2001

Bankruptcy Court Jurisdiction and Agency Action: Resolving the NextWave of Conflict

Rafael I. Pardo
Washington University in St. Louis School of Law, pardo@wustl.edu

COMMENT

BANKRUPTCY COURT JURISDICTION AND AGENCY ACTION: RESOLVING THE *NEXTWAVE* OF CONFLICT

RAFAEL IGNACIO PARDO*

In this Comment, Rafael Pardo criticizes a recent pair of decisions by the United States Court of Appeals for the Second Circuit, FCC v. NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.) *and* In re FCC. *Those cases held that a bankruptcy court lacks jurisdiction to determine whether the Federal Communications Commission is stayed from revoking a debtor's licenses. Pardo argues that the court of appeals interpreted the bankruptcy court's jurisdiction too narrowly because it failed to distinguish properly between an agency's action as a creditor and as a regulator. He concludes that bankruptcy courts and courts of appeals have concurrent jurisdiction to make automatic stay determinations regarding FCC licenses and that, for reasons of institutional competence, courts of appeals should defer to this exercise of jurisdiction by bankruptcy courts.*

INTRODUCTION

Five years ago, pursuant to an amendment to the Federal Communications Act (FCA),[1] the Federal Communications Commission (FCC) began to auction off a portion of radio spectrum for personal communications services (PCS) licenses.[2] While the auction for A- and B-block PCS licenses predominately had involved large bidders such as Sprint and AT&T,[3] the C-block license auction targeted smaller businesses by offering them deferred payment plans.[4] The

* This comment is dedicated to the late Professor Lawrence King, for everything he taught me about bankruptcy and for believing in me. My sincere thanks to Professors Larry Kramer and William Nelson for their helpful suggestions; Maggie Lemos for her encouragement and impressive development comments; and Katie Tinto, Seth Nesin, and P.K. Runkles-Pearson for their excellent editing.

[1] The Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, § 6002(a), 107 Stat. 312, 387, amended the Federal Communications Act (FCA), 47 U.S.C. § 151-612 (1994), including the addition of 47 U.S.C. § 309(j) (1994 & Supp. IV 1998).

[2] Auction of Licenses for Wireless Service Raises $10.22 Billion, Wall St. J., May 7, 1996, at B5.

[3] Gautam Naik & Bryan Gruley, NextWave's Tactics at Wireless Auction Are Under Fire, Wall St. J., May 6, 1996, at B4.

[4] By enacting § 309(j), Congress sought to help small companies compete with established wireless operators. See FCC v. NextWave Pers. Communications, Inc. (In re NextWave Pers. Communications, Inc.), 200 F.3d 43, 46 (2d Cir. 1999) ("The FCC was

favorable terms prompted aggressive bidding, and the prices of the C-block licenses became inflated, as reflected by the total amount bid for the C-block compared to that bid for the other blocks of the spectrum.[5] When NextWave Personal Communications, Inc. (NextWave)—which had incurred a $4.7 billion obligation in its bid for the licenses—found it could not make its payments, it filed for bankruptcy.[6] Shortly thereafter, the FCC canceled NextWave's licenses and scheduled their reauction.[7]

In its dispute with the FCC over the licenses, NextWave obtained a bankruptcy court ruling that permitted the company to avoid most of its debt obligation to the FCC.[8] The Second Circuit Court of Appeals, however, overturned the bankruptcy court's decision and held that the bankruptcy court did not have jurisdiction to prevent the FCC from allocating licenses as it deemed appropriate.[9] The business community has followed this case intently because of its ramification for future disputes over PCS licenses between wireless voice-and-data services providers and the FCC—specifically, how the decision affects the possibility of successful reorganization by an FCC-regulated corporation.[10] The answer to this question depends on whether a bankruptcy court may decide if the automatic stay, which protects the debtor and property of the estate,[11] prevents the FCC from reauctioning a debtor's licenses when the debtor fails to make a payment on its obligation to the FCC.

---

instructed to ensure that as part of its auction plan certain blocks of spectrum would be reserved for qualified entities, including small businesses, and that deferred payment plans on favorable terms would be available to them." (citing 47 U.S.C. § 309(j)(3)(B) (1994) and 47 U.S.C. § 309(j)(4)(D) (1994 & Supp. IV 1998)).

5 See infra note 34; cf. Naik & Gruley, supra note 3, at B4 ("Bidding eventually pushed past $10 billion—more than double what some analysts were expecting.").

6 Jill Carroll & Nicole Harris, NextWave Fails to Win Supreme Court Hearing, Wall St. J., Oct. 11, 2000, at B14.

7 Id.

8 See infra notes 35-37 and accompanying text.

9 See infra notes 46-47, 59-66 and accompanying text.

10 See Steven Lipin, Deals & Deal Makers: Two Opposite Court Rulings Raise Questions About FCC's Next Move on NextWave Licenses, Wall St. J., Nov. 2, 2000, at C17 [hereinafter Lipin, Deals & Deal Makers] ("Wall Street is closely following how the legal situation shakes out, because it will answer the question of whether federal agencies can be considered licensors . . . rather than creditors, which would allow companies in NextWave's situation to keep and possibly sell the licenses like any other asset."); Steven Lipin, FCC Move in Bankruptcy Case Sparks Ire, Wall St. J., Apr. 10, 2000, at C1 [hereinafter Lipin, FCC Move Sparks Ire] ("'If a licensing agency can [cancel a debtor's licenses], then it will be extremely difficult, if not impossible, for companies that have temporary financial problems to use Chapter 11 . . . to rehabilitate, to cure defaults[.]'" (quoting Professor Alan N. Reznick)).

11 See infra Part I.A (discussing automatic stay).

This Comment argues that *FCC v. NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.)*[12] wrongfully denies a bankruptcy court's jurisdiction over a debtor's PCS licenses, thereby hindering the court's ability to conduct an effective proceeding where, due to the automatic stay, the debtor is granted breathing room and the estate's assets are disposed of in an orderly fashion. Part I surveys the relationship between the automatic stay and agency action that implicates property of the debtor's estate. Part II discusses the Second Circuit's narrow construction of a bankruptcy court's jurisdiction over agency action. Part III argues that a bankruptcy court legitimately may exercise jurisdiction over PCS licenses that the FCC seeks to reauction and concludes that circuit courts should defer to this exercise of jurisdiction.

I
BANKRUPTCY COURT JURISDICTION OVER PROPERTY OF THE ESTATE

A. The Automatic Stay

The filing of a petition under any of the operative chapters of the Bankruptcy Code (Chapters 7, 9, 11, 12, and 13) acts as a stay that prevents creditors from taking certain actions against the debtor and its estate.[13] The stay becomes effective immediately and does not require judicial action.[14] But for the mechanical nature by which the provision takes effect, it could not play its fundamental role in protecting both debtors and creditors. For debtors, the automatic stay alleviates concerns over creditor collection efforts and allows them to assess their financial situations.[15] Creditors, on the other hand, know the assets of the estate will be preserved, thereby preventing a race to

---

[12] 200 F.3d 43 (2d Cir. 1999).

[13] See 11 U.S.C. § 362(a) (1994) (listing acts that are stayed, including collection efforts and foreclosure actions by creditors). This Comment uses the terms Bankruptcy Code and Code interchangeably to refer to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended primarily at 11 U.S.C.).

[14] See Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 113 (1st Cir. 1994) ("Because the automatic stay is exactly what the name implies—'automatic'—it operates without the necessity for judicial intervention."); FDIC v. Hirsch (In re Colonial Realty Co.), 980 F.2d 125, 137 (2d Cir. 1992) ("[T]he automatic stay is imposed by Congressional mandate and not by court order. By its very terms, no action by any court is necessary for the stay to take effect." (citations omitted)).

[15] See H.R. Rep. No. 95-595, at 340 (1977) (stating:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy),

judgment on their claims and ensuring equal treatment of similarly situated creditors.[16]

Although the stay takes effect automatically—that is, without the need for any action on the part of the bankruptcy court—it is important to recognize that the stay is understood as part of a bankruptcy court's injunctive power and depends on a jurisdictional grant of authority that permits its enforcement. The jurisdictional basis derives from § 1334(e), which grants the district court exclusive jurisdiction over all property of the debtor, wherever it is located.[17] When a district court assigns a case under Title 11 to a bankruptcy judge,[18] the power granted in 28 U.S.C. § 1334 then may be exercised by the bankruptcy court. The convergence of a bankruptcy court's jurisdictional grant and the automatic stay therefore enables the court to conduct a uniform proceeding in a single forum[19] where the court may adjudicate all claims related to the bankrupt estate.[20]

---

reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97. For the argument that it is appropriate to resort to legislative history to illuminate the meaning of statutory provisions of the Bankruptcy Code, see, for example, Rafael Ignacio Pardo, Note, Beyond the Limits of Equity Jurisprudence: No-Fault Equitable Subordination, 75 N.Y.U. L. Rev. 1489, 1507-10 (2000) (using legislative history to clarify meaning of broad language of 11 U.S.C. § 510(c)).

16 See H.R. Rep. No. 95-595, at 340 (stating:

> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that),

reprinted in 1978 U.S.C.C.A.N. 5963, 6297; accord S. Rep. No. 95-989, at 49 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5835; see also *Sunshine Dev., Inc.*, 33 F.3d at 114 (noting that automatic stay "prevent[s] different creditors from bringing different proceedings in different courts, thereby setting in motion a free-for-all in which opposing interests maneuver to capture the lion's share of the debtor's assets").

17 28 U.S.C. § 1334(e) (1994) ("The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."). District courts have "original and exclusive jurisdiction of all cases under title 11," id. § 1334(a), and have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11," id. § 1334(b).

18 See id. § 157(a) ("Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.").

19 See *Sunshine Dev., Inc.*, 33 F.3d at 114 ("[T]he doctrinal puzzle looks like this: the jurisdictional grant and the automatic stay work together to centralize nearly all claims relating to the bankrupt estate in the bankruptcy court.").

20 The filing of a bankruptcy petition creates an "estate," which includes "all legal or equitable interests of the debtor in property as of commencement of the case," regardless of where it is located and by whom it is held. 11 U.S.C. § 541(a)(1) (1994). Legislative history suggests that a debtor's interest in property includes any possessory interest, see H.R. Rep. No. 95-595, at 367 ("The debtor's interest in property also includes 'title' to property, which is an interest, just as are a possessory interest, [and a] leasehold interest,

Among those actions stayed under 11 U.S.C § 362(a) are proceedings against the debtor to obtain possession of property of the estate.[21] Subsection 362(a)(3) is a critical component of debtors' protection under the Code, for if any successful reorganization is to take place, the debtor-in-possession must be able to assess the value of its property and the various rights associated with it.[22] Without the breathing room that the automatic stay affords by insulating the debtor's property, a debtor-in-possession's chances of reorganizing would be limited severely.[23]

B. The Regulatory Power Exception to the Automatic Stay

The scope of the automatic stay, while generally broad, is limited by certain exceptions enumerated in the Code.[24] Under § 362(b), a governmental unit seeking to enforce its police or regulatory powers against a debtor is not stayed from proceeding with such action.[25] The

---

for example."), reprinted in 1978 U.S.C.C.A.N. 5963, 6323; accord S. Rep. No. 95-989, at 82, reprinted in 1978 U.S.C.C.A.N. 5787, 5868, and that the term "property of the estate" should be read broadly so as to include "tangible or intangible property," H.R. Rep. No. 95-595, at 367, reprinted in 1978 U.S.C.C.A.N. 5963, 6323; accord S. Rep. No. 95-989, at 82, reprinted in 1978 U.S.C.C.A.N. 5787, 5868; see also United States v. Whiting Pools, Inc., 462 U.S. 198, 204-05 (1983) ("The House and Senate Reports on the Bankruptcy Code indicate that § 541(a)(1)'s scope is broad."). The Code ensures that interests of the debtor in property are considered part of the estate by invalidating restrictions or conditions on transfer of the property. 11 U.S.C. § 541(c)(1)(A) ("[A]n interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law that restricts or conditions transfer of such interest by the debtor[.]").

[21] See 11 U.S.C. § 362(a)(3) ("[A] petition filed under . . . this title . . . operates as a stay, applicable to all entities, of . . . any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.").

[22] Subsection 362(a)(3) essentially "prevent[s] dismemberment of the estate" and allows for the payment of claims in an "orderly fashion." H.R. Rep. No. 95-595, at 341, reprinted in 1978 U.S.C.C.A.N. 5963, 6298; accord S. Rep. No. 95-989, at 50, reprinted in 1978 U.S.C.C.A.N. 5787, 5836.

[23] See *Whiting Pools, Inc.*, 462 U.S. at 203 ("The reorganization effort would have small chance of success, however, if property essential to running the business were excluded from the estate. Thus, to facilitate the rehabilitation of the debtor's business, all the debtor's property must be included in the reorganization estate." (citation omitted)); see also 3 Collier on Bankruptcy ¶ 362.03[2], at 362-14 (15th ed. rev. 2000) (stating:

> In reorganization cases, the stay is particularly important in maintaining the status quo and permitting the debtor in possession or trustee to attempt to formulate a plan of reorganization. Without the stay, the debtor's assets might well be dismembered, and its business destroyed, before the debtor has an opportunity to put forward a plan for future operations).

[24] See 11 U.S.C. § 362(b) (1994 & Supp. IV 1998) (listing seventeen exceptions to automatic stay).

[25] Id. § 362(b)(4) (Supp. IV 1998) (stating:

> The filing of a petition under . . . this title . . . does not operate as a stay . . . of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory

exception contemplates fraud prevention, environmental protection, consumer protection, and actions to protect public health and safety as permissible regulatory actions unaffected by the stay.[26] Moreover, legislative history suggests that, while the exception should be construed in such a way that the government body may pursue legitimate police power/regulatory goals, it should not apply so as to except agency action whose aim is to "protect a pecuniary interest in property of the debtor or property of the estate."[27]

In determining whether a regulatory agency is excepted from the automatic stay, courts have relied on two tests—the "pecuniary purpose" test and the "public policy" test—to distinguish between when an agency acts as a creditor and when it acts as a regulator.[28] The "pecuniary purpose" test asks if "the government's proceeding relates primarily to the protection of the government's pecuniary interest in the debtor's property and not to matters of public policy."[29] Under this test, a regulatory body will not be excepted from the stay if it primarily seeks to protect a pecuniary interest.[30] The "public policy" test, on the other hand, asks whether the government, through its action against the debtor, seeks to effectuate public policy or to adjudicate private rights.[31] Attempts by the government to advance private rights will not be excepted from the stay.[32]

The tests courts have developed to determine whether or not the exception applies demonstrate that, while the regulatory power exception reflects Congress's desire to ensure that the Bankruptcy Code will not interfere with local, state, or federal governments implementing

---

power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's . . . police or regulatory power).

26 H.R. Rep. No. 95-595, at 342-43, reprinted in 1978 U.S.C.C.A.N. 5963, 6299; S. Rep. No. 95-989, at 52, reprinted in 1978 U.S.C.C.A.N. 5787, 5838.

27 124 Cong. Rec. H32,395 (1978) (statement of Rep. Edwards); accord id. S33,995 (1978) (statement of Sen. DeConcini).

28 E.g., Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.), 128 F.3d 1294, 1297 (9th Cir. 1997) (finding that, under either test, IRS letter revoking tax exempt status of Chapter 11 debtor-religious organization fell within police/regulatory exception); NLRB v. Cont'l Hagen Corp., 932 F.2d 828, 833 (9th Cir. 1991) (noting that "NLRB actions have been exempted from the automatic stay under both analyses"); Eddleman v. U.S. Dep't of Labor, 923 F.2d 782, 791 (10th Cir. 1991) (holding that Department of Labor's enforcement proceedings are exempt from stay under either test), overruled in part on other grounds by Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson, 968 F.2d 1003 (10th Cir. 1992) (involving finality of bankruptcy orders); NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 942 (6th Cir. 1986) (holding NLRB unfair labor practice proceeding to be excepted from automatic stay under either test).

29 *Eddleman*, 923 F.2d at 791.

30 See id.

31 See id.

32 See id.

their respective regulatory schemes, the exception should not be read to give an agency free rein over a debtor's assets simply because the agency claims to act within its regulatory authority. The question of when a bankruptcy court properly may make automatic stay determinations regarding FCC action toward a debtor's licenses underlies the jurisdictional dispute in *NextWave*.

II
THE *NEXTWAVE* DECISIONS

Despite being a winning bidder at the C-block auction,[33] NextWave's capitalization and operating income were insufficient to build out its PCS system.[34] On June 8, 1998, NextWave filed for relief

[33] As the largest winner of FCC C-block licenses, Lipin, Deals & Deal Makers, supra note 10, at C17, NextWave's total bid amounted to $4,743,648,000. NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications, Inc.), 235 B.R. 277, 285 (Bankr. S.D.N.Y.), aff'd, 241 B.R. 311 (S.D.N.Y.), rev'd, 200 F.3d 43 (2d Cir. 1999). In exchange, NextWave acquired a total of sixty-three C-block licenses. Id. As a prospective and winning bidder that was a "[s]mall business," FCC regulations only required that NextWave pay ten percent of its total bid obligation up front. See 47 C.F.R. § 24.711(b) (2000). Accordingly, by July 23, 1996, NextWave had deposited the required up-front payments and postauction and reauction payments, which totaled five percent of its entire bid obligation ($237,182,402). *NextWave Pers. Communications, Inc.*, 235 B.R. at 285. On January 9, 1997, in compliance with FCC regulations, NextWave deposited an additional five percent of its bid obligation, which brought its total cash deposits to $474,364,806. Id. As for the remainder of its total bid, NextWave would be allowed to pay it over a ten-year period at below-market interest rates. See 47 C.F.R. § 24.711(b)(3). The FCC granted the licenses to NextWave on February 14, 1997 on the condition that NextWave would execute a series of promissory notes for the remainder of its obligation, payable to the FCC. *NextWave Pers. Communications, Inc.*, 235 B.R. at 285. On February 19, 1997, NextWave signed promissory notes backdated to January 3, 1997 and accompanying security agreements. Id.

[34] Describing NextWave's overly aggressive bid, the Wall Street Journal commented: "Paying for its licenses is only the critical first hump facing *NextWave*. . . . Over the next five years, it must raise another $1.8 billion to $2.7 billion to build its network . . . ." Naik & Gruley, supra note 3, at B4. Because of the artificially high price bid for the C-block licenses, C-block bidders had incurred much larger obligations than other licensees that had participated in auctions for other blocks of the spectrum, as indicated by comparing the winning bids of the different auctions in dollars per MHz-Pop. FCC v. NextWave Pers. Communications, Inc. (In re NextWave Pers. Communications, Inc.), 200 F.3d 43, 47 (2d Cir. 1999). Dollar per Mhz-Pop "measures the amount paid for a license that would allow the provision of a particular level of communications data to a particular number of people." Id. at 47 n.4. NextWave's winning bid, for example, averaged $1.43/Mhz-Pop, while D-, E-, and F-block winners' bids averaged $0.33/Mhz-Pop. Id.; see also Naik & Gruley, supra note 3, at B4 ("NextWave bid twice as much as Sprint and its cable partners did for PCS licenses in an earlier auction, and Sprint got most of the country.").

To build the requisite infrastructure to use its licenses, NextWave attempted to raise $700 million in public financing through an initial public offering of equity securities and through a high-yield debt offering, but its efforts failed. *NextWave Pers. Communications, Inc.*, 235 B.R. at 286. Other C-block licensees were also unable to secure the public financing necessary to make use of their licenses and, as a result, could not put their licenses into

under Chapter 11 and simultaneously sought a determination from the bankruptcy court that NextWave's deposits and issuance of promissory notes to the FCC constituted constructively fraudulent conveyances and, therefore, could be avoided.[35] The bankruptcy court concluded that NextWave's exchange of $474 million in cash and $4.27 billion in promissory notes for the C-block licenses was not an exchange of reasonably equivalent value.[36] It determined that the fair market value of the licenses was approximately $1 billion and thus subsequently held that $3.7 billion of NextWave's bid obligation to the FCC could be avoided.[37]

In making its determination, the bankruptcy court rejected the FCC's argument that, because only the courts of appeals may review final orders of the FCC,[38] the bankruptcy court lacked jurisdiction to hear the fraudulent conveyance claim.[39] Although the bankruptcy court acknowledged that governance of the auction process for the spectrum falls within the FCC's regulatory authority, and that any appeal over an FCC order regarding that process would fall within the jurisdiction of the courts of appeals,[40] it did not view the restructuring

service. Id. The FCC responded to the license holders' request for relief from installment payments by issuing a restructuring order on October 16, 1997. Id. at 286-87. The order provided C-block licensees several mutually exclusive restructuring options, including amnesty and plan restructuring. *NextWave Pers. Communications, Inc.*, 200 F.3d at 48. Under the amnesty option, a licensee could return the licenses, and the FCC would release it from its debt obligation. Id. Under plan restructuring, by applying seventy percent of an original down payment toward prepayment, a licensee could keep those licenses for which it could pay the full bid price. Id.

[35] *NextWave Pers. Communications, Inc.*, 235 B.R. at 281. Generally speaking, fraudulent conveyance law provides that a transfer may be avoided as constructively fraudulent if the debtor was insolvent, or thereby became insolvent, and if the transfer was not in exchange for reasonably equivalent value. Unif. Fraudulent Transfer Act § 5(a), 7 U.L.A. 657 (1984); see also Unif. Fraudulent Conveyance Act § 4, 7 U.L.A. 474 (1918) ("Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."). Section 544 of the Bankruptcy Code gives a trustee the rights of an actual unsecured creditor and permits the trustee to void transfers under applicable state fraudulent conveyance law. 11 U.S.C. § 544(b) (1994). Under § 1107, the debtor-in-possession has the same rights and powers of a Chapter 11 trustee. 11 U.S.C. § 1107. 11 U.S.C. § 103 makes clear that § 544(b) applies in Chapter 11; the debtor-in-possession, therefore, may avail itself of the trustee's avoidance powers under § 544(b). See 11 U.S.C. § 103 (stating that Chapter 5 of Title 11 applies in cases under Chapter 11).

[36] *NextWave Pers. Communications, Inc.*, 235 B.R. at 304.

[37] Id.

[38] See infra notes 93-95 and accompanying text (discussing jurisdiction of courts of appeals over claims challenging final orders of FCC).

[39] See NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications, Inc.), 235 B.R. 263, 269-71 (Bankr. S.D.N.Y.), aff'd, 241 B.R. 311 (S.D.N.Y.), rev'd, 200 F.3d 43 (2d Cir. 1999).

[40] Id. at 268 (stating:

orders by the FCC[41] as relating to its regulatory function.[42] To do so would give the FCC the authority to define its own status as a creditor in relation to its licensees or its licensees' creditors,[43] and, in the process, sidestep federal bankruptcy law.[44] Finding that it had jurisdiction over the claim, the court deemed that the FCC had acted as a creditor, not a regulator, and so was subject to NextWave's fraudulent conveyance claim.[45]

On appeal, the Second Circuit reversed the district court's affirmance of the bankruptcy court's orders.[46] The court reasoned that, because the courts of appeals, pursuant to 28 U.S.C. § 2342[47] and 47 U.S.C. § 402,[48] have exclusive jurisdiction over claims challenging final orders of the FCC, the bankruptcy court lacked jurisdiction to de-

---

> The regulatory jurisdiction conferred by Congress on a Federal agency and the grant of exclusive jurisdiction to the Circuit Courts to review the agency's actions preclude[ ] a district court (or, by reference, a bankruptcy court) from enjoining, reviewing, assessing damages for or otherwise adjudicating the consequences of the conduct of the Federal agency acting within the scope of its Congressional mandate).

The bankruptcy court also recognized that "the Bankruptcy Code expressly recognizes the exclusive jurisdiction of regulatory agencies to perform the regulatory functions conferred upon them by statute." Id. at 269.

41 See supra note 34.

42 See *NextWave Pers. Communications, Inc.*, 235 B.R. at 270.

43 See id. ("The basic defect in the FCC's argument is that Congress did not confer upon the FCC the power to determine unilaterally its own rights as a creditor in competition with and to the detriment of other creditors.").

44 Id. at 271 (stating:

> But in the absence of a clear expression by Congress, neither a Federal agency nor a private person has the power to dictate its own rights as a creditor and thereby confound the rights of other creditors and the debtor established by Congress under the bankruptcy laws. The FCA does not grant the FCC any such power and . . . Congress declined to pass a bill propounded by the FCC which would have expressly voided the Bankruptcy Court's jurisdiction in cases such as this).

45 See id. at 270-71. In a separate proceeding, the bankruptcy court also denied the FCC relief from the automatic stay. In re NextWave Pers. Communications, Inc., 235 B.R. 314 (Bankr. S.D.N.Y.), aff'd sub nom. NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications, Inc.), 241 B.R. 311 (S.D.N.Y.), rev'd, 200 F.3d 43 (2d Cir. 1999). The FCC appealed the bankruptcy court's decision to the district court, which affirmed the decisions and orders issued by the bankruptcy court in the adversary proceeding, including the findings that the bankruptcy court had jurisdiction over NextWave's fraudulent conveyance claim and that the court did not err in denying the FCC relief from the automatic stay. NextWave Pers. Communications, Inc. v. FCC (In re NextWave Pers. Communications, Inc.), 241 B.R. 311 (S.D.N.Y.), rev'd, 200 F.3d 43 (2d Cir. 1999).

46 See supra note 45 (detailing district court's holding).

47 28 U.S.C. § 2342 (1994 & Supp. IV 1998).

48 47 U.S.C. § 402 (1994 & Supp. IV 1998).

termine whether the automatic stay applied to the FCC.[49] Because the allocation of radio spectrum licenses lay within the FCC's regulatory purview, the bankruptcy court lacked jurisdiction over NextWave's claim.[50]

Following the Second Circuit's holding that the bankruptcy court could not alter the FCC's licensing requirements, the FCC announced by public notice that, despite NextWave's offer to make a present-value, lump-sum payment of its overdue obligation, its licenses would be reauctioned.[51] According to the FCC, NextWave's failure to make timely payments resulted in default under the conditions governing the grant of the licenses, thereby requiring automatic cancellation of the licenses.[52] In a subsequent proceeding, the FCC argued to the bankruptcy court that the cancellation did not run afoul of the automatic stay provisions since the cancellation occurred not through any direct action of the FCC, but rather because of NextWave's nonpayment.[53] In response, NextWave sought to have the public notice declared null and void.[54] The bankruptcy court granted the motion, reasoning that revoking the licenses, which were property of the estate, violated the automatic stay,[55] and that NextWave actually had not defaulted since, pursuant to 11 U.S.C. § 363,[56] it could not make payments to the FCC without authorization from the bankruptcy court.[57] Arguing that the ruling disregarded the Second Circuit's prior

---

[49] FCC v. NextWave Pers. Communications, Inc. (In re NextWave Pers. Communications, Inc.), 200 F.3d 43, 54 (2d Cir. 1999). For the relevant statutory language of 28 U.S.C. § 2342 and 47 U.S.C. § 402, see infra notes 93-96.

[50] *NextWave Pers. Communications, Inc.*, 200 F.3d at 54. The court of appeals noted, however, that the FCC, in its capacity as a creditor, would be subject to the bankruptcy court's jurisdiction. Id. at 55 (stating:

> This is not to say that [the bankruptcy] court[ ] lacked jurisdiction over every aspect of the relationship between the FCC and NextWave. To the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors. . . . We are merely holding that NextWave may not collaterally attack or impair in the bankruptcy courts the license allocation scheme developed by the FCC).

For a discussion of the illogic of using the concept of regulatory authority to define the jurisdictional reach of a bankruptcy court, see infra Part III.A.3.

[51] In re FCC, 217 F.3d 125, 132 (2d Cir. 2000).

[52] Id.

[53] Id.

[54] Id.

[55] In re NextWave Pers. Communications, Inc., 244 B.R. 253, 266-68 (Bankr. S.D.N.Y. 2000).

[56] 11 U.S.C. § 363 (1994).

[57] See *In re NextWave Pers. Communications, Inc.*, 244 B.R. at 274-76. Section 363(b)(1) requires the trustee to give notice and to provide an opportunity for objections at a hearing when seeking to use property of the estate outside the ordinary course of business. See 11 U.S.C. § 363(b)(1) ("The trustee, after notice and a hearing, may use, sell, or

decision, the FCC petitioned the Second Circuit for a writ of mandamus.[58]

In the subsequent proceeding, the Second Circuit agreed that the bankruptcy court violated the court of appeals's previous mandate and that, because the bankruptcy court did not have jurisdiction, its nullification of the FCC's order to reauction the licenses was improper.[59] The court again pointed out that review of the FCC's regulatory decisions lies within the exclusive province of the federal courts of appeals.[60] It reasoned that, because the FCC has exclusive power to regulate use of the spectrum and because it exercises its regulatory power when it grants a license to an entity under the regulations it has promulgated, the bankruptcy court lacked jurisdiction to review the FCC's subsequent actions regarding the licenses.[61]

In the Second Circuit's view, although the FCC auction rules took the form of a financial obligation, these rules primarily had a regulatory purpose—that is, governance of the spectrum.[62] The FCC's decision to reauction the licenses implicated its exclusive power to dictate the terms and conditions of licensure[63]—in this case, timely payment.[64] Thus, the decision was regulatory, and the bankruptcy court had no authority to interfere with the FCC's enforcement of its payment schedule.[65] The Second Circuit directed the bankruptcy court to vacate its previous order and to enter one that would deny NextWave's motion to enforce the automatic stay with regard to the licenses.[66]

---

lease, other than in the ordinary course of business, property of the estate."). As a debtor-in-possession, NextWave would have the same obligations as a trustee. See 11 U.S.C. § 1107 ("[A] debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter."). It is beyond the scope of this Comment to determine whether it would have been in the ordinary course of business for NextWave to make payments on its overdue obligation to the FCC.

58 In re FCC, 217 F.3d 125, 133 (2d Cir. 2000).

59 Id. at 138.

60 Id. at 138-40.

61 Id. at 135.

62 See id. ("[T]he regulatory purpose for requiring payment in full—the identification of the candidates having the best prospects for prompt and efficient exploitation of the spectrum—is quite obviously served in the same way by requiring payment on time.").

63 Id.

64 See id. at 136 ("There can be little doubt that if full payment is a regulatory condition, so too is timeliness.").

65 See id. at 137 ("[A] regulatory condition is a regulatory condition even if it is arbitrary. It is for the FCC to state its conditions of licensure, and for a court with power to review the FCC's decisions to say if they are arbitrary or valid.").

66 Id. at 141.

III
THE DOCTRINAL INCOHERENCE OF *NEXTWAVE*

The Second Circuit's decision in *NextWave* sets a dangerous precedent. In construing a bankruptcy court's jurisdictional reach narrowly, the court severely limited the ability of a bankruptcy court to preserve the assets of the estate.[67] The remainder of this Comment argues that the Second Circuit misconstrued the scope of a bankruptcy court's jurisdiction. This Part first examines whether, notwithstanding the *NextWave* decision, a bankruptcy court *may* assert jurisdiction over a debtor's PCS licenses and then whether a bankruptcy court *should* do so. To answer the first question, Part III.A sets forth the statutory justification for a bankruptcy court's exercise of authority over a debtor's licenses and explains why its jurisdiction does not conflict with a circuit court's exclusive review of all final orders of the FCC. Careful analysis of the Second Circuit's decision will reveal that a bankruptcy court is not divested of its jurisdiction simply because the FCC has acted within its regulatory authority with regard to a debtor's assets. Part III.B supplements this analysis by proposing that institutional considerations favor a bankruptcy court (as opposed to a court of appeals) as the proper forum for automatic stay determinations.

A. Establishing Bankruptcy Court Jurisdiction

1. 28 U.S.C. § 1334(e)

A bankruptcy court's jurisdiction over a debtor's licenses properly rests on 28 U.S.C. § 1334(e).[68] Pursuant to § 1334(e), a bankruptcy court—by referral from the district court[69]—has exclusive jurisdiction over all property of the debtor.[70] Recall that any action by a creditor to obtain possession of property of the estate is stayed in a bankruptcy proceeding.[71] Therefore, to determine whether the automatic stay applies to the FCC's attempt to reauction PCS licenses (or, put differently, whether a bankruptcy court has the authority to

---

[67] It should be noted that the Fifth Circuit Court of Appeals affirmed a bankruptcy court's decision to allow General Wireless, Inc. to retain its licenses and to avoid $894 million of its $954 million obligation to the FCC. United States ex rel. FCC v. GWI PCS 1 Inc. (In re GWI PCS 1 Inc.), 230 F.3d 788, 791 (5th Cir. 2000). By deciding the case on the merits, the Fifth Circuit's decision implicitly presumed that the bankruptcy court had jurisdiction. The affirmance also indicates that the bankruptcy court did not encroach upon the FCC's regulatory authority by holding that a portion of a licensee's debt obligation to the FCC could be avoided as a fraudulent transfer.

[68] 28 U.S.C. § 1334(e) (1994).

[69] See supra note 18 and accompanying text.

[70] See supra note 17 and accompanying text.

[71] See supra note 21 and accompanying text.

prevent the auction, pending a debtor's reorganization), one must first determine whether PCS licenses constitute property of the estate, as defined by 11 U.S.C. § 541(a)(1).[72] In conducting this analysis, it must be noted that property of the estate is a statutory term that is not necessarily coextensive with the general legal definition of property.[73] This Comment does not suggest that PCS licenses constitute property, but rather that, within the bankruptcy context, the degree of property interest a debtor holds in PCS licenses is sufficient to trigger a bankruptcy court's exclusive jurisdiction over licenses as property of the estate.

In its first *NextWave* decision, the Second Circuit explicitly stated that PCS licenses do not constitute property, noting that not even the federal government owns the spectrum.[74] The court concluded that, at most, a license "merely permits the licensee to use the portion of the spectrum covered by the license in accordance with its terms."[75] The view that a spectrum license does not grant its holder a property interest, however, is inconsistent with the position held by the FCC. As one court noted, the FCC has "expressly acknowledged that a licensee has a limited property interest in a cellular broadcasting license."[76] Moreover, the FCA allows for a license to be transferred, subject to certain statutory restrictions and conditions.[77] Under the

---

[72] See supra note 20 (discussing § 541(a)(1) and concept of property of estate).

[73] The legislative history to 11 U.S.C. § 541 (1994), which defines property of the estate, supports this view. See H.R. Rep. No. 95-595, at 368 (1977) ("Situations occasionally arise where property ostensibly belonging to the debtor will actually not be property of the debtor . . . ."), reprinted in 1978 U.S.C.C.A.N. 5963, 6324; accord S. Rep. No. 95-989, at 82 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5868.

[74] FCC v. NextWave Pers. Communications, Inc. (In re NextWave Pers. Communications, Inc.), 200 F.3d 43, 50 (2d Cir. 1999) ("The radio (or electromagnetic) spectrum belongs to no one. It is not property that the federal government can buy or sell."). The court of appeals described the spectrum as a "'scarce resource whose use [can] be regulated and rationalized only by the Government.'" Id. (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 376 (1969)).

[75] Id. at 51 (citing 47 U.S.C. § 301 (1994); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940)).

[76] In re Kan. Pers. Communications Servs., Ltd., 252 B.R. 179, 184 (Bankr. D. Kan.) (citing State St. Bank & Trust Co. v. Arrow Communications, Inc., 833 F. Supp. 41, 47 (D. Mass. 1993)), rev'd sub nom. United States v. Kan. Pers. Communications Servs., Ltd. (In re Kan. Pers. Communications Servs., Ltd.), 256 B.R. 807 (D. Kan. 2000); see also In re Ridgely Communications, Inc., 139 B.R. 374, 377 (D. Md. 1992) (stating that FCC has "acknowledged that a license confers certain private rights upon the licensee and that these rights may be sold for profit to a private party, subject to Commission approval"); Welch, 3 F.C.C.R. 6502, 6503, 6505 n.27 (1988) (acknowledging that licensee holds limited property interest in license).

[77] See 47 U.S.C. §§ 307(c), (d), 310(d) (1994). The First Circuit's position regarding the distribution of arrival and departure slots by the Federal Aviation Administration (FAA) to air carriers lends analogous support for the proposition that PCS licenses should be included in property of the estate. In FAA v. Gull Air, Inc. (In re Gull Air, Inc.), 890 F.2d

Bankruptcy Code, despite any restrictions or conditions on the transfer of a debtor's interest in property, such interest constitutes property of the estate.[78] Accordingly, several courts have held that a debtor's interest in a license subject to the FCC's authority is property of the estate, despite the restrictions or conditions imposed on transfer of the license.[79]

The FCC's actions in *NextWave* further support the notion that an FCC license should be defined as property of the estate. By entering into a security agreement with NextWave,[80] the FCC implicitly recognized NextWave's limited property interest in the licenses since a security interest will not attach unless the debtor has rights in the collateral subject to the security agreement.[81] One could argue that boil-

---

1255 (1st Cir. 1989), the court noted that, despite the fact that FAA regulations state that a carrier, when allocated a slot, is granted only a use privilege limited by the agency's regulatory authority, the carrier nonetheless receives a proprietary interest in the slot. Id. at 1260. The court, however, did not determine "whether a carrier's proprietary interest in an arrival or departure slot constitutes 'property of the estate' within the meaning of the Bankruptcy Code." Id. at 1261 n.8.

[78] See supra note 20.

[79] E.g., Ramsay v. Dowden (In re Cent. Ark. Broad. Co.), 68 F.3d 213, 214-15 (8th Cir. 1995); *In re Kan. Pers. Communications Servs., Ltd.*, 252 B.R. at 184-85; *In re Ridgely Communications, Inc.*, 139 B.R. at 376; Shimer v. Fugazy (In re Fugazy Express, Inc.), 114 B.R. 865, 871 (Bankr. S.D.N.Y. 1990), aff'd, 124 B.R. 426 (S.D.N.Y. 1991); cf. IRS v. Subranni (In re Atl. Bus. Cmty. Dev. Corp.), 994 F.2d 1069, 1073 (3d Cir. 1993) (noting that bankruptcy court had treated radio broadcasting license as property of estate under Bankruptcy Code). But see D.H. Overmyer Telecasting Co. v. Lake Erie Communications, Inc. (In re D.H. Overmyer Telecasting Co.), 35 B.R. 400, 401 (Bankr. N.D. Ohio 1983) (suggesting that, because "[a]n FCC broadcasting license is a property right only in a limited sense," it does not constitute property of estate).

[80] See supra note 33 (discussing NextWave's payment plan and security agreements).

[81] The bankruptcy court in *In re Kansas Personal Communications* made the same argument regarding the security agreement between Kansas Personal Communications, Ltd. and the FCC. See *In re Kan. Pers. Communications Servs., Ltd.*, 252 B.R. at 184-85. Despite reversing the bankruptcy court's decision, the district court in *In re Kansas Personal Communications* did not contest the idea that licenses constitute property of the estate. See United States v. Kan. Pers. Communications Servs., Ltd. (In re Kan. Pers. Servs., Ltd.), 256 B.R. 807, 810 (D. Kan. 2000) ("The FCC apparently acknowledges that a licensee holds a limited property interest in a license and does not challenge the bankruptcy court's holding on this point." (citation omitted)). One could argue that the security agreement analysis is invalid, given the general rule that proscribes private liens from attaching to FCC licenses. See *In re Ridgely Communications, Inc.*, 139 B.R. at 376 ("The general policy of the F.C.C. is that a lender/creditor may not perfect a security interest in a broadcast license."). Without this rule, the FCC could not preserve its regulatory authority over licensees and over the transfer of broadcast licenses. Espousing this principle, the FCC has held that "hypothecation endangers the independence of the licensee who is and who should be at all times accountable to the Commission in the exercise of the broadcasting trust." Merkley, 94 F.C.C.2d 829, 831 (1983) (internal quotation marks omitted), aff'd mem. sub nom. Merkely [sic] v. FCC, 776 F.2d 365 (D.C. Cir. 1985). Other courts have quoted this decision and principle with approval. E.g., *Subranni*, 994 F.2d at 1074; *In re Ridgely Communications, Inc.*, 139 B.R. at 376. If such a rule did not exist, "a private party with a lien on a broadcasting license would gain a degree of control over the license that it

erplate language in a security agreement, by itself, does not establish a property interest. However, not only did the FCC sign the notes, it also perfected its security interest in the licenses by filing UCC financing statements.[82] Such action expressly recognizes some form of property interest, albeit limited.

Finally, given that "Congress intended a broad range of property to be included in the estate,"[83] it is reasonable for a court to construe § 541 in such a manner that it will include a broadcasting license as property of the estate. The Second Circuit's approach in *NextWave*, however, was all-or-nothing: Either the license was actual property of the debtor or it was not.[84] The court failed to appreciate the implication of the licenses being subject to dispute in a bankruptcy proceeding. As a result, it failed to recognize a middle ground whereby NextWave could have a property interest in the licenses that was limited by the FCC's regulatory authority. Since one of the goals of bankruptcy court jurisdiction is to promote "the idea that a single forum should exist in which all the affairs of the debtor can be sorted out,"[85] excluding FCC licenses from property of the estate will render a bankruptcy court's exclusive jurisdictional grant over property of the estate largely ineffective.[86] If PCS licenses properly are regarded as

---

might exercise contrary to the public interest the FCC was created to protect." *Subranni*, 994 F.2d at 1074.

When it is the federal government that has taken a security interest in FCC licenses, however, the nature of the analysis is altogether different. For example, in holding that an IRS lien could attach to an FCC license for unpaid employment taxes, the court in *Subranni* reasoned that the "policy that prevents FCC licenses from being subjected to private liens is implicated only in an attenuated fashion when an IRS lien is transferred to the proceeds of an FCC approved bankruptcy sale of an FCC license issued to a bankrupt broadcaster." Id. at 1075. When the FCC is the entity that takes a security interest, the agency does not relinquish regulatory control over the licenses to a private party. Because the public policy concerns associated with private liens are not implicated, the *Kansas* court's reasoning is sound.

[82] In re NextWave Pers. Communications, Inc., 244 B.R. 253, 267 n.7 (Bankr. S.D.N.Y. 2000).

[83] United States v. Whiting Pools, Inc., 462 U.S. 198, 204 (1983).

[84] See FCC v. NextWave Pers. Communications, Inc. (In re NextWave Pers. Communications, Inc.), 200 F.3d 43, 51 (2d Cir. 1999) ("A license does not convey a property right; it merely permits the licensee to use the portion of the spectrum covered by the license in accordance with its terms.").

[85] Douglas G. Baird, Thomas H. Jackson & Barry E. Adler, Bankruptcy 40 (3d ed. 2000).

[86] See Shimer v. Fugazy (In re Fugazy Express, Inc.), 114 B.R. 865, 870 (Bankr. S.D.N.Y. 1990) (rejecting proposition that "the mere existence of [a] . . . federal regulation precludes property rights from coming within the wide horizon of property of the bankruptcy estate," for "'[t]o hold otherwise would be to rule . . . that a property interest subject to regulation, as nearly all are, or conditioned upon regulatory requirements, is not property of an estate'" (second omission in original) (quoting Beker Indus. Corp. v. Fla. Land & Water Adjudicatory Comm'n (In re Beker Indus. Corp.), 57 B.R. 611, 622 (Bankr.

property of the estate, however, a bankruptcy court effectively can administer the reorganization efforts of an FCC-regulated debtor.

2. *Reconciling the Jurisdictional Grants*

The Second Circuit in *NextWave* wrongly deprived the bankruptcy court of its jurisdiction, because it failed to recognize that a bankruptcy court's exclusive grant of jurisdiction over FCC licenses is distinct from, but in no way inconsistent with, the exclusive grant of jurisdiction to the courts of appeals over final orders issued by the FCC. Discussing the exclusivity of the circuit courts' jurisdiction to review the FCC's license allocation, the court of appeals observed: "The jurisdictional statutes leave no opening for the sort of jurisdiction over the FCC that the bankruptcy court seeks to exercise."[87] This conclusion is not as inevitable as the court suggests, however, because each court has an exclusive grant of jurisdiction over a separate, but closely related, issue that implicates the automatic stay. A description of how the statutes function provides a clearer view of why the different statutory grants do not conflict.

A bankruptcy court, through referral from the district court,[88] has original jurisdiction over all civil proceedings arising in or related to cases under the Bankruptcy Code, notwithstanding any statutory grants of exclusive jurisdiction to other courts.[89] Moreover, it has exclusive jurisdiction over property of the estate.[90] Finally, bankruptcy judges "may hear and determine . . . all core proceedings arising under title 11,"[91] including automatic stay determinations (which sometimes inquire whether an agency has acted as a creditor or as a regulator).[92]

S.D.N.Y. 1986))), aff'd, 124 B.R. 426 (S.D.N.Y. 1991). Excluding licenses would have the effect of punishing innocent creditors of an FCC-regulated debtor. Cf. LaRose v. FCC, 494 F.2d 1145, 1148 (D.C. Cir. 1974) ("[I]n recognition of the public interest in protecting innocent creditors, the Commission will approve the sale and assignment of the bankrupt's license when the transaction will not unduly interfere with the FCC mandate to insure that broadcast licenses are used and transferred consistently with the Communications Act.").

87 In re FCC, 217 F.3d 125, 139-40 (2d Cir. 2000).

88 See supra note 18 and accompanying text.

89 28 U.S.C. § 1334(b) (1994) ("*Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts*, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." (emphasis added)).

90 See supra notes 17-18 and accompanying text.

91 28 U.S.C. § 157(b)(1).

92 Core proceedings include "matters concerning administration of the estate." 28 U.S.C. § 157(b)(2)(A). Automatic stay determinations under 11 U.S.C. § 362 (1994 & Supp. IV 1998) fall within Chapter 3 of the Bankruptcy Code, which is entitled "Case Administration." 11 U.S.C. ch. 3 (1994). It follows that "[n]othing is more intrinsic to a case under title 11 than violations of the automatic stay." Gumport v. ICC (In re Transcon Lines), 147 B.R. 770, 774 (Bankr. C.D. Cal. 1992).

On the other hand, under 28 U.S.C. § 2342[93] and 47 U.S.C. § 402,[94] the courts of appeals have exclusive jurisdiction over any challenge to the validity of a final order of the FCC.[95] The Second Circuit specifically relied on § 402(b) to conclude that "judicial review *of all cases involving the exercise of the* [*FCC's*] *licensing power* is limited to [the Court of Appeals for the D.C. Circuit]."[96]

At first glance, it seems that the jurisdictional grants to the courts of appeals and the bankruptcy courts are irreconcilable, but the conflict is more apparent than real, for two reasons. First, because both courts have concurrent jurisdiction to make automatic stay determinations,[97] an overlap occurs between the exclusive grant of jurisdiction to a bankruptcy court over property of the estate and the exclusive grant of jurisdiction to the courts of appeals over final orders of the FCC.[98] Section 1334(b) explicitly states that no act of Congress shall prevent a district court (and bankruptcy court by referral) from exercising its original jurisdiction over civil proceedings arising under the Code.[99] Accordingly, the bankruptcy court retains its jurisdiction to make an automatic stay determination, despite the fact that such a determination implicates a final order of the FCC (in this case, the

---

93 28 U.S.C. § 2342 (1994 & Supp. IV 1998).

94 47 U.S.C. § 402(a) (1994 & Supp. IV 1998).

95 Section 2342 provides: "The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47[.]" 28 U.S.C. § 2342(1). Section 402(a), in turn, provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission" shall be confined to the courts of appeals. 47 U.S.C. § 402(a).

96 In re FCC, 217 F.3d 125, 140 (2d Cir. 2000) (second alteration in original). Section 402(b) restricts appeal of certain decisions and orders of the FCC to the Court of Appeals for the District of Columbia, including any appeal "[b]y the holder of any . . . station license which has been modified or revoked by the [FCC]." 47 U.S.C. § 402(b)(5).

97 Courts of appeals can, and on occasion do, make automatic stay determinations. See Erti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Litig.), 765 F.2d 343, 347 (2d Cir. 1985) ("Whether the stay applies to litigation otherwise within the jurisdiction of a district court or court of appeals is an issue of law within the competence of both the court within which the litigation is pending . . . and the bankruptcy court supervising the reorganization."); see, e.g., Brock v. Morysville Body Works, Inc., 829 F.2d 383, 387 (3d Cir. 1987) (noting that with regard to OSHA citation, "[w]e have no difficulty deciding that we may determine the applicability of the automatic stay"); NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 939 (6th Cir. 1986) ("We hold that we have jurisdiction to determine whether the NLRB unfair labor practice proceeding was subject to the automatic stay.").

98 Accordingly, if the validity of an FCC order were challenged before a court of appeals, the court could make an automatic stay determination with regard to the licenses. This accounts for the overlap between the two exclusive grants of jurisdiction.

99 See supra note 89.

reauction of NextWave's licenses).[100] Second, the two statutory grants of exclusive jurisdiction do not conflict since, as the following section demonstrates, appearances before bankruptcy courts regarding the automatic stay involve wholly different questions than do appearances in front of the courts of appeals regarding final orders of the FCC.

3. The Midas Touch

Reconciling the apparently conflicting grants of jurisdiction to the bankruptcy court and the courts of appeals when agency action implicates property of the debtor's estate requires recognizing a distinction between the questions presented to the two sets of courts—the legitimacy of agency action versus the nature of agency action. While circuit courts generally inquire into the legitimacy of agency action, a bankruptcy court only looks into the *nature* of agency action, asking whether it serves a regulatory or pecuniary purpose. One crucial flaw in the Second Circuit's reasoning was that it ignored this distinction. By focusing on what the FCC *is* rather than what it *did*, the Second Circuit assumed its conclusion. If the FCC's status as a "regulatory agency" means that any action taken under the authority vested in it by Congress is regulatory in nature, then it seems inevitable that the bankruptcy court always will lack jurisdiction to consider such actions—because they are always regulatory, they will never be stayed. The problem with this approach should be obvious: It allows the regulatory power exception to swallow the general requirements of the automatic stay provision whenever agency action is at issue.

The illogic of the Second Circuit's approach is that it distinguishes between actors, rather than actions, and thereby focuses merely on

---

[100] One court took a similar view in holding that a bankruptcy court and a court of appeals share jurisdiction "with respect to actions to enjoin, set aside, suspend or determine the validity of [Interstate Commerce Commission] Bankruptcy Regulations." Gumport v. ICC (In re Transcon Lines), 147 B.R. 770, 774 (Bankr. C.D. Cal. 1992). For discussion of why institutional competence favors a bankruptcy court as the proper forum for automatic stay determinations when a court of appeals and a bankruptcy court have concurrent jurisdiction, see infra Part III.B.

An alternative, formalistic argument is that neither 28 U.S.C. § 2342 nor 47 U.S.C. § 402 applies in this case. The two statutes concern challenges to the FCC's actions, or as Congress put it in § 402, "[a]ny proceeding to *enjoin, set aside, annul, or suspend* any order of the [FCC]." 47 U.S.C. § 402(a) (emphasis added). While an automatic stay determination as to whether the FCC may reauction licenses is undoubtedly a proceeding, it is not a proceeding to enjoin, set aside, annul, or suspend an action of the FCC. Rather, it is a proceeding to *enforce* the automatic stay—that is, to inform the FCC that the stay has taken effect and that the FCC may not move against the licenses. Because the automatic stay arises from "the operation of a legislative enactment, not by court order," (Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 114 (1st Cir. 1994); see also supra note 14) a bankruptcy court does not overstep its jurisdictional bounds when it conducts a stay determination regarding FCC licenses.

the status of the FCC as a federal agency with regulatory authority. In explaining why the bankruptcy court lacked jurisdiction, the Second Circuit stated: "When the FCC decides which entities are entitled to spectrum licenses under rules and conditions it has promulgated, it . . . exercises the full extent of its regulatory capacity."[101] To ask whether an agency acts within its regulatory capacity, however, overlooks the only question relevant to the determination of whether the bankruptcy court has jurisdiction: Assuming that the FCC acted within its regulatory capacity (as the legitimacy of its action is indeed a question for the court of appeals), was that action regulatory in nature, or rather did it more closely resemble an action of a creditor (albeit one with regulatory authority)?[102]

Under the Second Circuit's approach, the FCC is granted the "Midas Touch": Because licenses fall within the agency's regulatory purview, they will be deemed sacrosanct and immune from a bankruptcy court's jurisdiction, and thus exempt from the automatic stay.[103] The Midas Touch has the effect of negating the exclusive grant of jurisdiction to the bankruptcy court over property of the estate and the original grant of jurisdiction over automatic stay determinations. Because of the "regulatory capacity" of the FCC, the bankruptcy court always will be deemed to lack jurisdiction.[104] Moreover, anytime the FCC finds itself in the role of creditor, all it needs to do is invoke the talisman of its regulatory capacity to exempt itself from the reach of the Bankruptcy Code.[105] The Second Circuit's proffered approach, however, makes no sense.

---

[101] FCC v. NextWave Pers. Communications, Inc. (In re NextWave Pers. Communications, Inc.), 200 F.3d 43, 54 (2d Cir. 1999).

[102] By virtue of its exclusive authority to grant licenses, any action the FCC takes with regard to licenses inevitably involves its "regulatory capacity." The distinction between actions, however, allows for an adequate and proper inquiry, for an agency may act within its "regulatory capacity," but nonetheless assume the role of a creditor. See Eddleman v. U.S. Dep't of Labor, 923 F.2d 782, 791 (10th Cir. 1991) ("Of course, not every agency action against a debtor can be characterized as one that enforces "'police or regulatory power.'"), overruled in part on other grounds by Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson, 968 F.2d 1003 (10th Cir. 1992).

[103] See In re FCC, 217 F.3d 125, 135 (2d Cir. 2000) (stating:

> The FCC need not defend its regulatory calculus in the bankruptcy court; whenever an FCC decision implicates its exclusive power to dictate the terms and conditions of licensure, the decision is regulatory. And if the decision is regulatory, it may not be altered or impeded by any court lacking jurisdiction to review it

(emphasis omitted)).

[104] *NextWave Pers. Communications, Inc.*, 200 F.3d at 54.

[105] In refusing to follow the Second Circuit's approach, one bankruptcy court observed: "If the FCC contends that its action is regulatory, apparently the bankruptcy court must accept that assurance at face value and lacks authority to determine whether the Bankruptcy Code has any relevance or impact on the relationship between the FCC and the

a. Undoing the Midas Touch: The Regulatory Power Exception to the Automatic Stay. "[W]hen the government wears two hats, . . . courts have had to determine which hat the government is wearing in connection with the conduct at issue."[106] By enacting the police and regulatory exception to the automatic stay, Congress implicitly recognized that an agency could act both as a regulator and creditor. Legislative history to the exception explicitly states that the "section is intended to be given a narrow construction" and is "not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate."[107] Shortly following the enactment of the Bankruptcy Code, one commentator warned that, absent careful application of the police power and regulatory exception to the automatic stay (i.e., only in exceptional circumstances), the chances of successful reorganization by a government-sanctioned business would be reduced greatly.[108] With these concepts in mind, the Second Circuit's holding that the FCC's action "undoubtedly" fell within the regulatory exception must be examined more carefully.

For purposes of the automatic stay, a court should not assume that, because an agency acts within its regulatory purview, it acts as a regulator. The Second Circuit in *NextWave* recognized that a bankruptcy court would have jurisdiction over the FCC and NextWave so long as a debtor-creditor relationship existed between the agency and the debtor.[109] Yet in an about-face, it concluded that "[t]he fact that market forces are the technique used to achieve [its] regulatory pur-

---

debtor." In re Kan. Pers. Communications Servs., Ltd., 252 B.R. 179, 193 (Bankr. D. Kan.), rev'd sub nom. United States v. Kan. Pers. Communications Servs., Ltd. (In re Kan. Pers. Communications Servs., Ltd.), 256 B.R. 807 (D. Kan. 2000); see also Lipin, FCC Move Sparks Ire, supra note 10, at C1 ("'The implication is, anytime government is a creditor . . . all governmental authorities will try to obfuscate the issue by exercising police and regulatory power.'" (quoting Chaim Fortgang, partner at Wachtell, Lipton, Rosen & Katz)).

106 *In re Kan. Pers. Communications Servs., Ltd.*, 252 B.R. at 191.

107 124 Cong. Rec. H32,395 (1978) (statement of Rep. Edwards); accord id. S33,995 (1978) (statement of Sen. DeConcini). One court has held that the automatic stay precludes the FCC "from rendering any administrative cancellation of [a license] . . . unless the action was taken to protect the public health or safety." Shimer v. Fugazy (In re Fugazy Express, Inc.), 114 B.R. 865, 873 (Bankr. S.D.N.Y. 1990), aff'd, 124 B.R. 426 (S.D.N.Y. 1991); see also Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 113 (1st Cir. 1994) ("[N]o person or entity has a choate power to foreclose on property belonging to a bankrupt's estate so long as the automatic stay is in place.").

108 Frank R. Kennedy, Automatic Stays Under the New Bankruptcy Law, 12 U. Mich. J.L. Reform 3, 64 (1978) ("[I]t is entirely conceivable that enforcement during an interim before judicial relief can be obtained will be fatal to the hope of financial rehabilitation of a debtor."); see also supra note 23 and accompanying text (discussing importance of automatic stay for corporate reorganization).

109 FCC v. NextWave Pers. Communications, Inc. (In re NextWave Pers. Communications, Inc.), 200 F.3d 43, 55 (2d Cir. 1999) ("To the extent that the financial transactions

pose does not turn the FCC into a mere creditor."[110] Granted, this view is consistent with the principle that, sometimes, regulatory action assumes the form of a pecuniary obligation.[111] In *NextWave*, however, the court's conclusion resulted from excessive deference to the FCC's assertion that it had acted within its regulatory role.[112] Such an analysis entirely ignores the fact that the FCC conducted a problematic set of auctions that left the agency standing in the shoes of a creditor.[113] The better approach, therefore, would be for a court to distinguish among agency actions, rather than to separate an agency from other actors.

b. Petitioning for Relief. Of course, a bankruptcy court's jurisdictional authority to prevent actions against the debtor's estate under the automatic stay will be of little practical use if the FCC acts against the estate before the court has had an opportunity to determine whether such action serves a pecuniary purpose and therefore falls within the stay. In *NLRB v. Edward Cooper Painting, Inc.*,[114] the Sixth Circuit held that, since § 362 exceptions do not require an administrative agency to request relief from the bankruptcy court, the NLRB permissibly could proceed with an unfair labor practice hearing based on its belief that, because it is acting in a regulatory capacity, its proceeding is not stayed.[115] Furthermore, for reasons of

---

between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors.").

110 Id. at 54.

111 See Universal Life Church, Inc. v. United States (In re Universal Life Church, Inc.), 128 F.3d 1294, 1299 (9th Cir. 1997) ("[M]ost government actions which fall under [§ 362(b)(4)] have some pecuniary component, particularly those associated with fraud detection. This does not abrogate their police power function."); United States v. Commonwealth Cos. (In re Commonwealth Cos.), 913 F.2d 518, 522-23 (8th Cir. 1990) (stating:

> In accordance with the clearly expressed congressional intent, those circuits addressing the question have concluded that § 362(b)(4) does not exclude a governmental action to obtain the entry of a money judgment for a past violation of the law simply because money damages are the only relief sought in the action);

see also S. Rep. No. 95-989, at 52 (1978) ("[W]here a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay."), reprinted in 1978 U.S.C.C.A.N. 5787, 5838.

112 See supra note 103.

113 See Lipin, FCC Move Sparks Ire, supra note 10, at C1 ("The Second Circuit 'bails the FCC out of a terrible political position. . . . The prices of the licenses have gone way up, and the government wants to capture the upside.'" (quoting Professor Kenneth Klee)).

114 804 F.2d 934 (6th Cir. 1986).

115 Id. at 940-41. The court relied on the legislative history of § 362 which states that "'[b]y excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief

judicial economy, the Supreme Court, in *Board of Governors v. MCorp Financial, Inc.*,[116] stated that, for an administrative agency to avail itself of the regulatory exception, it does not have to seek approval from the bankruptcy court that its proposed exercise of regulatory power is legitimate.[117] The Second Circuit relied on this position in concluding that the bankruptcy court in *NextWave* did not have jurisdiction over the FCC's decision to reauction NextWave's licenses.[118]

But reliance on the Supreme Court's reasoning is misplaced. In both *MCorp* and *Edward Cooper*, the question was whether the agency could proceed with a *hearing* to determine the rights and obligations of the debtor.[119] A hearing differs greatly from a final order or an enforcement action when a bankruptcy court's jurisdiction over property of the estate is directly implicated.[120] Properly understood, *MCorp* stands only for the limited proposition that the "automatic stay provisions of the Bankruptcy Code [do not] have any application to *ongoing, nonfinal* administrative proceedings."[121] The Court's reasoning seems to indicate that, once property of the estate is

---

from the stay.'" Id. at 941 (quoting S. Rep. No. 95-989, at 51, reprinted in 1978 U.S.C.C.A.N. 5787, 5837).

116 502 U.S. 32 (1991).

117 See id. at 40 (stating:

> MCorp contends that in order for § 362(b)(4) to obtain, a court must first determine whether the proposed exercise of police or regulatory power is legitimate and that, therefore, in this litigation the lower courts did have the authority to examine the legitimacy of the Board's actions and to enjoin those actions. We disagree. MCorp's broad reading of the stay provisions would require bankruptcy courts to scrutinize the validity of every administrative or enforcement action brought against a bankrupt entity. Such a reading is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts. We therefore reject MCorp's reading of § 362(b)(4)).

118 See In re FCC, 217 F.3d 125, 138-39 (2d Cir. 2000) (discussing *MCorp*).

119 In *MCorp*, the Board of Governors of the Federal Reserve had initiated administrative proceedings against MCorp Financial, Inc. (MCorp), a bank holding company and Chapter 11 debtor. MCorp sought to enjoin the Board of Governors on the theory that such action violated the automatic stay. *MCorp*, 502 U.S. at 34, 36. The Supreme Court held that the judicial review provision of the Financial Institutions Supervisory Act of 1966 (FISA), barred the district court from enjoining the prosecution. Id. at 465 ("[T]he specific preclusive language in 12 U.S.C. § 1818(i)(1) is not qualified or superseded by the general provisions governing bankruptcy proceedings on which MCorp relies." (citation omitted)). The preclusion provision referenced by the Court reads: "[E]xcept as otherwise provided in this section . . . no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. § 1818(i)(1) (Supp. V 1988).

120 See infra notes 121-22 and accompanying text.

121 *MCorp*, 502 U.S. at 41 (emphasis added).

threatened by a final agency decision, the analysis would change to the extent that a bankruptcy court could assert its jurisdiction.[122]

Moreover, while the court in *Edward Cooper* relied on legislative history of § 362 to find that the NLRB did not have to request relief from the stay,[123] other language in that history suggests that some actions that otherwise might be excepted automatically may be stayed and that it is up to the bankruptcy court to make such a determination.[124] One bankruptcy court has gone so far as to hold that "§ 362 of the Code stays all enforcement activity automatically," such that the FCC must obtain relief from the automatic stay if it is to render an administrative cancellation of a license.[125]

As described by the First Circuit, Congress has "carved out" a "preferred position" for bankruptcy courts when disposition of property of the estate is involved.[126] This is necessarily so because of the importance of preserving the assets of the estate for orderly distribution and successful reorganization by the debtor. Accordingly, when regulatory action touches upon a debtor's assets, notwithstanding the broad discretion vested by Congress in regulatory agencies, an agency must contend not with the "limited authority" of a bankruptcy court (as the Court in *MCorp* stated),[127] but rather with the preferred position carved out by Congress for bankruptcy courts with regard to protection of property of the estate.

It is unsound for an agency not to petition the bankruptcy court for relief.[128] Such an approach violates the public policy of promoting corporate reorganization.[129] While actions taken in violation of the

---

122 Id. at 41 ("If and when the Board's proceedings culminate in a final order, and if and when judicial proceedings are commenced to enforce such an order, then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction under 28 U.S.C. § 1334(b).").

123 See supra note 114-115 and accompanying text.

124 See S. Rep. No. 95-989, at 51 (1978) (stating:

> There are some actions, enumerated in the exceptions, that generally should not be stayed automatically upon the commencement of the case, for reasons of either policy or practicality. Thus, the court will have to determine on a case-by-case basis whether a particular action which may be harming the estate should be stayed),

reprinted in 1978 U.S.C.C.A.N. 5787, 5837.

125 Shimer v. Fugazy (In re Fugazy Express, Inc.), 114 B.R. 865, 873 (Bankr. S.D.N.Y. 1990), aff'd, 124 B.R. 426 (S.D.N.Y. 1991).

126 Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 114 (1st Cir. 1994).

127 See supra note 117.

128 Cf. NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934, 940-41 (6th Cir. 1986) ("[A] more orderly procedure would require the [agency] to petition the bankruptcy court for permission to proceed.").

129 Protection of the debtor's assets goes hand in hand with Congress's will that corporate reorganizations will allow a business to "continue to operate, provide its employees

stay are invalid and voidable in the absence of limited equitable circumstances,[130] a debtor affirmatively must challenge the creditor's violation in order to undo such actions. This requires that the debtor "spend a considerable amount of time and money policing and litigating creditor actions."[131] If a regulatory agency decides to proceed against property protected by the automatic stay, the bankruptcy court may authorize the recovery of damages, including punitive damages in appropriate circumstances, in the event that an individual is injured by a willful violation of the stay.[132] By the time the action is declared void, however, the agency already has realized upon property of the estate. While the debtor and its innocent creditors may be able to recover costs for the damage under § 362(h), the debtor's already precarious financial condition will have been further impaired. Given the notion that some assets are more valuable as a going concern (i.e., used for production in the industry for which they were intended), damage awards will be of little comfort to a wireless service provider whose licenses the FCC has auctioned improvidently. Accordingly, it makes sense to allow a bankruptcy court to pass in the first instance on the nature of the FCC's actions regarding a debtor's licenses.

---

with jobs, pay its creditors, and produce a return for its stockholders." H.R. Rep. No. 95-595, at 220 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6179.

130 E.g., Easley v. Pettibone Mich. Corp., 990 F.2d 905, 911 (6th Cir. 1993) (stating:

> [O]nly where the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result, will the protections of section 362(a) be unavailable to the debtor.).

131 Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992). For this reason, some courts will hold actions that violate the automatic stay to be void, rather than voidable. E.g., In re Advent Corp., 24 B.R. 612, 614 (B.A.P. 1st Cir. 1982); Pettibone Corp. v. Baker (In re Pettibone Corp.), 110 B.R. 848, 852-53 (Bankr. N.D. Ill.), aff'd, 119 B.R. 603 (N.D. Ill. 1990), vacated on other grounds sub nom. Pettibone Corp. v. Easley, 935 F.2d 120 (7th Cir. 1991); Richard v. City of Chicago, 80 B.R. 451, 453 (N.D. Ill. 1987); United States v. Coleman Am. Cos. (In re Coleman Am. Cos.), 26 B.R. 825, 831 (Bankr. D. Kan. 1983); Miller v. Savings Bank of Balt. (In re Miller), 10 B.R. 778, 780 (Bankr. D. Md. 1981), aff'd, 22 B.R. 479 (D. Md. 1982); cf. *Schwartz*, 954 F.2d at 571 ("If violations are void, . . . debtors are afforded better protection and can focus their attention on reorganization."); *Edward Cooper Painting, Inc.*, 804 F.2d at 940 (noting that agency "proceed[s] at its own risk" when it does not petition for relief, for if bankruptcy court finds that agency takes creditor action against debtor, such action is void ab initio).

132 11 U.S.C. § 362(h) (1994) ("An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.").

B. The Jurisdictional Tie-Breaker

Thus far, this Comment has argued that a bankruptcy court *may* decide whether the FCC can reauction the licenses of a debtor. It now advances the proposition that a bankruptcy court *should* make such a determination. Institutional competence favors a bankruptcy court as the proper forum for automatic stay determinations.[133] This is not to suggest that courts of appeals may not make such determinations. To the contrary, they unquestionably have jurisdiction to determine the applicability of the automatic stay to proceedings before them.[134] But when a court of appeals and a bankruptcy court share concurrent original jurisdiction, "[t]he question then becomes which court should assume original jurisdiction."[135]

When considering Congress's intent "to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,"[136] appellate courts, in the interest of "sound judicial administration,"[137] should allow bankruptcy courts to make automatic stay determinations, and thus avoid great cost to the debtor's estate.[138] By "centralizing construction of the automatic stay" in bankruptcy courts, issues of law will be uniformly resolved and equal treatment of creditors will be assured.[139] Even though, as the Second Circuit pointed out in *NextWave*, courts of appeals have jurisdiction to review the FCC's regulatory action, a court of appeals should defer to the institutional competence of a bankruptcy court when property of the estate

---

133 See Harry D. Lewis, Enjoining Regulatory Action Against Chapter 11 Debtors, 96 Com. L.J. 335, 336 (1991) ("[B]alancing the competing interests of government agencies and other participants in the process of Chapter 11 reorganization is a task appropriately handled by either bankruptcy courts or the federal district courts sitting in bankruptcy.").

134 See supra note 97.

135 Brock v. Morysville Body Works, Inc., 829 F.2d 383, 391 (3d Cir. 1987) (Weis, J., dissenting).

136 Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984); see also *Brock*, 829 F.2d at 386 ("The jurisdictional grant of section 1334(b) similarly exists to allow the expeditious resolution of bankruptcy claims. Transferring controversies that are related to the petitioner's bankruptcy permits the district court to expeditiously complete the bankruptcy proceedings without the necessity of awaiting the outcome of . . . federal trials.").

137 *Brock*, 829 F.2d at 391 (Weis, J., dissenting).

138 The majority in *Brock* implicitly acknowledged this view in its discussion of concurrent jurisdiction between a court of appeals and a bankruptcy court. See id. at 386-87 ("Any order we may find enforceable would certainly have financial consequences for the distressed debtor, and it is the bankruptcy court that is familiar with the debtor's affairs."); see also id. at 391 (Weis, J., dissenting) ("[C]ompared to an appellate tribunal, a bankruptcy court has far more familiarity with the debtor's estate and better facilities for developing relevant facts . . . .").

139 Erti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Litig.), 765 F.2d 343, 349 (2d Cir. 1985).

is involved, rather than defer to findings made ex post by the agency that it has acted in its regulatory capacity.[140]

Of course, one could argue that, although property of the estate will be affected by the decision of a court of appeals, the decision itself has nothing to do with the estate, but rather with how the agency acted. Accordingly, a court of appeals has as much institutional competence as a bankruptcy court to answer that question. But courts of appeals do not have the extensive experience answering bankruptcy-related questions that bankruptcy courts do. That experience directly translates into a better understanding of the manner in which certain decisions affect case administration, especially decisions regarding property of the estate. Indeed, it is curious that in *NextWave*, the Second Circuit never mentioned any case discussing the regulatory power exception to the automatic stay. Such an omission evinces a failure to distinguish among agency actions—a key component in determining exception from the automatic stay. Instead, the Second Circuit separated the FCC from creditors, merely because of its status as an agency. Although the court's approach is not necessarily indicative of how other courts of appeals would decide a similar case, deferral to a bankruptcy court is more likely to secure consideration of those issues affecting administration of the estate.

In the end, the proposed "deferential" approach is functionally desirable: It promotes judicial economy and stability, while preserving the debtor's estate. When a federal regulatory agency seeks to exercise its power over property involved in a bankruptcy proceeding, all it must do is seek relief from the bankruptcy court.[141] If the court grants relief, then the agency may proceed under its statutory mandate and continue with its regulatory scheme. The agency will be unable to proceed against the debtor only if the court decides that the agency has acted in the capacity of a creditor, rather than a regulator. If the agency disagrees with the court's determination, then it has recourse through appellate review.[142] The most appealing aspect of this

---

[140] Cf. United States ex rel. FCC v. GWI PCS 1 Inc. (In re GWI PCS 1 Inc.), 230 F.3d 788, 807 (5th Cir. 2000) ("[W]here an agency's interpretation occurs at such a time and in such a manner as to provide a convenient litigation position for the agency, we have declined to defer to the interpretation.").

[141] For discussion of whether or not petition for relief by an agency that believes it qualifies for the regulatory power exception is required before it moves against property of the debtor, see supra Part III.A.3.b.

[142] See 28 U.S.C. § 158 (1994) (providing for appellate review of bankruptcy court orders). An appeal of right exists for final orders of a bankruptcy court. Id. § 158(a)(1). For purposes of appeal, an order granting or denying relief from the automatic stay is a final order. Banctexas Dallas v. Chateaugay Corp. (In re Chateaugay Corp.), 880 F.2d 1509, 1512-14 (2d Cir. 1989). An order of the bankruptcy court can be appealed to the district court or the bankruptcy appellate panel if the circuit has established one. 28 U.S.C.

approach is that it errs on the side of caution, since the harm would be greater to the debtor than to the agency in the event of an erroneous determination.[143]

Conclusion

When Congress enacted the Bankruptcy Code, it clearly expressed a federal and societal interest in guaranteeing financially distressed, but nonetheless viable, entities the opportunity to reorganize. Accordingly, other circuits should disregard *NextWave*: To follow its precedent is to "effectively tie the hands of the bankruptcy and district courts from exercising their exclusive jurisdiction to interpret and apply the provisions of the Bankruptcy Code."[144] Although a bankruptcy court would not have the jurisdiction to review the legitimacy of regulatory agency action, it always and necessarily must have the jurisdiction to determine the scope and reach of the automatic stay. Such determinations are at the core of bankruptcy court jurisdiction,[145] a principle that courts of appeals should not forget.

---

§ 158(a), (b)(1). Decisions of the district courts or bankruptcy appellate panels can be appealed to the courts of appeals. Id. § 158(d).

143 Were a court of appeals to hold that the FCC could reauction a debtor's licenses without fully appreciating the consequences for the financial status of the debtor, in all likelihood the debtor would not be able to reorganize. If however, the bankruptcy court wrongly decided to stay the FCC from reauctioning the licenses, the harm would be delay, but not to such an extent as to impede seriously the FCC's goal of "getting the spectrum up and running as quickly as possible." Lipin, Deals & Deal Makers, supra note 10, at C17.

144 In re Kan. Pers. Communications Servs., Ltd., 252 B.R. 179, 194 (Bankr. D. Kan.), rev'd sub nom. United States v. Kan. Pers. Communications Servs., Ltd. (In re Kan. Pers. Communications Servs., Ltd.), 256 B.R. 807 (D. Kan. 2000); see also id. at 193 ("To say that the bankruptcy court must accept the FCC's position without question, is to render § 362 meaningless.").

145 See id. at 194 (stating:

> To be sure, this Court is without jurisdiction to examine or question the validity of the FCC's regulations or the legitimacy of the FCC's conduct. This rule of law applies not only to the FCC, but to other regulatory agencies. There is a distinction, however, between questioning the validity of the FCC's regulations or conduct, and determining whether the FCC's conduct is within the scope of the automatic stay. In fact, courts routinely determine whether the stay applies, and if so, whether one of the exceptions to the stay applies. . . . The Second Circuit's decision fails to recognize this critical distinction

(footnote omitted)).