

In Brief: NextWave Redux

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In a landmark 2003 ruling, the U.S. Supreme Court held that the Bankruptcy Code's anti-discrimination provisions prohibited the Federal Communications Commission ("FCC") from revoking broadband spectrum licenses valued at nearly \$5 billion awarded at a pre-bankruptcy auction to chapter 11 debtor NextWave Personal Communications, Inc. based upon its failure to make timely payments to the FCC for the purchase of the licenses. The decision put an end to protracted litigation that had for many years limited access to the disputed broadband capacity, and was widely perceived as having given the green light to technology developers eager to exploit the public airways by removing the shroud of controversy from licenses covering a significant percentage of the available electromagnetic spectrum.

NextWave's bankruptcy spawned considerable debate concerning the power of the FCC to regulate access to the airwaves in ostensible derogation of various provisions of the Bankruptcy Code. While it did not prevail in the Supreme Court on the anti-discrimination issue, the FCC won a significant victory on another front when the Second Circuit Court of Appeals ruled in 1999 that the bankruptcy court presiding over NextWave's chapter 11 case lacked jurisdiction to abrogate the FCC's licensing authority by allowing NextWave to avoid a portion of its auction payment obligation as a fraudulent transfer. Unfortunately, this issue never made its way to the Supreme Court.

Based in part on the Supreme Court's 2003 ruling, NextWave, in April of 2004, successfully negotiated a global settlement of its auction debt to the FCC. Under the agreement, NextWave satisfied all of its debt obligations to the FCC by returning 90% of its licenses and making substantial additional cash payments. NextWave was permitted to keep the remaining licenses free and clear of any debt or claims or liens of the FCC. The settlement resulted in a total recovery of more than \$4 billion for the government and allowed NextWave to confirm a chapter 11 plan of reorganization in March of 2005.

It appeared that the cauldron of controversy surrounding NextWave's bankruptcy filing and its efforts to hold onto its hard won spectrum licenses had finally stopped boiling after over seven years of contentious litigation — but not quite. Less than a month after confirmation of NextWave's chapter 11 plan, a *qui tam* action was commenced under the False Claims Act ("FCA") against NextWave and its attorneys, alleging that the defendants violated the FCA by failing to advise the federal government of the possible application of the Credit Reform Act ("CRA") to spectrum auction debt and NextWave's related bankruptcy proceedings.

The complaint asserted seven FCA claims against the defendants, each of which stemmed, directly or indirectly, from their alleged knowing failure to inform the courts, the FCC, and Congress of the existence of the CRA and its alleged applicability to spectrum auction debts and, in particular, to NextWave's rights in bankruptcy. In substance, the plaintiff argued that, under the CRA, any disposition of a federal loan that decreases the government's recovery constitutes a "modification," and is thus barred in the absence of advance Congressional approval. Because no Congressional approval was sought or obtained by NextWave, the plaintiff contended, NextWave was precluded from satisfying its debt obligations to the FCC in the manner provided under the global settlement.

A New York district court recently granted the defendants' motion to dismiss, finding that the cause of action stated against NextWave's attorneys was untimely under the FCA's six-year statute of limitations, and that the remaining causes of action both failed to state a claim under the FCA and were barred by the doctrine of *res judicata*. According to the district court, the complaint's causes of action against the non-attorney defendants rested, at least in part, on their alleged use of false statements to obtain payment from the government or to avoid payment obligations to the government, yet it failed to identify a single false statement made by the defendants at any time. Moreover, the court characterized the basic premise of the complaint — that the defendants violated the FCA by failing to bring a federal statute to the attention of the federal government in the course of a litigation to which the federal government was a party — as “patently absurd.” In light of its conclusions, the district court never reached the issue of whether the CRA actually superseded NextWave's bankruptcy rights in the absence of Congressional approval.

FCC v. NextWave Personal Communications, Inc., 537 U.S. 293 (2003).

In re NextWave Personal Communications, Inc., 200 F.3d 43 (2d Cir. 1999), *cert. denied*, 531 U.S. 924 (2000).

U.S. ex rel. Finney v. NextWave Telecom, Inc., 337 B.R. 479 (S.D.N.Y. 2006).