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*By William J. Perlstein and Kenneth A. Bamberger**

INTRODUCTION

Last Term, in *FCC v. NextWave Personal Communications, Inc.* ("*NextWave*"),[1] the U.S. Supreme Court held that the Federal Communications Commission (the FCC or "Commission") could not revoke wireless communications licenses held by a debtor-in-possession under the Bankruptcy Code ("Code"), following that debtor's failure to make timely payments owed for their purchase.[2] The Code, the Court held, prevented the agency from canceling licenses issued pursuant to its administrative authority, notwithstanding the licensee's violation of a "full and timely payment" requirement established by regulation.[3]

The *NextWave* decision settled a five-year legal dispute that produced divergent decisions from a bankruptcy court, a federal district court, the FCC itself, and two federal courts of appeals. The decision is significant in its particulars: the holding concerned the allocation of valuable licenses to use wireless spectrum. Yet the case also has much broader ramifications for the treatment of government agencies in bankruptcy proceedings.

Specifically, the Court's opinion signals three related principles that may impose significant limitations on the power of administrative agencies participating in bankruptcy proceedings. First, agencies are subject to the strictures of the Bankruptcy Code, even when they act in a regulatory capacity; second, bankruptcy law may prohibit the enforcement of a wide array of license conditions; and third, the Bankruptcy Code trumps agency licensing rules.

At the same time, however, the opinion leaves in place lower court decisions limiting bankruptcy jurisdiction over administrative action. Just as the *NextWave* adjudication delimits the authority of administrative agencies in the bankruptcy

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1. 123 S. Ct. 832 (2003). The Court also decided a companion case, *Arctic Slope Regional Corp. v. NextWave Personal Communications, Inc.*, No. 01-657.

2. *NextWave*, 123 S. Ct. at 842.

3. *Id.* at 839.

context, it also suggests systemic limitations on bankruptcy courts' power to review those same agencies.

This Article seeks to put the Supreme Court's decision in context. It describes the factual and procedural history of NextWave's dispute with the FCC and engages in a preliminary assessment of the case's broader implications for administrative agencies. Thus, it seeks to explore some of the consequences of the Court's decision for the treatment of government creditors in bankruptcy proceedings and for the jurisdiction of the bankruptcy courts over administrative matters. Finally, it explores the options remaining for government entities structuring licensing procedures in an attempt to comport with the *NextWave* decision's holdings.

The History of the Case

The FCC's Spectrum License Auctions

The Federal Communications Act[4] ("Act" or "Communications Act") was designed "to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority."[5] The Act established the FCC and vested it with the authority to issue radio licenses upon its determination that doing so will serve the "public interest, convenience, and necessity."[6]

Since its inception, the FCC has utilized a number of processes to identify licensees that would best promote this statutory mandate. It traditionally held comparative hearings to consider the qualifications of competing applicants. This method was replaced in 1982, when Congress, concerned with delay and expense, amended the Act to authorize the FCC to award initial licenses to qualified applicants "through the use of a system of random selection," or lottery.[7] The lottery system, in turn, was criticized for "encouraging unproductive speculation for spectrum licenses" and replaced after Congress amended the Act again in 1993.[8]

In the 1993 amendments, Congress authorized the FCC to award certain commercial spectrum licenses through a system of "competitive bidding," or auction.[9] Through the auction mechanism, Congress sought to enable the FCC to further "the development and rapid deployment" of new technologies and services to benefit the public;[10] to assist in the "recovery for the public of a portion of the value of the public spectrum;"[11] and to promote "efficient and intensive use of

4. 47 U.S.C. §§ 151–615b (2000).
5. *Id.* § 301.
6. *Id.* § 309(a).
7. *Id.* § 309(i); *see* Communications Amendments Act of 1982, Pub. L. No. 97-259, § 115, 96 Stat. 1094 (1982).
8. H.R. Rep. No. 103-111, at 248 (1993).
9. 47 U.S.C. § 309(j)(1); *see* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002, 107 Stat. 388 (1993).
10. 47 U.S.C. § 309(j)(3)(A).
11. *Id.* § 309(j)(3)(C).

the electromagnetic spectrum."[12] The auctions were also intended to eliminate "administrative or judicial delays" in license allocation.[13] In 1997, Congress mandated the use of auctions for most initial licensing proceedings.[14]

At the same time, Congress feared that "competitive bidding could result in a significant increase in concentration in the telecommunications industries,"[15] and that auctions might favor deep-pocketed "incumbents, with established revenue streams, over new companies or start-ups."[16] Congress therefore directed the Commission to promote "economic opportunity and competition" by "disseminating licenses among a wide variety of applicants, including small businesses."[17] It gave the agency, among other tools, flexibility to design alternative payment schedules; the statute accordingly instructs the Commission, in issuing regulations, to consider such alternatives as "guaranteed installment payments."[18]

In an effort to implement the statute's direction to consider measures which would enable small businesses to participate in the industry, two of six auction blocks of spectrum dedicated to broadband "Personal Communications Services" (PCS)—the "C" and "F" Blocks—were limited to small businesses and other designated entities.[19] The Commission further allowed small businesses that obtained licenses at auction to pay in installments. Specifically, applicants eligible for the C-Block auction were required to pay ten percent of their winning bid in cash by the time of the license grant,[20] with the remainder to be paid over the ten-year term of the license.[21]

The FCC's auction rules specified that, for bidders electing to pay in installments, any license granted "shall be conditioned upon the full and timely performance of the licensee's payment obligations under the installment plan,"[22] and that, in the event of failure to make timely payments, the license will "automatically cancel."[23]

NEXTWAVE'S PARTICIPATION IN THE SPECTRUM AUCTIONS

NextWave Personal Communications Inc. was formed to participate in the FCC's auction of the "C-Block" PCS licenses, and was declared the high bidder for sixty-three such licenses after it submitted winning bids totaling $4.74 billion.[24]

12. *Id.* § 309(j)(3)(D).
13. *Id.* § 309(j)(3)(A).
14. *See* Pub. L. No. 105-33, § 3002, 111 Stat. 258 (1997).
15. H.R. REP. No. 103-111, at 254 (1993).
16. *Id.* at 255.
17. 47 U.S.C. § 309(j)(3)(B).
18. *Id.* § 309(j)(4)(A).
19. 47 C.F.R. § 24.709(a)(1),(b) (2002).
20. *Id.* § 24.711.
21. *Id.* § 24.711(b).
22. *Id.* § 1.2110(g)(4).
23. *Id.* § 1.2110(g)(4)(iv).
24. NextWave Power Partners Inc. was formed to participate in the FCC's F-Block license auction, which concluded in January 1997. It was declared the high bidder for 27 F-Block licenses after it submitted winning bids of approximately $123 million.

In accordance with the FCC auction regulations, NextWave deposited ten percent of that amount to cover its downpayment obligations. It then executed promissory notes for the balance of the bids, which were to be paid in installments. Several months later, the Commission granted NextWave its licenses, took a security interest in each, and filed U.C.C. financing statements to perfect its claims. The security agreements gave the Commission "a first lien on and continuing security interest in all of the Debtor's rights and interest in [each] License."[25] The licenses included the following language:

> This authorization is conditioned upon the full and timely payment of all monies due pursuant to . . . the terms of the Commission's installment plan as set forth in the Note and Security Agreement executed by the licensee. Failure to comply with this condition will result in the automatic cancellation of this authorization.[26]

Shortly after the licenses were awarded, a number of licensees, encountering difficulty in obtaining financing to build out their systems, petitioned the FCC to restructure their installment payment obligations. In response, the Commission suspended installment payment obligations for C-Block licensees, and issued two "Restructuring Orders," offering a variety of revised financing options.[27] The Commission gave licensees until June 8, 1998 to elect a restructuring option, and until July 31, 1998 to resume installment payments.[28]

By the June 8, 1998 deadline, however, auctions for several other blocks of spectrum had already begun, and the relatively low bidding had significantly reduced the value of NextWave's C-Block licenses. This adversely affected the company's ability to attract investors.

NextWave made no election by the June 8, 1998 deadline. Instead, on that day it filed for reorganization under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Southern District of New York, and simultaneously initiated an adversary proceeding against the FCC, through which it sought to avoid its C-Block license payment obligations alleging, *inter alia*, that its payment obligation to the FCC constituted a fraudulent conveyance. After filing in bankruptcy court, NextWave made no further payments on its licenses.

25. NextWave Pers. Communications, Inc. v. FCC, 254 F.3d 130, 134 (D.C. Cir. 2001) (alteration in original) (quoting Security Agreement between NextWave and FCC ¶ 1 (Jan. 3, 1997)), *aff'd*, 537 U.S. 293 (2003).

26. *Id.* (alteration in original) (quoting FCC, *Radio Station Authorization for Broadband PCS 2* (issued to NextWave Jan. 3, 1997)).

27. *See In re* Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. (PCS) Licensees, Second Report and Order and Further Notice of Proposed Rule Making, 12 F.C.C.R. 16436, 16439, 16452–70 (Oct. 16, 1997); *In re* Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. (PCS) Licensees, Order on Reconsideration of the Second Report and Order, 13 F.C.C.R. 8345, 8350–51 (Mar. 24, 1998); *In re* Amendment of the Comm'n's Rules Regarding Installment Payment Fin. for Pers. Communications Servs. (PCS) Licensees, Second Order on Reconsideration of the Second Report and Order, 14 F.C.C.R. 6571, 6576 (April 5, 1999).

28. *Wireless Telecommunications Bureau Announces June 8, 1998 Election Date For Broadband PCS C Block Licensees*, Public Notice, 13 F.C.C.R. 7413 (Apr. 17, 1998).

THE LOWER COURT PROCEEDINGS

Bankruptcy Court and Second Circuit Opinions, Take One

In exercising jurisdiction over the *NextWave* proceedings, the bankruptcy court acknowledged that, under 47 U.S.C. § 402, it lacked jurisdiction to "enjoin[ ], review[ ], assess[ ] damages for or otherwise adjudicat[e] the consequences of the conduct of [a] Federal agency acting within the scope of its Congressional mandate."[29] It concluded, however, that it had jurisdiction over the case because, in its view, NextWave's claim against the Commission did not involve "any regulatory conduct on the part of the FCC," but rather, concerned solely the debtor-creditor relationship between the FCC and NextWave.[30] The court determined that, as a creditor, the FCC was subject to its jurisdiction under the Bankruptcy Code, and that nothing in the Communications Act or any other body of law expressly stated otherwise.[31] It went on to conclude that NextWave's $4.74 billion license fee obligation was avoidable as a "fraudulent conveyance" under section 544 of the Code, because those obligations dramatically exceeded the actual value of the licenses by the time the company received them.[32] Accordingly, the court reduced the company's total obligation to the FCC by $3.72 billion.[33]

After the district court affirmed the bankruptcy court rulings, the U.S. Court of Appeals for the Second Circuit reversed, concluding that the bankruptcy court improperly exercised its jurisdiction.[34] It determined that the FCC's action was, in fact, "regulatory," because (i) the Commission explicitly made "full and timely payment of the winning bid," a condition for obtaining and retaining a spectrum license, and (ii) this condition had a purpose "related directly to the FCC's implementation of the spectrum auctions."[35] Specifically, the payment condition was intended to "provide strong incentives for potential bidders to make certain of their qualifications and financial capabilities before the auction so as to avoid delays in the deployment of new services to the public that would result from litigation, disqualification and re-auction."[36] Because NextWave's action constituted a claim against the FCC in its regulatory capacity, the bankruptcy court lacked jurisdiction under 47 U.S.C. § 402 "to decide the question of whether NextWave had satisfied the regulatory conditions placed by the FCC upon its retention of the Licenses."[37] Moreover, the Second Circuit held, "[b]y holding that

29. NextWave Pers. Communications, Inc. v. FCC (*In re* NextWave Pers. Communications, Inc.), 235 B.R. 263, 268 (Bankr. S.D.N.Y. 1998), *aff'd*, 241 B.R. 311 (S.D.N.Y. 1999), *rev'd*, 200 F.3d 43 (2d Cir. 1999).

30. *Id.* at 269–70.

31. *Id.* at 270.

32. NextWave Pers. Communications, Inc. v. FCC (*In re* NextWave Pers. Communications, Inc.), 235 B.R. 305, 313 (Bankr. S.D.N.Y. 1999), *aff'd*, 241 B.R. 311 (S.D.N.Y. 1999), *rev'd*, 200 F.3d 43 (2d Cir. 1999).

33. *Id.* at 313.

34. FCC v. NextWave Pers. Communications, Inc. (*In re* NextWave Pers. Communications, Inc.) 200 F.3d 43, 62 (2d Cir. 1999).

35. *Id.* at 52 (quoting 47 C.F.R. § 24.708 (2000)).

36. *Id.* (quoting *In re* Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Second Report and Order, 9 F.C.C.R. 2348, 2382 para. 197 (April 20, 1994)).

37. *Id.* at 54.

for a price of $1.023 billion NextWave would retain licenses for which it had bid $4.74 billion" the bankruptcy court went so far as to "exercise[ ] the FCC's radio-licensing function," which it did not have the power to do.[38]

Finally, the Second Circuit articulated a distinction between claims in which the FCC acts as a regulator and those in which it is simply a creditor. Although the bankruptcy court lacked jurisdiction to change the conditions under which NextWave could retain its licenses, the court acknowledged that the bankruptcy court might well have jurisdiction over NextWave's underlying debts themselves. "To the extent that the financial transactions between [the FCC and NextWave] do not touch upon the FCC's regulatory authority," the court wrote, "they are indeed like the obligations between ordinary debtors and creditors."[39]

Bankruptcy Court and Second Circuit Opinions, Take Two

Shortly after the ruling, NextWave agreed to pay the full balance due on its C-Block licenses. On January 12, 2000, however, the FCC announced that NextWave's C-Block licenses had automatically cancelled due to nonpayment and that they would be re-auctioned in July 2000. NextWave returned to bankruptcy court to challenge the cancellation and the proposed re-auction.

The bankruptcy court declared the cancellation of NextWave's licenses invalid.[40] Specifically, it held that the FCC's action violated various provisions of the Bankruptcy Code, including the automatic stay under section 362 of the Bankruptcy Code.[41]

Section 362 provides that a Chapter 11 petition "operates as a stay, applicable to all entities" of a variety of acts to collect on or enforce debts, and stays any act "to obtain possession of" or "exercise control over[,] property of the estate."[42] It does, however, create an exception to the stay for a "governmental unit" acting to enforce its "regulatory power."[43]

The bankruptcy court acknowledged that, pursuant to section 362(b)(4), it lacked jurisdiction to interfere with the Commission's regulatory acts.[44] It also acknowledged that the Second Circuit had decided that "a regulatory purpose was implicit" in the FCC's requirement of "full payment."[45] The bankruptcy court

38. *Id.* at 55.

39. *Id.* Pointing out that NextWave "remain[ed] a debtor in bankruptcy," and that "[i]f the Licenses [were] returned to the FCC, the bankruptcy court [might] resolve resulting financial claims that the FCC has against NextWave," the Second Circuit reviewed the merits of the bankruptcy court's avoidance decision. *Id.* at 56. Concluding that no fraudulent conveyance occurred because NextWave became obligated on its winning bid at the close of the auction, the court decided that NextWave should not be allowed to avoid $3.72 billion of its debt under the Bankruptcy Code. *Id.* at 46, 62.

40. *In re* NextWave Pers. Communications, Inc., 244 B.R. 253, 257–58, 267–70 (Bankr. S.D.N.Y. 2000).

41. *Id.* at 267.

42. 11 U.S.C. § 362(a) (2000).

43. *Id.* § 362(b)(4). The regulatory power exception does not apply to subsections 362(a)(4) and (5), which stay "any act to create, perfect, or enforce any lien against property of the estate" or of the debtor. *Id.* § 362(a)(4), (5).

44. *In re* NextWave Pers. Communications, Inc., 244 B.R. at 260–61.

45. *Id.* at 270.

concluded, however, that the "regulatory objective" behind such a requirement was fulfilled by the debtors' modified plan, which provided for payment of the entire amount due in a lump sum upon confirmation.[46] By contrast, the court held, the FCC's cancellation of licenses because of the debtor's failure to pay in a "timely" manner lacked a regulatory purpose, and violated the automatic stay.[47]

The court further held that the FCC action abridged NextWave's rights to cure its defaults in bankruptcy.[48] Finally, the court reserved judgment as to whether the FCC action violated the "anti-discrimination" provision contained in section 525 of the Code,[49] which proscribes revocation of a bankrupt's license "solely because such bankrupt . . . has not paid a debt that is dischargeable" under the Code.[50]

The Second Circuit granted the FCC's petition for mandamus, and, in May 2000, it directed the bankruptcy court to vacate its order and lift the automatic stay as it applied to the FCC's jurisdiction over the licenses.[51] The appeals court accepted the FCC's contention that installment-payment conditions in the licenses were "regulatory" provisions, holding that "whenever an FCC decision implicates its exclusive power to dictate the terms and conditions of licensure, the decision is regulatory."[52] Accordingly, because "[e]xclusive jurisdiction to review the FCC's regulatory action lies in the courts of appeals," the bankruptcy court's interference with the FCC's licensing decision exceeded bankruptcy court jurisdiction.[53]

The Second Circuit did not, however, rule on whether the FCC's cancellation was procedurally valid under administrative law, noting that "NextWave remains free to pursue its challenge to the FCC's regulatory acts" in another forum.[54] "It is for the FCC to state its conditions of licensure," the Second Circuit ruled, "and for a court with power to review the FCC's decisions to say if they are arbitrary or valid."[55]

The FCC Petition and D.C. Circuit Opinion

NextWave had, indeed, already filed a petition with the FCC, requesting reconsideration of the license cancellation. Denying the petition on procedural grounds,[56] the Commission noted that the public notice of re-auction "was not

46. *Id.*
47. *Id.*
48. *Id.* at 263, 268–69; *see also* 11 U.S.C. §1123 (2000). Under 11 U.S.C. § 1123, debtors (subject to court approval) have the power to "tak[e] care of the triggering event and return[ ] to pre-default conditions." Di Pierro v. Taddeo (*In re* Taddeo), 685 F.2d 24, 26–27 (2d Cir. 1982).
49. *In re* NextWave Pers. Communications, Inc., 244 B.R. at 271.
50. 11 U.S.C. § 525(a) (2000).
51. *In re* FCC, 217 F.3d 125, 141 (2d Cir. 2000).
52. *Id.* at 135.
53. *Id.* at 139–40.
54. *Id.* at 140.
55. *Id.* at 137.
56. *In re* NextWave Pers. Communications, Inc., Order on Reconsideration, 15 F.C.C.R. 17500, 17505–06 (Sept. 6, 2000). The Commission concluded that NextWave's petition was late and its challenge to the re-auction notice was procedurally defective. *Id.* at 17506. Yet "because of the importance of the issues raised in NextWave's Petition," it addressed the challenge to the automatic cancellation. *Id.*

an order or action" that "cancel[ed] NextWave's licenses."[57] Rather, "[p]ursuant to [Commission] rules, the licenses canceled automatically" after NextWave failed to make its first installment payment.[58]

Going on, nonetheless, to address the petition on the merits, the FCC rejected NextWave's arguments that the cancellation was arbitrary and capricious and barred by estoppel and waiver.[59] It further concluded that the arguments relying on the Bankruptcy Code—specifically, sections 362 (automatic stay), 525 (anti-discrimination), and 1123 (ability to cure defaults)—were "summarily rejected by the Second Circuit," and were thus "precluded under the doctrine of *res judicata*."[60]

NextWave appealed the FCC decision to the U.S. Court of Appeals for the D.C. Circuit, claiming that the license cancellation was "patently unlawful" under the Bankruptcy Code and that its claims were not precluded by the Second Circuit's opinions.[61]

On the issue of res judicata, the FCC argued that the Second Circuit had concluded that the relevant provisions of the Bankruptcy Code do not govern regulatory actions and therefore the D.C. Circuit could not visit the issue of the license cancellation here. NextWave argued, to the contrary, that the Second Circuit's decision was jurisdictional—i.e., that it concerned "*where* NextWave's bankruptcy challenges should be decided, not *how* they should be resolved."[62] The D.C. Circuit agreed with NextWave in relevant part, holding that the Second Circuit "principally held that the Commission's license cancellation was a regulatory act reviewable only by a court of appeals under section 402 of the Communications Act, and thus that the bankruptcy court lacked jurisdiction to apply the Code to these acts."[63] Because the D.C. Circuit was such a court of appeals, however, it could hear NextWave's challenges.[64]

57. *Id.* at 17505.

58. *Id.* The Government would make a contrary argument before the Supreme Court: "[t]he automatic trigger . . . when somebody fails to make a payment . . . [is] really not enough, if you look at the broader perspective of the regulation, because there's an alternative way to get out of the automatic cancellation." Tr. of Oral Argument at 13, FCC v. NextWave Pers. Communications, Inc., 123 S. Ct. 832 (2003) (No. 01-653).

59. *In re* NextWave Pers. Communications, Inc., Order on Reconsideration, 15 F.C.C.R. 17500, 17506–17 (2000).

60. *Id.* at 17514.

61. NextWave Pers. Communications, Inc. v. FCC, 254 F.3d 130, 139 (D.C. Cir. 2001) (quoting Appellant's Opening Brief at 16). NextWave also argued that the license cancellation was invalid because the FCC "failed to provide adequate notice that the timely payment regulations apply to Chapter 11 debtors." *Id.* at 140 (citing Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618, 631 (D.C. Cir. 2000) (holding that an agency may not sanction a company for its failure to comply with regulatory requirements without first providing "fair notice" of those requirements)).

62. *Id.* at 142–43 (quoting Appellants' Opening Brief at 26).

63. *Id.* at 143.

64. The D.C. Circuit held:

> We thus agree with the Commission that issue preclusion bars NextWave from relitigating the question of whether the license cancellation falls within subsection 362(b)(4). The Second Circuit spoke clearly and unequivocally about this issue, stating that "[u]ndoubtedly, the FCC is a governmental unit that is seeking 'to enforce' its 'regulatory power,' " *In re* FCC, 217 F.3d at 138, and that "we hold that the FCC's regulatory decisions fall within [subsection] 362(b)(4)." *Id.* at n. 8. And under the Second Circuit's jurisdictional reading of section 362, this decision was

In ruling on the merits, the D.C. Circuit reached only one of NextWave's claims, and decided in its favor. The court concluded that cancellation of NextWave's licenses for failure to make timely installment payments violated section 525's prohibition on the revocation of a debtor's licenses solely for failure to pay dischargeable debts.[65]

In reaching its decision, the D.C. Circuit rejected a number of arguments put forth by the FCC. First, it rejected the notion that section 525 does not govern situations in which section 362(b)(4)'s exemption of governmental regulatory activities from the stay applies; such a result would be inconsistent with the plain language of section 525.[66] Second, the court rejected the FCC's contention that it did not cancel the license "solely because" of the failure to pay debt, concluding that, regardless of whether the Commission had a regulatory motive canceling the debtor's licenses on the basis of its payment record, the debtor's "failure to make its payments was thus the 'sole' trigger of the license cancellation, in the sense that the Commission looked to no other factor in determining whether NextWave should retain its licenses; and we think this is exactly the kind of conduct barred by section 525's plain text."[67]

The U.S. Supreme Court's Decision

On January 27, 2003, the U.S. Supreme Court agreed with the position of the D.C. Circuit.[68] The Court, in an 8-1 opinion written by Justice Scalia, affirmed the D.C. Circuit's holding that Bankruptcy Code section 525 prohibited the FCC from revoking the licenses held by NextWave upon the debtor's failure to make timely payments for the licenses' purchase.[69]

In a straightforward decision relying on the statutory text, the Court held that because it is undisputed that the FCC is a "governmental unit" that has "revoke[d]" a "license," and that NextWave is a "debtor" under the Bankruptcy Act, this case is squarely governed by section 525's prohibition against the revocation by a governmental unit of a license to a debtor "solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case."[70]

The Court considered and dispatched three arguments that the statute should be interpreted differently. First, it rejected the FCC's argument that the agency did not revoke NextWave's licenses "solely because" of nonpayment, but rather because of a "regulatory motive" for which ability to pay was a proxy. The Court

> necessary to the case: if subsection 362(b)(4) did not apply, section 362 could have provided a basis for the bankruptcy court to assert jurisdiction over the license cancellation. In considering NextWave's Bankruptcy Code arguments, . . . we will thus assume that the license cancellation falls within the regulatory power exception to the automatic stay.

Id. at 148 (alterations in original).

65. *Id.* at 156.
66. *Id.* at 152.
67. *Id.* at 153.
68. FCC v. NextWave Pers. Communications, Inc., 123 S. Ct. 832 (2003).
69. *Id.* at 845.
70. *Id.* at 838 (alteration in original) (quoting 11 U.S.C. § 525(a) (2000)).

instead interpreted the statutory "solely because" test as one of proximate causation: section 525 prohibits license revocations which are proximately caused by a failure to make payments on a dischargeable debt, regardless of the government's "ultimate motive in pulling the trigger."[71] The Court, moreover, refused to create an extra-statutory exception for cancellations that have a valid regulatory purpose. Noting that Congress has elsewhere enacted regulatory exceptions to provisions of the Bankruptcy Code clearly and expressly, the Court refused to read such an exception into the statute where the text does not so provide.[72]

Second, the Court rejected the FCC's contention that regulatory conditions like full and timely payment are not properly classified as "debts" that are "dischargeable." Noting that the Bankruptcy Code defines a debt as a "liability on a claim," that "claim" includes any "right to payment," and that a "right to payment" is simply an "enforceable obligation," the Court concluded that NextWave's payment obligations to the FCC were debts, regardless of the motives underlying them.[73] Furthermore, all debts arising before the confirmation date of a reorganization plan are discharged on confirmation, save only those exceptions described in section 523, none of which applies here.[74]

Third, the Court rejected the FCC's contention that the interpretation of section 525 adopted in the Supreme Court's decision creates a conflict with the Communications Act. Because nothing in the Communications Act's auction provisions requires the FCC to permit installment payments, or mandates that cancellation be the sanction for failure to make agreed-upon payments, the Court characterized these aspects of the spectrum auction rules as "nothing more than a policy preference on the FCC's part."[75] These "administrative preferences," the Court held, cannot trump section 525, because "'[w]hen two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'"[76] There being no "inherent conflict" between the Communications Act and section 525, the Court applied the bankruptcy provision's restriction on government action.[77]

In a lone dissent, Justice Breyer argued that the statutory purpose of section 525 requires a contrary reading of that provision. Specifically, he suggested that the Code should not bar nonpayment-triggered license revocations if they are unrelated to the fact that the underlying debt happens to be dischargeable in bankruptcy (as almost all debts are).[78] Emphasizing the purpose and history of section 525—which he believed supports its construction entirely as a measure

71. *Id.* at 839.

72. *Id.*

73. *Id.* (citing 11 U.S.C. § 101(12), (5)(A) (2000); Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 559 (1990)).

74. *See* 11 U.S.C. § 1141(d)(1)(A), (2); Ohio v. Kovacs, 469 U.S. 274, 278 (1985) ("Except for the nine kinds of debts saved from discharge by 11 U.S.C. § 523(a), a discharge in bankruptcy discharges the debtor from all debts that arose before bankruptcy.").

75. *NextWave*, 123 S. Ct. at 840.

76. *Id.* (quoting J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 534 U.S. 124, 143–44 (2001)).

77. *Id.*

78. *Id.* at 844 (Breyer, J., dissenting).

to prevent discrimination because of bankruptcy status—Justice Breyer concluded that "Congress did not want *always* to prohibit the Government from enforcing a sales contract through repossession."[79] Accordingly, he suggested that the provision be read with the following limitation: "[w]here the fact of bankruptcy is totally irrelevant, where the government's action has no relation either through purpose or effect to bankruptcy or to dischargeability, where consequently the revocation cannot threaten the bankruptcy-related concerns that underlie the statute, then the revocation falls outside the statute's scope."[80]

Justice Scalia, in a final section of his opinion joined by all of the majority Justices except Justice Stevens, criticized Justice Breyer's purpose-based construction of section 525's text "in splendid isolation from [the provision's] language," on account of both its method and its substance.[81]

Implications of the *NextWave* Decision for Administrative Agencies

Treatment of the Government under the Bankruptcy Code

The Supreme Court's decision severely circumscribes judicial consideration of policy arguments to create exceptions to the Bankruptcy Code for government creditors. The Court's strict construction of section 525's anti-discrimination provision sends a strong message that, unless such exemptions are clearly provided for by the text of the statute, they do not exist.

The Bankruptcy Code reflects a recognition of the dual role played by federal, state, and local governments in bankruptcy proceedings. On the one hand, government agencies are often creditors, and the debts owed to public entities frequently constitute a substantial portion of a debtor's obligations. Accordingly, exempting government creditors from the requirements of the statute would significantly impede two of the Bankruptcy Code's central goals: that debtors should be allowed to discharge their debts and progress with a "fresh start;"[82] and that creditors with similar types of claims should be treated equally.[83] On the other hand, regulatory agencies are charged with promoting important public policies that can be undermined when administrative obligations are displaced by the initiation of bankruptcy proceedings.

The statutory text, therefore, balances bankruptcy objectives with other policy concerns. It expressly provides for the broad application of the Code to "governmental units."[84] But it also provides numerous exceptions. Most notably, the automatic stay—the fundamental procedural mechanism underpinning the exercise

79. *Id.* at 845 (Breyer, J., dissenting).
80. *Id.* at 844 (Breyer, J., dissenting).
81. *Id.* at 840.
82. *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244–45 (1934) (discussing underlying purpose of bankruptcy in giving debtor fresh start).
83. *See, e.g.*, 11 U.S.C. § 726(a)(2) (2000) (treating general unsecured creditors as class in distribution of debtor's assets).
84. *See id.* § 106(a).

of bankruptcy court jurisdiction—is expressly inapplicable to actions to enforce a governmental unit's "police or regulatory power."[85] There are exceptions from general bankruptcy rules for contracts with agencies regulating federal depository institutions[86] and support debts assigned to government entities.[87] Section 525(a) itself exempts three statutory regimes from its non-discrimination requirement.[88] And various debts owed to government agencies are accorded priority treatment.[89]

The "police power" exception to the stay, in particular, has resulted in a significant body of case law seeking to distinguish instances in which the government acts as a regulator—promoting "public safety and welfare"[90] or "effectuat[ing] public policy"[91]—from those in which it acts as a creditor: seeking to protect its "pecuniary interest in the debtor's property,"[92] or to "adjudicate private rights."[93] This distinction—which parallels judicial analysis of the governmental role in a number of other contexts—has proven intuitively attractive, if doctrinally inexact.[94]

The Supreme Court has, on a number of occasions, considered (and rejected) arguments by government agencies that they should be exempted from various provisions of the Code that contain no explicit government exceptions. In *United*

85. *Id.* § 362(b)(4).

86. *See id.* § 365(o) (stating that Chapter 11 trustees are "deemed to have assumed . . . and shall immediately cure any deficit" under such commitments).

87. *See id.* § 523(a)(5)(A) (providing that support debts assigned to a third party are discharged, unless the third party is a government entity).

88. *See id.* § 525(a). The exceptions are the Perishable Agricultural Commodities Act of 1930, 7 U.S.C. §§ 499a–499s (2000), the Packers and Stockyard Act of 1921, 7 U.S.C. §§ 181–299 (2000), and section 1 of the Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1944, and for other purposes," approved July 12, 1943. 7 U.S.C. § 204 (2000). In addition, the Code contains a number of special bankruptcy exceptions for particular government agencies or programs. *See, e.g.*, 11 U.S.C. § 362(b)(8) (2000) (exempting certain foreclosure actions by the Secretary of Housing and Urban Development from the automatic stay); *id.* § 362(b)(12), (13) (exempting certain foreclosure actions by the Departments of Transportation and Commerce from the automatic stay); *id.* § 362(b)(16) (exempting certain actions by the Department of Education from the automatic stay); *id.* § 365(d)(5)–(d)(9), (f)(1) (excepting airport landing rights leases from rules governing executory contracts).

89. *See id.* § 507(a)(8)–(9).

90. Universal Life Church, Inc. v. United States (*In re* Universal Life Church), 128 F.3d 1294, 1297 (9th Cir. 1997) (setting forth the "pecuniary purpose" test for characterizing governmental action).

91. NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 942 (6th Cir. 1986) (quoting *In re* Herr, 28 B.R. 465, 468 (Bankr. D. Me. 1983) (setting forth the "public policy" test for characterizing government action)).

92. *Universal Life Church*, 128 F.3d at 1297.

93. *Edward Cooper Painting*, 804 F.2d at 942 (internal quotation marks omitted).

94. *Compare* Safety-Kleen, Inc. (Pinewood) v. Wyche, 274 F.3d 846, 865–66 (4th Cir. 2001) (holding regulatory exception to automatic stay provision applied to issuance and enforcement of bond order by state agency against hazardous waste landfill operator; financial assurance requirements, which formed basis for bond order, were part of South Carolina's "police and regulatory power" because they served primary purpose of South Carolina's financial assurance regulations to deter environmental misconduct and to encourage safe design and operation of hazardous waste facilities), *with* Chao v. Hospital Staffing Servs., Inc., 270 F.3d 374, 394 (6th Cir. 2001) (holding enforcement action by the Secretary of Labor brought under the Fair Labor Standards Act to recover unpaid minimum wages, unpaid overtime, and liquidated damages only incidentally serves public interest and does not come within "police or regulatory power" exception to the automatic stay). *See also* S. REP. NO. 95-989, at 52 (1978) (explaining the scope of 11 U.S.C. § 362(b)(4)).

States v. Kimbell Foods, Inc.,[95] the Court considered the argument that a lien of the U.S. Small Business Association (SBA) should be given priority over the lien of a private lender. Rejecting the government's appeals to the need for "efficiency of administration" the Court concluded that the SBA "is in substantially the same position as private lenders, and the special status it seeks is unnecessary to safeguard the public fisc. Moreover, Congress' admonitions to extend loans judiciously supports the view that it did not intend to confer special privileges on agencies that enter the commercial field."[96] Thus, *Kimbell Foods* holds that the government should be treated like a private commercial party when it acts like one.

United States v. Whiting Pools, Inc.,[97] applied the *Kimbell Foods* rule in declining to create an Internal Revenue Service (IRS) exception to the Code's requirement that assets seized before bankruptcy should be "turned over" to the estate.[98] The Court opined that "[w]e see no reason why a different result should obtain when the IRS is the creditor[,]" concluding that "[n]othing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector."[99]

More recently, the Court has decided that the restitution obligations imposed as a condition of probation in state criminal actions constitute dischargeable "debts," regardless of the purpose underlying their imposition.[100] Against this background, then, the *NextWave* decision rooted judicial analysis of the Bankruptcy Code's treatment of regulatory agencies and statutes in a single touchstone: the express intent of Congress. It did this in two ways.

First, it entrenched the trajectory of decisions from *Whiting Pools* to *Davenport* by putting to rest any notion that the regulatory or pecuniary nature of government action is relevant in bankruptcy unless so stated by Congress. Simply put, Congress has demonstrated that it knows how to provide regulatory exceptions to provisions of the Bankruptcy Code "clearly and expressly."[101] Where it has not done that—and where it makes no mention of either motive or purpose—those considerations are irrelevant.

Second, it clarifies a method for resolving conflicts between regulatory policy and the Bankruptcy Code in which the latter almost always trumps. Where nothing in a federal administrative statute (as opposed to a regulation) is explicitly at variance with provisions of the Bankruptcy Code, there is no conflict, only a "policy preference" at odds with congressional intent.[102]

95. 440 U.S. 715 (1979).
96. *Id.* at 737.
97. 462 U.S. 198 (1983).
98. *See* 11 U.S.C. § 542(a) (2000).
99. *Whiting Pools, Inc.*, 462 U.S. at 209.
100. *See* Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 559 (1990) (noting that the Code "makes no reference to purpose" and that the "plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objectives the State seeks to serve in imposing the obligation").
101. FCC v. NextWave Pers. Communications, Inc., 123 S. Ct. 832, 839 (2003).
102. *Id.* at 840.

Accordingly, when there is a conflict between an administrative decision and the Bankruptcy Code, courts first need to determine whether that decision is mandated by the regulatory statute's language;[103] if it is merely an administrative interpretation—however reasonable—the Bankruptcy Code provision governs.[104] *NextWave* thus makes clear that unless Congress expressly indicates its intent, either by a legislative exception or statutory conflict, administrative regulation cannot trump incompatible provisions of the Bankruptcy Code.

Government Licensing: How Broad Are the Limits on Which License Conditions Can Survive Bankruptcy?

By holding that the FCC could not cancel NextWave's licenses because of its failure to make installment payments, the Supreme Court confirmed the holdings of a long line of cases prohibiting the revocation of licenses based on the nonpayment of monetary debts.[105] Thus one obvious way licensing entities might seek to preclude the section 525 problem is by requiring full payment at the time a license is granted.

As discussed above, one of the goals of the C-Block and F-Block auctions was to provide favorable financing terms in order to encourage small business ownership of wireless spectrum.[106] The resulting installment payment structure put the agency in the role of being both regulator and creditor. By contrast, avoiding such a payment structure would—in many cases—ensure that no debtor-creditor relationship is created, and thus limit agency interaction with bankruptcy courts.[107]

Yet the Supreme Court's reasoning in *NextWave* could turn agencies into creditors even without installment schemes. Specifically, the decision could provide a basis for debtors to seek to prevent agencies from enforcing a broad range of nonmonetary regulatory requirements against debtor licensees. In holding that section

103. This inquiry parallels the inquiry in "Step One" of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984), the case which provides the usual framework for analyzing interpretations of federal administrative statutes. That "Step One" analysis first asks whether Congress has unambiguously expressed its intent in a statute's language, and gives effect to any such meaning. *Id.*

104. *Chevron's* usual "Step Two" provides that, if Congress has not spoken clearly, courts are required to accord deference to any agency interpretation, so long as it is reasonable. *See id.*

105. *See, e.g.*, Stoltz v. Brattleboro Hous. Auth. (*In re* Stoltz), 315 F.3d 80, 95 (2d Cir. 2002) (holding public housing agencies may not deny continued occupancy in public housing based upon the nonpayment of past rent); Hiser v. Blue Cross (*In re* St. Mary Hosp.), 89 B.R. 503, 510–13 (Bankr. E.D. Pa. 1988) (agency may not revoke debtor's right to participate in Medicare program because of failure to pay pre-petition overpayments); *In re* Dembek, 64 B.R. 745, 750–51 (Bankr. N.D. Ohio 1986) (holding public educational institutions may not deny student transcripts based upon the nonpayment of tuition or student loan debts); William Tell II, Inc. v. Ill. Liquor Control Comm'n (*In re* William Tell II, Inc.), 38 B.R. 327, 330 (N.D. Ill. 1983) (holding state may not revoke debtor's liquor license for unpaid taxes); Lee v. Bd. of Higher Educ., 1 B.R. 781, 787 (S.D.N.Y. 1979) (holding public educational institutions may not deny student transcripts based upon the nonpayment of tuition or student loan debts).

106. There was substantial discussion at the time that the auction rules were set that the principal effect of the favorable financing terms would be to increase the total amount of the bids rather than to reduce the financial burden on the small business bidders.

107. *See infra* notes 138–39 and accompanying text.

525 barred the cancellation of NextWave's licenses, the Court found it irrelevant whether the bankruptcy court had jurisdiction to alter or modify the triggering license obligation. The question, the Court held, was simply whether the obligation resulted in a dischargeable debt.[108]

The meaning of the term "debt" is quite broad. In general, the definition of "debt" (and the related term "claim") contained in Bankruptcy Code section 101 encompasses nearly every conceivable obligation of the debtor so long as that obligation accords a "right to payment."[109]

Yet courts are divided as to what types of obligations—specifically, which obligations arising from equitable remedies—fall outside that category. As a general matter, equitable claims—such as those arising from rights to performance—are dischargeable if governing law (usually state contract or property law) provides for an alternative monetary remedy.[110] The Supreme Court relied on this principle in *Ohio v. Kovacs*,[111] holding that a mandatory injunction (an environmental cleanup order) was dischargeable in a situation in which the state had ousted the debtor from possession of the relevant property by receivership.[112] On those facts, the ouster prevented the debtor from personally performing the cleanup, and therefore the debtor could only comply by reimbursing the state receiver for money expended in the cleanup.

The *Kovacs* holding has been interpreted broadly by some lower courts. The U.S. Court of Appeals for the Sixth Circuit, for example, has held that an equitable remedy creates a dischargeable debt in bankruptcy if it would cost money for the debtor to comply with the order.[113]

Combining the Sixth Circuit's standard for debts—obligations are dischargeable unless the debtor "can comply with the [administrator]'s orders without spending money"[114]—with the Supreme Court's construction of section 525 could significantly limit an agency's ability to ensure that debtor-licensees act consistent with the public interest. Under such a standard—admittedly the minority rule—section

108. *See* FCC. v. NextWave Pers. Communications, Inc., 123 S. Ct. 832, 840 (2003) (stating "'[e]xcept for the nine kinds of debts saved from discharge by 11 U.S.C. § 523(a), a discharge in bankruptcy discharges the debtor *from all debts that arose before bankruptcy*'") (alteration in original) (quoting Ohio v. Kovacs, 469 U.S. 274, 278 (1985)).

109. *See* 11 U.S.C. § 101(5), (12) (2000).

110. *See id.* § 101(5) (defining "claim" as, *inter alia*, a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment"); *see also* Johnson v. Home State Bank, 501 U.S. 78, 84 (1991) (holding mortgage created either a right to performance or a remedy for breach of performance, and therefore a "claim" that was dischargeable).

111. 469 U.S. 274 (1985).

112. *Id.* at 283.

113. *See* United States v. Whizco, Inc., 841 F.2d 147, 150–51 (6th Cir. 1988); *see also* Kennedy v. Medicap Pharmacies, Inc., 267 F.3d 493, 497 (6th Cir. 2001) (holding the right to equitable relief constitutes a claim "if it is an alternative to a right to payment" or "if compliance with the equitable order will itself require the payment of money"). *But cf.* Am. Int'l, Inc. v. Datacard Corp., DBS, 106 F.3d 1342, 1348 (7th Cir. 1997) (holding purchaser of contaminated property from estate could pursue CERCLA response costs against debtor and that such costs were not discharged in bankruptcy); United States v. LTV Corp. (*In re* Chateaugay Corp.), 944 F.2d 997, 1008–09 (2d Cir. 1991) (holding where agency did not have the option of incurring and suing for the costs of stopping present pollution, an order to stop such pollution is not dischargeable because it is not a claim).

114. *Whizco*, 841 F.2d at 151.

525 might be read to bar the revocation of licenses not just for nonpayment of money debts owed to the agency, but for failure to satisfy license conditions like "build-out" targets, an alternative means for fulfilling Congress's statutory goal: the "rapid deployment of new technologies, products, and services."[115] Because complying with such license terms would require money expenditures, debtors may argue that the license conditions should be considered debts dischargeable in the bankruptcy proceeding.[116]

This is not to say that, even under this interpretation, section 525 would bar all regulatory restrictions on licensees. Conditions that required no expenditure—such as the FCC rules governing spectrum aggregation and foreign ownership of communications licenses,[117] or local closing-hour restrictions on liquor establishments[118]—would likely survive section 525's prohibition.

Yet, the FCC's prevailing renewal rule for wireless common carrier licensees, which accords licensees who meet a performance requirement of "substantial service" a preference (known as a "renewal expectancy") over other contenders who may want the license at the end of its term, might not; the licensee could argue that the agency's action in not renewing for failure to meet build-out targets or other conditions requiring expenditures is a "refus[al] to renew a license . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable."[119] The Agency would likely contend that the refusal to renew was not because of the failure to pay the debt (unlike the *NextWave* situation where that was the triggering event) but because of the debtor's failure to provide the service. Although the debt that would be incurred in the buildout is not owed to the agency, the obligation to meet the licensing conditions may be argued to be a dischargeable debt.

Although the issue is certainly different than the one that the Supreme Court faced in *NextWave*, such an argument is likely to be made by debtors facing the loss of licenses for failure to make expenditures that were conditions of the license. Similarly, section 525 could be argued to bar the operation of critical conditions in environmental or land-use permits, so long as (i) their performance would require debtor expenditures, and (ii) they constituted the proximate cause of a permit's revocation. As discussed below,[120] administrative agencies would be well

115. 47 U.S.C. § 309(j)(3)(A) (2000); *see also* Brief of Amici Curiae Creditors of NextWave Pers. Communications, Inc. at 28, FCC v. NextWave Pers. Communications, Inc., 537 U.S. 293 (2003) (No. 01-653) (suggesting this licensing condition as a permissible alternative).

116. *See* Reply Brief for the Federal Communications Commission at 20, FCC v. NextWave Pers. Communications, Inc., 537 U.S. 293 (2003) (No. 01-653). It makes no difference that the regulatory condition would not give the FCC the right to compel the expenditure, but only cause the license to cancel. The FCC made that very same argument to the Supreme Court in *NextWave* to no avail.

117. 47 C.F.R. § 90.115 (2002).

118. *Cf.* Colonial Tavern, Inc. v. Byrne (*In re* Colonial Tavern, Inc.), 420 F. Supp. 44, 45–46 (D. Mass 1976) (holding that the bankruptcy court was without jurisdiction to grant a preliminary injunction enjoining the city licensing board from enforcing a sixty-day suspension of liquor licenses held by Chapter 11 debtors for alleged violations of a midnight closing hour).

119. 11 U.S.C. § 525(a) (2000).

120. *See infra* notes 138–39 and accompanying text.

advised to review their licensing and oversight regulations with an eye to whether they could be interpreted by a bankruptcy court as falling within a prohibition on refusing to grant or renew a license solely because of the licensee or applicant's failure to pay a dischargeable debt.

The *NextWave* decision, then, creates some tension with the established principle that "the estate may take no greater interest than that held by the debtor," and therefore that "restrictions imposed by a debtor's transferor are valid in bankruptcy."[121] Where the operation of such restrictions conflict with section 525, the government creditor must look to other provisions of the Bankruptcy Code for relief, such as the exceptions to the automatic stay that permit certain government activities to proceed to enforce a police or regulatory power including a nonmonetary judgment.[122]

Conflicting Impulses: Foundations for the Strengthening of Administrative Agency Positions

Notwithstanding the Supreme Court's rejection of regulatory motive as a justification for an exception to the Bankruptcy Code, the *NextWave* litigation could strengthen the government's usual position in bankruptcy proceedings in two ways.

Jurisdiction

Most significantly, it is worth noting that the question presented in *NextWave* did not raise, and the Court did not address, an issue of great importance to government entities in bankruptcy proceedings: the jurisdiction of the bankruptcy court to consider the legitimacy of agency action. The Second Circuit's second opinion addressed the issue squarely, concluding that the "bankruptcy court lacks jurisdiction to decide whether the FCC's regulatory decision is a proper exercise of discretion, or to decide whether it is provident and in the public interest."[123] Rather, jurisdiction to review administrative action resides only in the courts invested with that power by the relevant organic statute (in this case, federal courts

121. California v. Farmers Markets, Inc. (*In re* Farmers Markets, Inc.), 792 F.2d 1400, 1403 (9th Cir. 1986) (citation omitted). *See generally* FAA v. Gull Air, Inc. (*In re* Gull Air, Inc.), 890 F.2d 1255, 1263–64 (1st Cir. 1989) (holding that a debtor airline's proprietary interest in airport landing slots issued by the Federal Aviation Administration (FAA) hinged upon a rule revoking the slots pursuant to FAA regulations, notwithstanding the bankruptcy court ruling that counted them as assets of the estate); *In re* Access Beyond Techs., Inc., 237 B.R. 32, 38–39 (Bankr. D. Del. 1999) (stating that a Chapter 11 trustee assumed all rights and limitations that the debtor-licensees had in patent license agreements, which included restrictions on alienation without the licensor's prior approval); 5 Collier on Bankruptcy ¶ 541.07[2] (Lawrence P. King ed., 15 ed. rev. 2003) ("[A] trustee must conform in all respects to a license which comes into the estate upon the bankruptcy of a licensee [because] the trustee occupies the same position as the debtor.").

122. Justice Breyer's dissent argued that the majority opinion put governmental agencies in a worse position than nongovernmental creditors in trying to enforce their rights as creditors of a debtor. FCC v. NextWave Pers. Communications, Inc., 123 S. Ct. 832, 844 (Breyer, J., dissenting).

123. *In re* FCC, 217 F.3d 125, 138 (2d Cir. 2000).

of appeals).[124] The Supreme Court acknowledged this holding in a footnote, and concluded that the D.C. Circuit, in its opinion, "recognized and seemingly approved" of the Second Circuit ruling.[125]

The Supreme Court, by not ruling on the issue, therefore, let stand governing law—in the appeals courts that most frequently address administrative law and bankruptcy issues—that severely circumscribes bankruptcy court jurisdiction over issues that require review of agency action. The impact of these decisions remains to be seen, not only on the bankruptcy courts' power to consider administrative action under the APA or *Chevron*, but also to consider antitrust enforcement agencies' challenges to bankruptcy proceedings, an issue that has remained a source of dispute.[126]

Executory Contracts

Second, government entities may be helped by the implications of the *NextWave* decision for an issue the Court did not explicitly address, but which is the subject of various lower court decisions considering the meaning of section 365(c)(1)(A) of the Bankruptcy Code: whether this section absolutely bars trustees and debtors-in-possession (DIP) even from assuming executory contracts where applicable law excuses the nondebtor from accepting performance from a party other than the debtor or debtor-in-possession.[127]

The language of the section is framed in terms of whether the trustee (or DIP) is proposing to "assume *or* assign" such an executory contract. This issue has substantial importance to government agencies that are contractors with companies that file for relief under Chapter 11, because the Anti-Assignment Act, 41 U.S.C. § 15, bars the assignment of government contracts.[128] The Third Circuit in

124. *Id.* This holding creates some tension with the text of 28 U.S.C. § 1334(b). That section accords original but not exclusive jurisdiction to district courts—which can then refer matters to bankruptcy courts, *see id.* at §157,–over "all civil proceedings" related to bankruptcy cases, "*[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts.*" *Id.* at § 1334(b) (emphasis added).

125. 123 S. Ct. at 842 n.5.

126. *Compare In re* Harwald Co., 497 F.2d 443, 445 (7th Cir. 1974) ("A determination by the bankruptcy court of whether sale of a bankrupt's assets to a prospective purchaser would, because of the purchaser's special characteristics, violate antitrust laws could not, contrary to the appellants' contention, properly be considered part of the bankruptcy proceedings."), *with In re* Financial News Network, Inc., No. 91B-10891, 1991 Bankr. LEXIS 1457 (Bankr. S.D.N.Y. May 10, 1991) (asserting jurisdiction over FTC); DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 1205 (2d ed. 1990) (noting that under the 1978 Bankruptcy Act, "[i]f a debtor . . . was enmeshed in an antitrust dispute, the bankruptcy judge had jurisdiction over it") (citing *In re* Repair & Maint. Parts Corp., 19 B.R. 575 (Bankr. N.D. Ill. 1982)). *See generally* 11 U.S.C. § 363 (b)(2) (2000) (setting time limits for notifying FTC and DOJ of transactions in bankruptcy proceedings).

127. The language of the section provides that a

> trustee may not assume or assign any executory contract . . . whether or not such contract or lease prohibits or restricts assignment of rights . . . if applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession . . . .

Id. § 365(c)(1)(A).

128. 41 U.S.C. § 15 (2000).

In re West Electronics Inc.,[129] held that the effect of section 365(c)(1)(A) was to bar the debtor from assuming (not just assigning) a government contract that it had been performing before it filed for bankruptcy relief.[130]

The cases addressing this issue have often interpreted this section of the Code by determining whether it establishes either a "hypothetical" or an "actual" test. The tests consider (i) whether the trustee (or DIP) is proposing to assign a non-assignable contract or only seeking to assume it; and (ii) if the debtor is only proposing to assume the contract, whether the section nevertheless applies where nonapplicable law would bar any assignment.[131]

The literal interpretation of the Code adopted by the Court in *NextWave* would appear to favor those courts adopting the "hypothetical" test. This test, it is argued by its proponents, is mandated by the literal "assume or assign" language of section 365(c)(1)(A), and is usually the position favored by government agencies that have contracted with parties that become debtors-in-possession and want the flexibility to decide whether to direct an immediate termination of the debtor's contract with the government agency. The proponents of the "actual" test have argued that there is no policy reason why a debtor that becomes a DIP should not be able to assume the same contract that it was performing before it filed for bankruptcy relief. The Court's rejection of such policy considerations in *NextWave* may make the lower courts more likely to side with those who favor the "hypothetical" test that is supported by the literal language of that section.

Moving Forward: What Options Remain for Administrative Agencies

Although the *NextWave* decision restricts government entities' ability to trump the provisions of the Bankruptcy Code by administrative regulation, it neither leaves the FCC entirely without recourse in this case, nor denies agencies in general the ability to design licensing programs consistent with the requirements of section 525.

FCC Remedies

Although the Supreme Court declined to indicate the import of the parties' debtor-creditor relationship, it recognized that the FCC had perfected a security interest giving it a first "lien on and continuing security interest in all of the Debtor's rights and interest in [each] License."[132] Consistent with *NextWave*'s message that the Government will be treated like any other creditor in the absence

129. 852 F.2d 79 (3d Cir. 1988).

130. *Id.* at 83.

131. *Compare* Perlman v. Catapult Entm't, Inc. (*In re* Catapult Entm't, Inc.), 165 F.3d 747, 750 (9th Cir. 1999) (using the hypothetical test), *with* Institut Pasteur v. Cambridge Biotech Corp., 104 F.3d 489, 493 (1st Cir. 1997) (using the actual test).

132. FCC v. NextWave Pers. Communications, Inc., 123 S. Ct. 832, 836 (2003) (citing Security Agreement between NextWave and the FCC ¶ 1 (Jan. 3, 1997)).

of a congressional indication to the contrary, then, the Commission should, at least, possess the usual rights of a secured creditor in a bankruptcy proceeding.

Under general bankruptcy rules, if NextWave proposes to cure and reinstate its payment obligation pursuant to sections 1123(a)(5)(G) and 1124(2)(a) of the Code,[133] it will be required to pay its debt to the FCC in full. If NextWave instead proposes to impair the Commission's debt by altering the terms or conditions of the obligation, the FCC should be entitled to the full value of its allowed secured claim.[134]

In general, if a creditor is oversecured, i.e., the value of the collateral securing the claim is greater than the amount of the prepetition claim, it is entitled to insist on payment in full, plus interest, fees and costs.[135] An undersecured creditor, by contrast, may either choose to have its claim bifurcated into secured and unsecured portions,[136] or it may elect instead to insist on payment-in-full in nominal dollars: payments whose present value must equal the present value of the collateral and whose total value must equal the amount of the overall claim.[137] These options should be available to the FCC as a secured creditor.

Future Regulatory Programs

Administrative agencies would prefer, of course, not to have to rely on the bankruptcy process for the delayed adjudication of their secured claims. There are, therefore, two methods of structuring licensing programs that could avoid some of the constraints of the *NextWave* Court's construction of section 525.

Mechanisms for Ensuring Payment

If the government's principal objective is the prompt and reliable payment of fees owed by licensees, it could do one of two things. First, it could—as most licensors do—require payment in full at the time of the license grant. This would preclude a debtor-creditor relationship in many instances, although such a relationship could arise because of other license conditions, or at the time of renewal. It seems unlikely that either the FCC (or any other agency) will soon adopt a scheme like the FCC used to auction the C-Block and F-Block licenses in light of the difficulties that the FCC has faced since it sought to auction this spectrum in 1997.

133. 11 U.S.C. § 1123(a)(5)(G) provides that a bankruptcy plan shall "provide adequate means for the plan's implementation," such as "curing or waiving of any default." 11 U.S.C. § 1123(a)(5)(G) (2000). Section 1124(1) provides that claims are impaired under a plan unless that plan "leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest." *Id.* § 1124(1).

134. *See* United States v. Whiting Pools, Inc., 462 U.S. 198, 204 (1983) ("The creditor with a secured interest in property included in the estate must look to [the provisions of the Bankruptcy Code] for protection, rather than to the nonbankruptcy remedy of possession."); *see also* 11 U.S.C. § 506 (determination of secured status).

135. *See* 11 U.S.C. § 1129(a)(7).

136. *See id.* § 506(a)—in which case the debtor is obligated to pay the present value of the allowed secured claim (generally, the current value of the collateral) over time, and to pay the unsecured portion pro rata with other unsecured creditors pursuant to section 502.

137. *See id.* § 1111(b).

Second, as discussed immediately below, a government agency that carefully constructs a set of criteria for license awards and renewals that consider performance, financial health, service capacity, and other nonmonetary standards should have a strong argument that any actions it takes is not "solely" due to nonpayment of the amount owed to the agency. It will be important for the agency to apply these standards in a nondiscriminatory fashion to debtors and nondebtors, so that it can establish when it is seeking to act against a licensee in bankruptcy that it has acted in the same manner when reviewing the actions of nondebtors.

Mechanisms for License Oversight

If an agency, whether or not it is owed any amount by its licensees, seeks primarily to keep control over the licenses and their exercise, it should adopt the more complicated approach of conditioning licenses on a periodic multi-factor inquiry intended to determine whether continued licensure serves the statutory mandate.[138] Because the inquiry would include a number of elements—such as the financial health of the licensee and the successful use of the licensed resource—any resulting cancellation should not be attributed "solely" to one cause in the manner proscribed by section 525. Similarly, by scheduling the assessment periodically, revocations would not be attributable to a nonpayment trigger.

Further, such a solution finds support in section 525's legislative history, which states explicitly that the statute "does not prohibit consideration of other factors, such as future financial responsibility or ability, and does not prohibit imposition of requirements such as net capital rules, if applied nondiscriminatorily."[139] Again, establishing a record of acting similarly towards debtors and nondebtors will be important when an agency action is challenged as discriminatory by a licensee that is in bankruptcy.

Conclusion

The decision of the Supreme Court in *Nextwave*, although addressing a relatively unique set of relationships between a regulator and a debtor, is just the latest decision from that Court to hold that government agencies will be treated as ordinary creditors with respect to prepetition monetary obligations owed by a debtor. Government agencies that intend to consider financial capability in future licensing proceedings must account for the provisions of section 525 in the establishment and application of their procedures and should expect that licensees will seek to take refuge behind section 525 and the *Nextwave* decision in an effort to thwart license revocation. These agencies should act accordingly in dealing

138. Such procedures would have to be consistent with any provisions of the Communications Act that constrain the FCC's ability, on substantive and procedural grounds, to revoke a license. *See, e.g.*, 47 U.S.C. § 312 (2000) (setting forth "Administrative sanctions").

139. S. Rep. No. 95-989, at 81 (1978).

with license revocations, establishing that such revocations are being done for reasons other than "solely" for failure to pay a debt that would be dischargeable in bankruptcy, so that when they seek to act to revoke a license of a licensee that files for bankruptcy, they can establish that they are not doing so "solely" on such grounds.