankruptcy Code.

Background

In 1994, the FCC adopted rules allowing it to sell portions of the airwaves—or "spectrum"—to winning auction bidders on credit, and to take security interests in the licenses as collateral for repayment. These rules (amended in 1995) were intended to promote the infiltration of the communications sector by smaller and less traditional companies. The FCC decided to sell portions of the airwaves—or "spectrum"—to winning auction bidders on credit, and to take security interests in the licenses as collateral for repayment. While this decision exposed the market to new sources of capital, it also exposed the FCC to the sharp economic downturn in the communications industry. The FCC may have thought that its license revocation rights under federal communications law and its rights as a secured party under the Uniform Commercial Code would shield it against the financial and non-financial risks of the new transaction structure. But, in hindsight, the FCC could hardly have chosen a worse time than the late 1990s to become a lender to small communications companies, at least from a public policy perspective.

Soon after purchasing licenses for portions of C-Block and F-Block spectrum from the FCC in 1997, NextWave Personal Communications, Inc. (NextWave) was unable to raise enough money to begin making installment payments on the approximately $4.74 billion purchase price. Faced with the possibility that the FCC would revoke the licenses due to NextWave's failure to pay, NextWave filed a Chapter 11 petition—with a primary goal of protecting the licenses, its most valuable assets.

> Supreme Court's decision marks a decisive victory for the integrity of the Bankruptcy Code.

Phase I: Fraudulent Transfer Claim Dismissed on Jurisdictional Grounds

In the initial salvo, NextWave filed an adversary proceeding against the FCC, asserting that the $4.74 billion indebtedness resulting from the purchase of spectrum licenses was avoidable as a fraudulent transfer because, at the time NextWave received the licenses from the FCC, the value of the licenses had already declined to approximately $1 billion.

The bankruptcy court and district court agreed with NextWave, but the Second Circuit reversed, holding that the lower courts exceeded their jurisdictional limits "[b]ecause jurisdiction over claims brought against the FCC in its regulatory capacity lies exclusively in the federal courts of appeals." *In re NextWave Personal Communications, Inc.*, 200 F.3d 43, 54 (1999). The Second Circuit also reversed the lower courts on alternate grounds, finding that, primarily because NextWave understood the terms and risks of the auction and sale, no constructive fraud had occurred. *See id*. at 61-62.

Phase II: Chapter 11 Plan Fails to Overcome Jurisdictional Hurdle

Following the Second Circuit decision, NextWave filed a Chapter 11 plan of reorganization that provided for a single lump sum payment to satisfy its remaining obligations to the FCC. The FCC objected to the plan, taking the position that the NextWave spectrum had been automatically revoked upon failure to make prepetition installment payments. In fact, the FCC offered the NextWave spectrum for sale at re-auction.

NextWave was able to obtain an order from the bankruptcy court prohibiting the FCC from re-auctioning the licenses by enforcing the Bankruptcy Code's automatic stay. The FCC responded by petitioning the Second Circuit for a writ of mandamus commanding the bankruptcy court to observe the jurisdictional limitations imposed by the Second Circuit's prior ruling. The Second Circuit granted the FCC's petition, reiterating the jurisdictional grounds for its previous ruling and broadening the effect of the "government action" exception to the automatic stay. *See In re Federal Communications Commission*, 217 F.3d 125, 138 (2d Cir. 2000).

Phase III: Bankruptcy Code Protects Against FCC Administrative Action

Not to be deterred by jurisdictional restraints from its end goal of protecting its licenses, NextWave also filed a petition with the FCC, challenging the spectrum revocation decision through the FCC's own administrative procedures. This action, which bypassed the bankruptcy court altogether, was ultimately appealed to the Court of Appeals for the D.C. Circuit, and a decision was entered in favor of NextWave. The District of Columbia Circuit Court held that the FCC's cancellation of the NextWave licenses violated section 525 of the Bankruptcy Code. *See NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130 (D.C. Cir. 2001).

The Supreme Court Opinion

Following oral arguments last autumn, on January 27, 2003 the Supreme Court affirmed the Court of Appeals decision, holding that section 525(a) of the Bankruptcy Code prohibited the FCC's revocation of NextWave's spectrum licenses.

The Supreme Court framed the primary issue as whether a "valid regulatory motive" of a federal agency provides an exception to the broad limitations on "government units" in section 525(a). In deciding that no such exception exists, the Supreme Court noted that a "valid regulatory motive" could be found for nearly every federal regulatory decision, and that such an exception would vitiate the meaning of section 525(a).

The Supreme Court also disagreed with the FCC's argument that NextWave's payment obligations were not dischargeable debts. The FCC had tried to use the Court's literal perspective to its advantage by establishing that NextWave's failure to make payments to the FCC did not activate the section 525(a) exception—because the payments were not on account of "a debt that is dischargeable" and therefore did not subject the FCC to the restrictions under Section 525. The FCC attempted to use the jurisdictional rulings from the parallel NextWave fraudulent transfer litigation to argue that a bankruptcy court did not have the power to discharge a debt to the FCC. But the Supreme Court, relying on the Bankruptcy Code's broad definition of "debt" and limited exceptions to discharge, did not accept the FCC's reasoning.

> An exception for any governmental action that has a "valid regulatory motive" would vitiate the meaning of section 525.

Justice Breyer's sole dissenting opinion argued that the majority's "literal interpretation of the statute threatens to create a serious anomaly," effectively denying the government the ability to enforce a lien in a manner available to non-governmental secured creditors. Justice Breyer believed, after reviewing the statute's title ("Protection against discriminatory treatment"), its language, and its history ("that bankruptcy-related discrimination is the evil at which the statute aims"), that the statute's purpose was not to prevent government debt collection where such discriminatory concerns are not present. Justice Breyer argued that an exception to section 525(a) is implicit in the statute—but his "strict construction" colleagues won the day.

In his concurring opinion, Justice Stevens noted that, "given the fact that the Commission has a secured interest in the license, if the licensee can obtain the financing that will enable it to perform its obligations in full, the debt will ultimately be paid." Justice Stevens may be correct in his financial analysis, which responds partially to Justice Breyer's concerns, but the NextWave dispute does not concern money alone. The FCC rejected NextWave's offer of payment in full through a

Chapter 11 plan, and was not content to assert its rights as a secured creditor. Instead, the FCC wanted to maintain full dominion over what is often considered to be public property—a campaign ultimately lost in the face of section 525(a).

The NextWave dispute leaves behind a choppy wake: strong jurisdictional rulings that generally remain good law, new interpretations of fraudulent transfers and the automatic stay, and the potential for revision of the FCC's policy regarding the enforcement of its rights to recover payment for licenses purchased on credit. But the Supreme Court's final say in the dispute sends a clear message—that even where the bankruptcy court is not the proper forum, the Bankruptcy Code, or at least section 525(a), will still be available to protect a debtor's assets from actions by governmental authorities.

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