Boston College Law Review

Volume 53 | Issue 5 Article 5

11-26-2012

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Jennifer Kent
Boston College Law School, jennifer.kent.2@bc.edu

Recommended Citation

Jennifer Kent, *Lien on Me: The Survival of Security Interests in Revenues from the Sale of an FCC License*, 53 B.C.L. Rev. 1807 (2012), http://lawdigitalcommons.bc.edu/bclr/vol53/iss5/5

LIEN ON ME: THE SURVIVAL OF SECURITY INTERESTS IN REVENUES FROM THE SALE OF AN FCC LICENSE

Abstract: A debtor can give a security interest in collateral only when, among other things, the debtor has rights in that collateral. This rule becomes complicated when a holder of a Federal Communications Commission (FCC) license wishes to grant a security interest in the proceeds it may receive from selling that license in the future. The question of when an FCC licensee acquires the right to receive revenues from the sale of its license is a controversial one, due to the fact that any sale of an FCC license cannot occur until there is (1) a contract for sale and (2) approval from the FCC. The existence of contingencies in future rights to payment, however, is not a new phenomenon. In several industries, acquisition of the item from which the right to payment stems triggers this right—in the FCC context, this right arises upon acquisition of the FCC license itself. This Note argues that, given the similarities between the FCC licensing scheme and these other industries, and the presence of only inconsequential differences, there is no reason to treat FCC licensing differently. As such, the right to receive revenues from the sale of an FCC license should be found to exist upon acquisition of the FCC license, and should not depend on whether the two contingencies required for sale have occurred.

Introduction

The telecommunications industry is responsible for transmission of a large portion of information between parties in the United States.[1] Given the importance of communication and the reliance on technology in today's society, the telecommunications industry is a vital component of the world's economy.[2] Although information can be transmitted through wires and cables, a significant amount of telecommunications

[1] *What We Do*, FCC, http://www.fcc.gov/what-we-do (last visited Oct. 12, 2012).

[2] *See* Press Release, Research and Markets, Telecom Sector in United States—Trends and Opportunities (2011–2015) Is Essential Reading for Those Operating in the Telecoms Field (Aug. 11, 2011), *available at* http://www.businesswire.com/news/home/20110811006356/en/Research-Markets-Telecom-Sector-United-States.

services are offered wirelessly over a spectrum of radio frequencies (the "spectrum").[3]

Like all businesses, entities within the telecommunications industry often need substantial financing to operate.[4] The high cost of Federal Communications Commission (FCC) licenses makes this particularly true for entities looking to enter the telecommunications market.[5] Potential entrants must have a license to operate on the spectrum, but few have the capital needed to place a successful bid at auction.[6] Any lender willing to finance a telecommunications provider will require the provider to offer collateral to secure the loan and ensure repayment.[7] Often, creditors seek the debtor's right to receive proceeds from the future sale of the debtor's FCC license ("sale revenues") as collateral.[8]

The enforceability implications of this security interest are unclear, however, when the sale of the license occurs after a provider has filed bankruptcy.[9] For a security interest in an item to survive bankruptcy, the item must have been subject to a valid pre-petition security interest, or be proceeds of collateral that was subject to a valid pre-petition security interest.[10] A valid security interest is created when the interest at-

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[3] *See* Press Release, *supra* note 2. These services include broadcast television, broadband internet, and cellular phones. *See* Stuart Minor Benjamin et al., Telecommunications Law and Policy 12 (2d ed. 2006).

[4] Stephen L. Sepinuck, *Collateralizing the Economic Value of Broadcast Licenses*, Transactional Lawyer, Oct. 2011, at 5, 6.

[5] *See id.*; Frank Montero, *Security Interests in FCC Licenses: A Key to Unlocking Capital Sources?*, CommLawBlog (Nov. 7, 2008), http://www.commlawblog.com/2008/11/articles/broadcast/security-interests-in-fcc-licenses-a-key-to-unlocking-capital-sources.

[6] *See* Sepinuck, *supra* note 4, at 6; Montero, *supra* note 5.

[7] *See* William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 Fed. Comm. L.J. 1, 16–17 (1997).

[8] *See id.* at 17.

[9] *See In re* TerreStar Networks, Inc., 457 B.R. 254, 269 & n.13 (Bankr. S.D.N.Y. 2011); *In re* Tracy Broad. Corp., 438 B.R. 323, 330 (Bankr. D. Colo. 2010), *aff'd*, 469 B.R. 55 (D. Colo. 2011), *overruled by* 2012 WL 4874485 (10th Cir. 2012).

[10] *See* 11 U.S.C. § 552 (2006). "Pre-petition" refers to the period of time before one files for bankruptcy and commences the bankruptcy case; "post-petition" refers to the period of time after commencement. *See* Raymond T. Nimmer et al., Commercial Transactions: Secured Financing Cases, Materials, Problems 74, 253 (3d ed. 2003) To be subject to a valid pre-petition security interest, the debtor must have had rights in the collateral before commencement of the bankruptcy case. *See* U.C.C. § 9-203(b) (2003). A sale of an FCC license usually occurs during the bankruptcy case; thus, a security interest in sale revenues that does not survive bankruptcy is essentially worthless. *See In re TerreStar*, 457 B.R. at 269 n.13; David Oxenford, *Securing a Loan to a Broadcaster, Part 2—Bankruptcy Cases and Liens on Licenses*, Broadcast L. Blog (Sept. 6, 2011), http://www.broadcastlawblog.com/2011/09/articles/assignments-and-transfers/securing-a-loan-to-a-broadcaster-part- 2-bankruptcy-cases-and-liens-on-licenses/.

taches; thus, for a security interest to survive bankruptcy, all requirements for attachment must be satisfied pre-petition.[11] A sale of an FCC license cannot occur until two conditions are met.[12] This raises an important question: if neither of the two conditions of sale have been satisfied by the time the debtor files for bankruptcy, does the debtor have "rights in the collateral" such that the security interest attaches?[13] The question has created a controversy; some believe that a debtor has rights as soon as the debtor acquires the license, whereas others state that the debtor cannot have rights when neither condition of sale has occurred because the sale of the license is not adequately forthcoming.[14]

This Note analyzes the current dispute over the question of when a debtor acquires the right to receive revenues from the sale of its FCC license, argues that the debtor's right comes into existence at the time it acquires the license, and goes beyond the traditional policy argument that courts have relied on to provide a legal basis for that conclusion.[15] Part I provides an overview of the process through which creditors obtain a security interest in sale revenues of an FCC license, as well as the bankruptcy implications of such a lien.[16] Part II highlights the debate regarding when the debtor acquires the right to receive sale revenues by discussing the outcomes of *In re TerreStar Networks, Inc.* and *In re Tracy Broadcasting Corp.*[17] Part III outlines three situations outside the telecommunications context in which a debtor's right to receive future

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[11] *See* U.C.C. § 9-203(a); NIMMER ET AL., *supra* note 10, at 115. One of the requirements for attachment is that the debtor have "rights in the collateral." U.C.C. § 9-203(b).

[12] *See In re Tracy*, 2012 WL 4874485, at *6 (explaining that there must be a contract for sale, as well as FCC approval, before the license may be sold to a third party); *In re TerreStar*, 457 B.R. at 269; *In re Tracy*, 438 B.R. at 330.

[13] *See In re TerreStar*, 457 B.R. at 269; *In re Tracy*, 438 B.R. at 330; *supra* note 4, at 5.

[14] *See In re Tracy*, 2012 WL 4874485, at *6, *13 (holding that a security interest in a debtor's right to receive sale revenues must attach pre-petition; otherwise, such security interests would be of little value and would prevent entities in the telecommunications industry from obtaining loans); *In re TerreStar*, 457 B.R. at 269 (holding that a debtor's right to receive sale revenues from the debtor's FCC license exists pre-petition, even though neither condition of sale has yet occurred, such that the security interest attaches pre-petition and survives bankruptcy); *In re Tracy*, 438 B.R. at 330 (holding that when neither condition of sale has occurred, any right to receive value is too remote to exist; thus, the debtor does not have rights in the revenues from the future sale sufficient to make the security interest attach pre-petition and the security interest cannot survive bankruptcy); *See also* Sepinuck, *supra* note 4, at 5 (Explaining the debate over when the debtor acquires the right to receive sale revenues through a discussion of the *In re Tracy* bankruptcy court decision and the *In re TerreStar* decision).

[15] *See In re TerreStar*, 457 B.R. at 269; *infra* notes 21–349 and accompanying text.

[16] *See infra* notes 21–108 and accompanying text.

[17] *See infra* notes 109–181 and accompanying text.

funds has been found to exist before the contingencies required to receive those funds have occurred; specifically, in pension plan refunds, contingency fee agreements, and sale revenues from a liquor license.[18] Finally, Part IV argues that the FCC licensee's right to receive future sale revenues similarly exists before the sale revenues themselves do—upon the acquisition of the FCC license—based on the similar characteristics of the previously analyzed industries and the broadcasting market.[19] It is not the debtor's right to receive revenues that is contingent, but the value of that right; thus, a security interest in the proceeds from the future sale of a debtor's FCC license survives bankruptcy.[20]

I. The Role of an FCC License in a Secured Transaction

A. *Spectrum Licenses and the FCC*

Wireless communication is made possible through the use of the spectrum—a range of radio frequencies over which information can be sent through the airwaves.[21] The ability to transmit information over the spectrum allows parties to communicate without the bulky infrastructure of communication via wires.[22] Additionally, the spectrum allows for flexibility in communication, as radio waves can be transmitted in several different directions or targeted at one specific point.[23]

Although communicating over the spectrum has several advantages, there are significant limitations associated with its use.[24] The spectrum is a rivalrous resource; a particular frequency can only be used by one entity at any given time.[25] Thus, the use of each specific frequency must be exclusive to ensure that one entity's use does not interfere with another's.[26] Further, the spectrum is a finite resource; there are only a certain number of frequencies that can be used to transmit information.[27] The necessary exclusivity of use, coupled with the finite frequencies available, makes the spectrum a scarce re-

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[18] *See infra* notes 182–281 and accompanying text.

[19] *See infra* notes 282–349 and accompanying text.

[20] *See infra* notes 282–349 and accompanying text.

[21] *See* Benjamin et al., *supra* note 3, at 7.

[22] *Id.* at 14.

[23] *Id.* at 8.

[24] *See id.* at 15.

[25] *Id.* at 15, 32.

[26] *See id.* at 31; Mike Harrington, Note, *A-B-C, See You Real Soon: Broadcast Media Mergers and Ensuring a "Diversity of Voices,"* 38 B.C. L. Rev. 497, 503 (1997).

[27] Benjamin et al., *supra* note 3, at 15.

source.[28] Our economic system strives to ensure that scarce resources, including the spectrum, are allocated to those who value them the most and are used in ways that maximize societal welfare.[29]

The FCC is responsible for overseeing the use of the spectrum.[30] To accomplish this task, the FCC first determines which ranges of frequency on the spectrum will be used for which telecommunications purposes.[31] Within each range, the FCC creates licenses that allow the holder to operate on particular frequencies and within particular geographic areas for a limited period of time.[32] Generally, an entity that wants to operate on the spectrum must obtain an FCC license.[33] Most licenses are distributed through an auctioning process during which individual users or companies bid for a license.[34] After the initial grant of the license, the FCC retains control over who uses it.[35] A licensee may not transfer its license to another entity without FCC approval.[36] In deciding whether to grant a license or allow a license transfer, the FCC must consider whether or not the intended use of the license will serve the public interest.[37]

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[28] *Id.* at 32.

[29] Rupert G. Rhodd et al., *The Use of Economic Pricing Models in Government Procurement*, SECOND INTERNATIONAL PUBLIC PROCUREMENT CONFERENCE PROCEEDINGS 933, 933 (International Public Procurement Conference CD-ROM, Sept. 2006), *available at* http://www.ippa.ws/IPPC2/PROCEEDINGS/Article_38_Rhodd_et_al.pdf.

[30] BENJAMIN ET AL., *supra* note 3, at 62; STEPHEN G. BREYER, REGULATION AND ITS REFORM 72 (1982); Babette E.L. Boliek, *FCC Regulation Versus Antitrust: How Net Neutrality Is Defining the Boundaries*, 52 B.C. L. REV. 1627, 1643 (2011).

[31] BENJAMIN ET AL., *supra* note 3, at 62. This process is known as allocation. *Id.* For instance, cell phones are operated on the range of 824–849 MHz, as well as other ranges. *About the Spectrum Dashboard*, REBOOT.FCC.GOV, http://reboot.fcc.gov/reform/systems/spectrum-dashboard/about (last visited Oct. 12, 2012).

[32] BENJAMIN ET AL., *supra* note 3, at 62–63, 114.

[33] 47 U.S.C. § 301 (2006) ("No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except . . . with a license . . . ."). Some parts of the spectrum may be used without a license if the FCC chooses to leave a particular range open for use. *See* BENJAMIN ET AL., *supra* note 3, at 62; *FCC Encyclopedia: Accessing Spectrum*, FCC, http://www.fcc.gov/encyclopedia/accessing-spectrum (last visited Oct. 12, 2012).

[34] *See* BENJAMIN ET AL., *supra* note 3, at 177. License holders have the ability to petition for renewal of their license at the end of the license period. *Id.* at 114.

[35] 47 U.S.C. § 310(d) ("No . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the [Federal Communications] Commission . . . .").

[36] *Id.*

[37] *In re TerreStar*, 457 B.R. at 262; *see* Harrington, *supra* note 26, at 506. Although "the public interest" has not been clearly defined, achieving a diversity of broadcast providers has consistently been found to serve the public interest. *See* Harrington, *supra* note 26, at 506.

FCC licenses, whether obtained by auction or by an approved sale from a previous holder, can be very expensive.[38] Potential market entrants must have a license to use spectrum, but few have the capital needed to obtain one; thus, the ability of an entity to acquire a spectrum license usually depends on its ability to obtain financing.[39] Any lender willing to finance a telecommunications provider will require that the provider offer collateral to secure the loan and ensure repayment.[40]

Telecommunications providers—unlike providers in other industries in which participants own real estate or inventory—have limited assets in which to grant a security interest.[41] Essentially, telecommunications providers' assets are limited to their broadcasting equipment, their FCC licenses, and the airtime the broadcasters can sell under their licenses.[42] Additionally, entities that are planning to enter or are relatively new to the industry will have little cash flow with which to demonstrate their creditworthiness.[43]

Given the extraordinary value of an FCC license, it is often the most significant asset a telecommunications provider owns.[44] As such, both creditors and telecommunications providers prefer to use the value of the license as collateral.[45] To increase their protection in the event of the debtor's default or bankruptcy, creditors want an interest in any revenues that might be generated by the license in the future.[46] Specifically, a creditor will seek a security interest in any proceeds that would derive from a future FCC-approved sale of the license.[47] Typically, because the licensee depends on the FCC license to operate, such sales only occur after the licensee has entered bankruptcy.[48] As such, it

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[38] Sepinuck, *supra* note 4, at 6.

[39] *See* 47 U.S.C. § 301; Sepinuck, *supra* note 4, at 6.

[40] *See* Fishman, *supra* note 7, at 17.

[41] *See* Montero, *supra* note 5. Telecommunications providers rarely own real estate; nor do they have a stockpile of valuable inventory given that what they are "selling" is the intangible ability to communicate. *See id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*; Oxenford, *supra* note 10.

[45] *See* Nimmer et al., *supra* note 10, at 24, 26. Creditors want to secure loans, especially large loans, with high-value collateral to increase their protection and decrease the risk of non-collectability. *Id.* at 23. The debtor is similarly benefitted; a creditor facing less risk will offer a loan with a lower rate of interest, reducing the cost of borrowing. *Id.* at 24.

[46] *See id.* at 23–24. Access to both current and future revenues increases the value of the license, making it more desirable as collateral. *See id.*

[47] *See* Oxenford, *supra* note 10.

[48] *See In re TerreStar*, 457 B.R. at 269 n.13 (noting that a fact pattern in which the sale of an FCC license occurs before the licensee enters bankruptcy is a "narrow hypothetical"); Oxenford, *supra* note 10.

is very important to a creditor that its interest in the proceeds from a future sale survives the commencement of bankruptcy proceedings.[49]

B. *Taking Security Interests in Future Collateral*

Article 9 of the Uniform Commercial Code (UCC) governs security interests in personal property.[50] An enforceable security interest provides a secured creditor with a lien on the collateral, allowing the creditor to repossess the property if the debtor defaults on the loan.[51] A security interest is not enforceable against the debtor or third parties until it attaches.[52] Section 9–203(b) of the UCC outlines the three conjunctive requirements necessary for attachment.[53] Under this provision, the debtor must have rights in the collateral before a security interest can attach.[54]

The UCC does not explain what rights are sufficient to constitute "rights in the collateral" under section 9–203.[55] Similarly, it does not indicate when the debtor acquires rights in the collateral.[56] It is clear that a debtor with full title and physical possession has sufficient rights.[57] It is equally clear that a debtor not in possession of an item, and with no property or contractual interest in it, does not have sufficient rights in the collateral to grant a valid security interest.[58] Between these two extremes, the question of whether the debtor has sufficient rights in the collateral to create a valid security interest is unclear.[59]

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[49] *See* Oxenford, *supra* note 10.

[50] U.C.C. § 9-109 (2003).

[51] Nimmer et al., *supra* note 10, at 16.

[52] U.C.C. §§ 9-203(a), 9-308(a); *see* Nimmer et al., *supra* note 10, at 74, 115. To be enforceable against third parties, an interest must also be perfected. Nimmer et al., *supra* note 10, at 115. Perfection requires attachment, plus an applicable statutory step. U.C.C. § 9-308(a).

[53] U.C.C. § 9-203(b). Attachment requires that: (1) value has been given; (2) the debtor has rights in the collateral; and (3) one of four possible evidentiary conditions has been met. *Id.*

[54] *Id.* ("[A] security interest is enforceable against the debtor and third parties with respect to the collateral only if . . . the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party . . . ."). This rule is consistent with the general principle that one cannot give rights that they themselves do not have. Margit Livingston, *Certainty, Efficiency, and Realism: Rights in Collateral Under Article 9 of the Uniform Commercial Code*, 73 N.C. L. Rev. 115, 118 (1994).

[55] Nimmer et al., *supra* note 10, at 99; Livingston, *supra* note 54, at 116.

[56] Nimmer et al., *supra* note 10, at 103.

[57] *See* Livingston, *supra* note 54, at 123–24 & n.44.

[58] *See id.*

[59] *Id.*

Property that a debtor acquires after the creation of the security agreement is known as after-acquired property.[60] There are two ways a creditor can obtain a security interest in after-acquired property.[61] First, a creditor can include specific language in the security agreement taking an interest in the after-acquired property of a certain type.[62] Second, if a creditor has a valid security interest in collateral, a security interest will also attach to anything that is proceeds of that collateral—even when those proceeds are acquired after the creation of the original security agreement.[63] Of the two ways a creditor may obtain a security interest in after-acquired property described above, only the second will survive the commencement of a bankruptcy case.[64] Under section 9-203, a security interest in after-acquired property will not attach until the debtor gains rights in the after-acquired property.[65] If the debtor has not yet acquired the property at the time the bankruptcy case commences, they do not have rights in the after-acquired property, and a security interest in the after-acquired property created under the first method will be invalid.[66]

C. *Survival of Security Interests in Future Collateral in Bankruptcy*

Bankruptcy is a federal tool that an entity may use to restructure its debt, allowing creditors to recover all or part of the money owed to them while providing the debtor with a fresh start.[67] When a party initiates bankruptcy proceedings, a bankruptcy estate is created.[68] A bankruptcy estate consists of all of the debtor's property at the time the case begins.[69] Despite its sweeping coverage, a bankruptcy estate will typically be insufficient to cover all of the debts owed by the debtor.[70]

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[60] Black's Law Dictionary 69 (9th ed. 2009).

[61] *See* U.C.C. §§ 9-204(a), 9-315(a) (2003).

[62] *Id.* § 9-204(a). A debtor cannot use this method for consumer goods, generally, or for a commercial tort claim. *Id.* § 9-204(b).

[63] *Id.* § 9-315(a). As defined under the UCC, proceeds includes, inter alia, "(A) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral; (B) whatever is collected on, or distributed on account of, collateral; [and] (C) rights arising out of collateral . . . ." *Id.* § 9-102(a)(64).

[64] *See* 11 U.S.C. § 552 (2006); *supra* notes 60–63 and accompanying text.

[65] U.C.C. § 9-203(b)(2).

[66] *See id.*

[67] Nimmer et al., *supra* note 10, at 254, 257–58.

[68] *Id.* at 259. A bankruptcy case is commenced upon the filing of a bankruptcy petition, either voluntarily by the debtor or involuntarily by the creditors. *Id.* at 257.

[69] *Id.* at 259.

[70] *Id.* at 254.

Secured creditors have an advantage in the bankruptcy process over their unsecured counterparts.[71] Creditors with a valid lien have a property interest in the collateral that continues to be recognized throughout the bankruptcy proceeding.[72] This interest entitles secured creditors to receive the full value of their secured claim from the collateral defined in the security agreement.[73] Unsecured creditors' claims are paid on a pro-rata basis from the remaining assets of the estate that are not subject to an exemption or a security interest.[74]

The commencement of a bankruptcy case separates the world into two parts: "pre-petition" and "post-petition."[75] This distinction is of critical importance, as only those whose claim to payment arose pre-petition are creditors in the bankruptcy proceeding.[76] Additionally, the applicability of many Bankruptcy Code (the "Code") provisions depends on whether the debtor is operating pre-petition or post-petition.[77] Section 552 of the Code is one of these bankruptcy provisions.[78]

Section 552(a) provides that property acquired post-petition is not subject to any lien under a security agreement that was created pre-petition.[79] Essentially, this provision invalidates any after-acquired property clause contained in a security agreement.[80] Thus, a creditor who chooses to obtain a security interest in after-acquired property through reliance on an after-acquired property clause risks losing that interest in bankruptcy.[81]

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[71] *Id.* at 251.

[72] *Id.* Unsecured creditors have no property interest in any specific asset of the debtor. *Id.*

[73] NIMMER ET AL., *supra* note 10, at 251. If the value of the collateral is less than the value of the claim, a security interest entitles a creditor to receive the full value of the collateral. *See id.* at 269.

[74] *Id.* at 251. Unsecured creditors, then, have less of a chance of recovering the full value of their claim than secured creditors do. *See id.*

[75] *Id.* at 253.

[76] *Id.* Post-petition claimants are part of the debtor's fresh start; the bankruptcy proceeding does not affect their rights. *Id.*

[77] *See* 11 U.S.C. §§ 541, 544, 547, 552 (2006).

[78] *Id.* § 552.

[79] *Id.* § 552(a).

[80] *See In re TerreStar*, 457 B.R. at 266; *In re Tracy*, 438 B.R. at 329. An after-acquired property clause encumbers the relevant property pre-petition; however, the property is not acquired by the estate, and thus the security interest cannot attach, until the post-petition period. *See* U.C.C. § 9-203(b)(2) (2003); NIMMER ET AL., *supra* note 10, at 210.

[81] *See* 11 U.S.C. § 552(a); *In re Tracy*, 438 B.R. at 329. If the property is not acquired pre-petition, the security interest in it will be lost. *See* 11 U.S.C. § 552(a); *In re Tracy*, 438 B.R. at 329.

Section 552(b) of the Code creates an exception to this general rule.[82] When a security agreement grants a security interest in a type of collateral (the "original collateral") as well as the proceeds of that collateral, section 552(b) allows such proceeds acquired post-petition to remain subject to the creditor's lien if the original collateral was acquired pre-petition.[83] The security interest in the original collateral must have been enforceable at the time of the bankruptcy filing for this provision to apply.[84] With respect to the original collateral, then, the debtor must have had rights in the collateral pre-petition for a security interest to attach to the original collateral's proceeds that were acquired post-petition.[85] The practical implication of section 552 is that even if a creditor takes a security interest in a particular item, that interest will be destroyed in bankruptcy if the debtor acquires rights in that item post-petition, and that item is not proceeds of original collateral that was acquired pre-petition and subject to an attached security interest.[86]

D. *Security Interests in the Broadcasting Industry*

There are two distinct packages of rights associated with an FCC license: public and private rights.[87] The public rights of an FCC license encompass the right to decide who holds the license and for how long.[88] A licensee has no property interest in the public rights; that interest belongs to the FCC.[89] The private rights of an FCC license include the right to receive payment from an approved transfer of the license, and they belong to the licensee.[90]

It is settled law that a debtor cannot grant a security interest directly in its FCC license.[91] Section 310(d) of the Communications Act of 1934 (Communications Act) provides that licensees may not transfer

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[82] 11 U.S.C. § 552(b).

[83] *Id.* "Proceeds" is not defined in the Code; thus, most courts apply the UCC definition. *See, e.g.*, *In re* Bumper Sales, Inc., 907 F.2d 1430, 1437 (4th Cir. 1990); *In re Tracy*, 438 B.R. at 329.

[84] *See In re TerreStar*, 457 B.R. at 270 n.14; *In re Tracy*, 438 B.R. at 330.

[85] *See* 11 U.S.C. § 552(b); U.C.C. § 9-203(a).

[86] 11 U.S.C. § 552.

[87] *See In re Tracy*, 438 B.R. at 328; *In re* Ridgely Commc'ns, Inc., 139 B.R. 374, 378–79 (Bankr. D. Md. 1992).

[88] *See In re Tracy*, 2012 WL 4874485, at *3; *In re TerreStar*, 457 B.R. at 262–63; *In re Ridgely Commc'ns, Inc.*, 139 B.R. at 378—79.

[89] *See In re TerreStar*, 457 B.R. at 262–63; *In re Tracy*, 438 B.R. at 327.

[90] *See In re Tracy*, 2012 WL 4874485, at *3; *In re TerreStar*, 457 B.R. at 262–63; *In re Ridgely Commc'ns, Inc.*, 139 B.R. at 378–79.

[91] *See In re Tracy*, 2012 WL 4874485, at *3; *In re TerreStar*, 457 B.R. at 262; *In re* O'Cheskey, 9 FCC Rcd. 986, 987 (1994).

their license or rights under the license to third parties without express approval from the FCC.[92] A security interest in a license would potentially require a debtor to transfer its license to a third party creditor without FCC approval—a clear violation of the Communications Act.[93] The FCC has interpreted this statute to mean that licensees are prohibited from granting a security interest in the FCC license itself.[94]

Additionally, a licensee may not grant a security interest in the public rights of the license, because the public rights belong to the FCC, not the licensee.[95] The FCC has stated that a licensee may, however, grant a security interest in its private right to receive the sale revenues of an FCC license.[96] This remains consistent with the Communications Act, because the only interest being conveyed is one in the assets received from a sale of the license.[97] As a result, a creditor's repossession right is not as broad as it is with other forms of collateral; a creditor cannot unilaterally force the sale of an FCC license to obtain the sale revenues.[98] Instead, the creditor must wait to exercise its repossession right until after a contract has been negotiated with the buyer and the sale has been approved by the FCC.[99] Thus, the FCC continues to control who owns the license throughout the entire process, as required by federal law.[100]

Because a creditor cannot repossess a debtor's right to sale revenues, its security interest must extend to the sale revenues them-

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[92] 47 U.S.C. § 310(d) (2006) ("No . . . license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.").

[93] *In re O'Cheskey*, 9 FCC Rcd. at 987. A creditor who holds a valid security interest in an item may repossess the item upon the debtor's default. NIMMER ET AL., *supra* note 10, at 16. Such a repossession would allow the license to transfer from the debtor licensee to the creditor without FCC approval, in violation of the Communications Act. *See* 47 U.S.C. § 310(d); *In re O'Cheskey*, 9 FCC Rcd. at 987.

[94] *In re O'Cheskey*, 9 FCC Rcd. at 987.

[95] *See* U.C.C. § 9-203(b) (2003). The licensee has no property interest in the public rights; thus, it has no rights in them. *See In re TerreStar*, 457 B.R. at 262–63; *In re Tracy*, 438 B.R. at 327.

[96] *In re O'Cheskey*, 13 FCC Rcd. at 10,656, 10,660; G. Ray Warner, *The Anti-Bankruptcy Act: Revised Article 9 and Bankruptcy*, 9 AM. BANKR. INST. L. REV. 3, 49 (2001). A debtor's right to receive revenues from the sale of its FCC license is a general intangible. *See In re TerreStar*, 457 B.R. at 267–69; *In re Tracy*, 438 B.R. at 330.

[97] *See In re O'Cheskey*, 9 FCC Rcd. at 987.

[98] *See id.*; NIMMER ET AL., *supra* note 10, at 16. Typically, upon default, a creditor may seize the collateral and sell it to satisfy the debt. *See* NIMMER ET AL., *supra* note 10, at 16.

[99] *See In re O'Cheskey*, 9 FCC Rcd. at 987.

[100] *See* 47 U.S.C. § 310(d) (2006); *In re O'Cheskey*, 9 FCC Rcd. at 987.

selves.[101] Sale revenues are most often acquired post-petition; thus, the bankruptcy status of a creditor's security interest in sale revenues usually turns on whether these revenues are considered proceeds of collateral acquired pre-petition such that a security interest exists in them under section 552(b) of the Code.[102]

Sale revenues stem directly from the right to receive value from the transfer of an FCC license.[103] As such, sale revenues are considered proceeds of the debtor's right to receive value.[104] To fall within the section 552(b) exception, then, the original collateral—the debtor's right to receive value for the transfer of its license—must have been acquired pre-petition and subject to an attached security interest.[105] If the collateral was acquired post-petition, section 522(a) would invalidate any security interest in the sale revenues and the section 552(b) exception would not apply.[106]

Thus, the essential question is when the debtor receives rights in the original collateral such that a security interest attaches.[107] The answer to this question turns on when the debtor's right to receive value from a transfer of its license comes into existence.[108]

II. The Current Debate: When Does a Licensee Acquire the Right to Revenues from the Sale of Its License?

Two recent cases illustrate the different ways that courts may answer the question of when a licensee acquires the right to receive revenues from the sale of its FCC license.[109] In October 2010, the U.S. Bankruptcy Court for the District of Colorado, in *In re Tracy Broadcasting Corp.*, determined that a debtor's right to receive value does not ex-

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[101] *See* Oxenford, *supra* note 10. If a creditor has an interest in sale revenues, it can repossess them after the sale occurs. *See In re O'Cheskey*, 9 FCC Rcd. at 987; Nimmer et al., *supra* note 10, at 16.

[102] *See In re TerreStar*, 457 B.R. at 269 n.13; *In re Tracy*, 438 B.R. at 330.

[103] *See In re Tracy*, 2012 WL 4874485, at *4.

[104] *See* U.C.C. § 9-102(a)(64) (2003).

[105] *See* 11 U.S.C. § 552(b) (2006). As explained above, the debtor is unable to give a security interest in the FCC license itself. *See supra* notes 91–94 and accompanying text.

[106] *See* 11 U.S.C. § 552.

[107] *See In re Tracy*, 2012 WL 4874485, at *6–7.

[108] *See id.*; U.C.C. § 9-203(b).

[109] *See In re* TerreStar Networks, Inc., 457 B.R. 254, 269 (Bankr. S.D.N.Y. 2011); *In re* Tracy Broad. Corp., 438 B.R. 323, 330 (Bankr. D. Colo. 2010), *aff'd*, 469 B.R. 55 (D. Colo. 2011), *overruled by* 2012 WL 4874485 (10th Cir. 2012).

ist until the sale of the license is adequately forthcoming.[110] In that same month, in *In re TerreStar Networks, Inc.*, the U.S. Bankruptcy Court for the Southern District of New York reached a contradictory conclusion, and held that a debtor's right to receive value from a transfer exists at the time the debtor acquires the FCC license.[111] *In re Tracy* was ultimately overturned in October 2012 by the U.S. Court of Appeals for the Tenth Circuit, who used a similar policy-based rationale as the court in *In re TerreStar.*[112]

The two cases involved almost identical facts.[113] In each, the debtor was a telecommunications provider that possessed an FCC license to operate over the spectrum.[114] Each debtor, to obtain financing, granted its lender a security interest in its right to receive revenues from any future sale of its FCC license.[115] The debtor in *In re Tracy* granted a security interest in its general intangibles, which included the right to sale revenues.[116] The security agreement in *In re TerreStar* covered general intangibles, and also explicitly granted an interest in the debtor's right to receive value in connection with the disposition of any FCC license it held.[117] Both debtors filed for bankruptcy, and, at the time of filing, had not sold their FCC license.[118]

In both *In re TerreStar* and *In re Tracy,* an unsecured creditor sought to invalidate the lender's lien on the sale revenues.[119] The creditor in *In re TerreStar* first argued that, because one cannot take a security interest in an FCC license itself, the lender's security interest was invalid.[120] The court quickly dismissed this argument, finding that although the lender did not have a security interest in the license itself, it did have a valid security interest in the debtor's right to receive value from

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[110] *See In re Tracy*, 438 B.R. at 330. A sale of an FCC license becomes possible upon both 1) the negotiation of a contract for sale with a third party and 2) the approval of such a sale by the FCC. *Id.*

[111] *See In re TerreStar*, 457 B.R. at 269.

[112] *See In re Tracy Broad. Corp.*, 2012 WL 4874485, at *7–*9 (10th Cir. 2012); *In re TerreStar*, 457 B.R. at 269.

[113] *See In re TerreStar*, at 258–60; *In re Tracy*, 438 B.R. at 324–26.

[114] *See In re TerreStar*, 457 B.R. at 258; *In re Tracy*, 438 B.R. at 324–25.

[115] *See In re TerreStar*, 457 B.R. at 258; *In re Tracy*, 438 B.R. at 325.

[116] *In re Tracy*, 438 B.R. at 325. A general intangible is any personalty "other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software." U.C.C. § 9-102(42) (2003).

[117] *In re TerreStar*, 457 B.R. at 258.

[118] *See id.* at 261; *In re Tracy*, 438 B.R. at 325.

[119] *See In re TerreStar*, 457 B.R. at 257; *In re Tracy*, 438 B.R. at 325.

[120] *In re TerreStar*, 457 B.R. at 257.

a transfer of its license.[121] The creditor in *In re Tracy* did not attempt to make this argument; all parties involved acknowledged that there was no security interest in the license itself.[122]

Both creditors then attacked the lender's security interest in the debtor's right to receive sale revenues from the FCC license.[123] The creditors sought to invalidate the interest under section 552 of the Code.[124] The contract negotiation, FCC approval, and subsequent sale of the license did not occur pre-petition.[125] If the sale occurrs post-petition, the sale revenues would necessarily be acquired post-petition; thus, section 552(a) would invalidate any security interest in them.[126] The creditors argued that the original collateral from which the sale revenues were proceeds—the debtor's right to receive the value from a sale—would not materialize until after commencement of the bankruptcy case, when it was certain that a sale would occur.[127] Thus, the section 552(b) exception would not apply because the proceeds acquired post-petition did not stem from original collateral acquired pre-petition.[128]

A. In re TerreStar Networks, Inc.*: The Right to Receive Sale Revenues Exists at the Time the License Is Acquired*

The *In re TerreStar* court rejected the unsecured creditor's argument, and held that the lender's security interest would remain valid in bankruptcy.[129] The court took a functionalist approach; its rationale was not based on a reading of section 552, but was instead grounded in policy concerns.[130] The court first asserted that it is an established rule that a creditor may take a security interest in a debtor's right to receive value

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[121] *Id.* at 265.

[122] *In re Tracy*, 438 B.R. at 327.

[123] *See In re TerreStar*, 457 B.R. at 257; *In re Tracy*, 438 B.R. at 327.

[124] *See In re TerreStar*, 457 B.R. at 257; *In re Tracy*, 438 B.R. at 327. Section 552(a) of the Code invalidates a security interest in property that is acquired post-petition. 11 U.S.C. § 552(a) (2006).

[125] *See In re TerreStar*, 457 B.R. at 261; *In re Tracy*, 438 B.R. at 330.

[126] *See* 11 U.S.C. § 552(a); *In re TerreStar*, 457 B.R. at 266; *In re Tracy*, 438 B.R. at 327.

[127] *See In re TerreStar*, 457 B.R. at 266; *In re Tracy*, 438 B.R. at 327.

[128] *See In re TerreStar*, 457 B.R. at 266, 269; *In re Tracy*, 438 B.R. at 327. *See supra* notes 75–86 and accompanying text (explaining sections 552(a) and 552(b) of the Code and their effect on property acquired after the commencement of the bankruptcy case).

[129] *In re TerreStar*, 457 B.R. at 269–70.

[130] *See id.*

from a transfer of its license.[131] To find that a security interest in sale revenues could not attach when neither condition of sale has occurred would, according to the *In re TerreStar* court, render a security interest in a debtor's right to receive value essentially meaningless.[132] Such a rule effectively conditions the validity of a creditor's lien on sale revenues on both the negotiation of a contract for sale of the license and the FCC's approval of such a contract.[133] These conditions are problematic, as the sale of a license rarely occurs pre-petition.[134] Thus, a rule requiring one or both conditions of sale to be satisfied before a security interest in sale revenues could attach would mean that few, if any, security interests in a debtor's right to receive value from a license transfer would survive in bankruptcy.[135]

Additionally, the court noted that the FCC has explicitly acknowledged a licensee's ability to grant a security interest in its right to sale revenues.[136] Rendering a security interest in sale revenues meaningless would completely ignore the fact that the body that is responsible for creating and defining the right in question intended a licensee to be able to grant a security interest in that right.[137] Practically, then, it does not make sense to adopt a rule that renders these approved liens effectively impossible.[138]

Thus, the *In re TerreStar* court necessarily acknowledged that the debtor's right to receive sale revenues from the FCC license existed pre-petition, before either condition of sale occurred.[139] The sale revenues themselves were acquired post-petition, and any security interest in these revenues granted in the pre-petition security agreement would be invalidated under section 552(a) of the Code.[140] Section 552(b)'s exception would apply here, however, because the sale revenues are pro-

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[131] *See id.* at 264. To establish that it is in fact well-settled that a creditor may take a security interest in the debtor's right to receive revenues from the sale of its FCC license, the court looked to prior case law as well as an FCC order. *Id.* at 262–64.

[132] *See id.* at 269–70.

[133] *Id.* at 269; *see also In re Tracy*, 438 B.R. at 330 (holding that the validity of a creditor's lein is subject to these two conditions).

[134] *See In re TerreStar*, 457 B.R. at 269 n.13.

[135] *See id.* at 269.

[136] *Id.*

[137] *See id.*; Benjamin et al., *supra* note 3, at 62–63.

[138] *See In re TerreStar*, 457 B.R. at 269.

[139] *See id.* at 261. For an interest in the post-petition sale revenues to survive bankruptcy—as the *In re TerreStar* court held it did—the revenues must have been proceeds from collateral acquired pre-petition. *See* 11 U.S.C. § 552(a)–(b) (2006); *In re TerreStar*, 457 B.R. at 259. Thus, the right to receive sale revenues must have been acquired pre-petition. *See* 11 U.S.C. § 552(a)–(b).

[140] *See* 11 U.S.C. § 552(a); *In re TerreStar*, 457 B.R. at 261.

ceeds of collateral that was acquired pre-petition—the right to receive sale revenues.[141]

B. *The Original* In re Tracy Broadcasting Corp.*: The Right to Receive Sale Revenues Cannot Exist When Neither Condition of Sale Has Occurred*

The *In re Tracy* 2010 Bankruptcy Court decision (the "original *In re Tracy* decision") agreed with the unsecured creditor, holding that section 552(a) invalidated any security interest that the creditor may have had in the sale revenues.[142] First, the court acknowledged that an FCC license contains both public and private rights, and presumed that a debtor is able to grant a security interest in its private right to the revenues from the sale of a license.[143] Next, the court found that the debtor's right to receive sale revenues was contingent on two events: an agreement with a third party to sell the license, and the FCC's approval of the sale.[144] The court reasoned that in the absence of these two requirements, any right to receive value is too remote to exist.[145] Neither contingency had occurred as of the commencement of the bankruptcy case; thus, the right to receive value did not exist pre-petition.[146] The right to receive value instead would come into existence post-petition, after the contract for sale was executed and the transfer was approved by the FCC.[147] The collateral defined in the pre-petition security agreement—the right to receive sale revenues—would thus be acquired, if at all, after the commencement of the bankruptcy case.[148] As a result, the security interest in the collateral could not attach until the post-petition period.[149]

The court held that in such a situation, the post-petition acquisition of the collateral would trigger section 552(a) of the Code.[150] Because a security interest in the right to receive sale revenues would not

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[141] *See* 11 U.S.C. § 552(b); *In re TerreStar*, 457 B.R. at 270 n.14; U.C.C. § 9-102(a)(64) (2003). The second requirement of 552(b)—that the proceeds at issue are covered by the security agreement—was satisfied because the pre-petition security agreement extended to the sale revenues themselves, as well as the right to receive sale revenues. *See* 11 U.S.C. § 552(b); *In re TerreStar*, 457 B.R. at 258.

[142] *In re Tracy*, 438 B.R. at 330–31.

[143] *Id.* at 328.

[144] *Id.* at 330.

[145] *Id.*

[146] *Id.*

[147] *Id.* At the time of the case, neither contingency had occurred. *Id.*

[148] *In re Tracy*, 438 B.R. at 330.

[149] *Id.*

[150] *Id.*; *see* 11 U.S.C. § 552(a) (2006) (invalidating after-acquired property clauses when the property has not been acquired at the time the bankruptcy case is commenced).

attach until after the commencement of the bankruptcy case, section 552(a) invalidated the creditor's pre-petition lien.[151] Additionally, neither the right to receive sale revenues nor the sale revenues themselves fell under the section 552(b) exception; neither were proceeds of any collateral that was acquired pre-petition.[152] In so holding, the court did not specify whether the occurrence of one contingency would bring the right to receive value into existence, or if both a contract for sale and FCC approval would need to occur before a debtor acquired the right to receive sale proceeds.[153]

C. In re Tracy Broadcasting Corp. *Revisited: The Right to Receive Sale Revenues Exists at the Time the License Is Acquired*

In October 2012, the U.S. Court of Appeals for the Tenth Circuit reversed the original *In re Tracy* decision and held that a debtor's right to receive revenues from the sale of its FCC license exists even before either condition of sale has occurred.[154] The court relied primarily on a results-oriented policy argument to support this conclusion.[155] Just like the court in *In re TerreStar*, the *In re Tracy* court recognized that if a security interest were not able to attach before either condition of sale had occurred, the value of the security interest would be very low.[156] This would devastate the telecommunications industry, as granting a security interest in the debtor's right to receive sale revenues "may well be the licensee's best tool to obtain capital."[157]

The court continued beyond this overt policy rationale and noted that state law also supports the conclusion that a debtor's rights in the collateral exist even when a sale is not imminent.[158] Section 9-408 of the Nebraska UCC overrides state laws requiring a licensee to obtain government consent before transferring a license to the extent that

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[151] *See In re Tracy*, 438 B.R. at 330.

[152] *See id.* Both the sale revenues and right to receive sale revenues are proceeds of the license. *See* U.C.C. § 9-102(a)(64). Because one cannot take a security interest in an FCC license itself, the sale revenues and the right to receive sale revenues are not proceeds of collateral acquired pre-petition. *See In re Tracy*, 438 B.R. at 326–27. The sale revenues are also proceeds of the right to receive revenues, but that collateral was not acquired pre-petition. *See id.* at 330.

[153] *See id.*

[154] *In re Tracy*, 2012 WL 4874485, at *6, *13.

[155] *See id.* at *8.

[156] *See id.* at *8; *In re TerreStar*, 457 B.R. at 269–70.

[157] *In re Tracy*, 2012 WL 4874485, at *8.

[158] *Id.* at *9. This case was filed in Nebraska federal court, and thus the court was analyzing Nebraska state law. *Id.* at *1.

such law would prevent the attachment of a security interest in the license.[159] Essentially, the Nebraska statute allows attachment of security interests in a state government-issued license, regardless of whether the debtor cannot transfer that license without government approval.[160] The creditor would not be able to force a sale or transfer of the license; instead, the creditor would have to wait for the government to approve a sale in order for the creditor to repossess the sale revenues.[161]

The court acknowledged that the Nebraska law is state law and, as such, does not apply to the federal restrictions on sale present in the FCC licensing context.[162] Regardless, the court stated, the existence of and rationale behind the Nebraska law supports the idea that a security interest in the right to receive sale revenues of an FCC license attaches at the time the security agreement is executed.[163] The Nebraska state law would cover licenses that are identical to FCC licenses, except for the fact that they are issued and regulated by the state government instead of the federal government.[164] The court stated that because the Nebraska state law finds security interests in these licenses to be valid, the state legislature has implicitly recognized that attachment of the security interest occurs at the time the security agreement was created.[165] As such, because attachment requires rights in the collateral, the debtor must have had rights in the collateral at the time the security interest was created, before either condition of sale has been met.[166] If the only difference between FCC licenses and the licenses covered by the Nebraska state law is the fact that FCC licenses are federal, not state,

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[159] *See* NEB. REV. ST. ANN. U.C.C. § 9-408 (LexisNexis 2009 & Supp. 2011) ("A rule of law, statute, or regulation that . . . requires the consent of a government, governmental body or official . . . to the assignment or transfer of, or creation of a security interest in, a . . . general intangible, including a contract, permit, license . . . is ineffective to the extent that the rule of law, statute, or regulation: (1) would impair the creation, attachment, or perfection of a security interest . . . ."); *In re Tracy*, 2012 WL 4874485, at *9.

[160] *See* NEB. REV. ST. ANN. U.C.C. § 9-408; *In re Tracy*, 2012 WL 4874485, at *9.

[161] *See* NEB. REV. ST. ANN. U.C.C. § 9-408; *In re Tracy*, 2012 WL 4874485, at *9–10.

[162] *See In re Tracy*, 2012 WL 4874485, at *9–10. The requirement that the FCC must approve a transfer of a license is federal law; the Nebraska statute explicitly only applies to restrictions created by state law. *See id.* at *11; Benjamin et al., supra note 3, at 62.

[163] *In re Tracy*, 2012 WL 4874485, at *9–10.

[164] *Id.* at *9, *11.

[165] *In re Tracy*, 2012 WL 4874485, at *9–10. A security interest must attach in order to be valid; thus, a finding that a security interest is valid necessarily requires a finding that the security interest has attached. *See* NEB. REV. ST. ANN. U.C.C. § 9-203.

[166] See NEB. REV. ST. ANN. U.C.C. § 9-203(b); *In re Tracy*, 2012 WL 4874485, at *9–10, *13. This rationale is problematic, however, because it assumes that the Nebraska state legislature is not just making an exception to the normal attachment rules for licenses of this type. *See infra* notes 175–179 and accompanying text.

then the logic and rationale behind the Nebraska state law is equally applicable to federal licenses as well—the same rights and interests exist under both the state and federal licenses.[167] Thus, the court reasoned, because Nebraska state law would encompass the same kinds of licenses as FCC licenses but at the state level, the rationale of the Nebraska state law provides support for reaching the same conclusion—that the security interests are valid—at the federal level.[168]

D. The Current State of the Controversy

Although the original *In re Tracy* decision has been overturned and now aligns with the conclusion in *In re TerreStar*, this issue has not been resolved.[169] *In re TerreStar* and *In re Tracy* are currently the only two cases to directly consider when the right to receive revenues from the sale of an FCC license actually comes into existence.[170] As this issue continues to be presented to courts, it is possible that some courts will reach the same conclusion, using the same rationale, as the court in the original *In re Tracy* decision.[171]

Furthermore, both *In re TerreStar* and *In re Tracy* take a functional approach and rely on policy arguments to reach their conclusion.[172] Other courts may be reluctant to follow, and may instead prefer to base their decision on legal principles and the UCC.[173] Thus, it is important to show why a debtor's right to receive sale revenues exists at the time the license is acquired, so that future courts may rely on section 9-203 of the UCC to find that these security interests did in fact attach prepetition, before either condition of sale has occurred.[174]

Although the court in *In re Tracy* looked to the Nebraska UCC for additional support, this does not provide an actual legal basis for their

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[167] *See In re Tracy*, 2012 WL 4874485, at *9, 12.

[168] *See In re Tracy*, 2012 WL 4874485, at *9.

[169] *See In re Tracy*, 2012 WL 4874485, at *13; *In re TerreStar*, 457 B.R. at 269–70.

[170] *See In re Tracy*, 2012 WL 4874485, at *13; *In re TerreStar*, 457 B.R. at 269–70. A few other courts have held that a security interest in the right to receive sale revenues attaches at the time the licensee acquires the license, but do not involve a direct discussion of why a licensee's right to receive sale revenues can exist before either condition of sale has occurred. See MLQ Investors, L.P. v. Pacific Quadracasting, 146 F.3d 746 (9th Cir. 1998); Urban Communicators PCS L.P. v. Gabriel Capital, L.P., 394 B.R. 325 (S.D.N.Y. 2008); *In re* Media Properties, 311 B.R. 244 (Bankr. W.D. Wis. 2004).

[171] *See In re Tracy*, 438 B.R. at 330.

[172] *See In re Tracy*, 2012 WL 4874485, at *8–10; *In re TerreStar*, 457 B.R. at 269–70.

[173] *See* U.C.C. § 9-203(b) (2003); *In re Tracy*, 2012 WL 4874485, at *8–10; *In re TerreStar*, 457 B.R. at 269–70; *infra* notes 282–349 and accompanying text.

[174] *See* U.C.C. § 9-203(b)(2).

conclusion.[175] The Nebraska UCC applies only to state law; by its terms, it does not apply in the FCC licensing context because FCC licenses and their restrictions are created by federal law.[176] Additionally, the Nebraska UCC provision means that the Nebraska state legislature is stating that attachment has occurred at the time the security interest was created.[177] The court assumed that this means that the Nebraska state legislature believes that the licensee had rights in the collateral at the time the security interest was created, before either condition of sale had occurred.[178] This rationale is problematic, however, as it is possible that the Nebraska legislature was making an exception—essentially saying that even though the debtor in these license situations do *not* have rights in the collateral, and thus the formal UCC attachment requirements are not met, it thinks these security interests should attach regardless.[179] Finally, there are many states that have a section 9-408 that differs from that of Nebraska; the *In re Tracy* court's discussion of the provision, therefore, may not be applicable in those states.[180] Thus, there is still a need for a legal hook that would be applicable in the federal context of FCC licensing, and would apply regardless of the specific provisions of each state's UCC.[181]

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[175] *In re Tracy*, 2012 WL 4874485, at *9.

[176] *See In re Tracy*, 2012 WL 4874485, at *9–10; Benjamin et al., *supra* note 3, at 62.

[177] *See In re Tracy*, 2012 WL 4874485, at *9.

[178] *See id*; *supra* notes 158–168 and accompanying text.

[179] *See In re Tracy*, 2012 WL 4874485, at *9. In fact, this is the more likely interpretation when considering the canon of statutory construction that one should not construe words as to make them superfluous. Caleb Nelson, Statutory Interpretation 88 (2011). If the Nebraska state legislature believed that licensees had sufficient rights in the collateral despite the requirement of government consent to transfer, then a security interest would attach under § 9-203 and § 9-408 would be superfluous. *See* U.C.C. § 9-203(b)(2)(2003).

[180] For example, New York has omitted § 9-408(c) from its UCC. N.Y. U.C.C. Law § 9-408 (McKinney 2002). Additionally, the following states have omitted subsection (e) of § 9-408 from their UCCs: Colorado, District of Columbia, Georgia, Hawaii, Idaho, Illinois, Maine, Minnesota, Nevada, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, Vermont, Virginia, Washington, Wisconsin. *See* Colo. Rev. Stat. § 4-9-408 (2012); D.C. Code § 28:9-408 (LexisNexis 2001); Ga. Code Ann. § 11-9-408 (2002 & Supp. 2012); Haw. Rev. Stat. Ann. § 490:9-408 (LexisNexis 2009); Idaho Code Ann. § 28-9-408 (2001 & Supp. 2012); 810 Ill. Comp. Stat. Ann. 5 / 9-408(West 2004); Me. Rev. Stat. Ann. tit. 11, § 9-1408 (Supp. 2011); Minn. Stat. § 336.9-408 (2012 & Supp. 2011); Nev. Rev. Stat. § 104.9408 (2011); N.D. Cent. Code § 41-09-70 (2010 & Supp. 2011); Ohio Rev. Code Ann. § 1309.408 (West 2004); Okla. Stat. Ann. tit. 12A, § 1-9-408 (West 2001 & Supp. 2012); S.C. Code Ann. § 36-9-408 (2003); Tex. Bus. & Com. Code Ann. § 9.408 (West 2011 & Supp. 2012); Utah Code Ann. § 70A-9a-408 (LexisNexis 2009); Vt. Stat. Ann. tit. 9A, § 9–408 (2001); Va. Code Ann. § 8.9A-408 (2001 & Supp. 2012); Wash. Rev. Code Ann. § 62A.9A-408 (West 2003 & Supp. 2012); Wis. Stat. Ann. § 409.408 (West 2003).

[181] *See In re Tracy*, 2012 WL 4874485, at *9–10.

III. The Existence of a Debtor's Rights in Contingent Rights to Payment

The need to take a security interest in a right to funds, when the funds may or may not exist depending on some future event, is not unique to creditors in the broadcasting industry.[182] Whether the debtor's right to such funds exists before the triggering events occur has been an issue of debate in several other situations involving contingent rights to payment.[183] This Part looks at three such situations: (1) a debtor's right to receive a refund of a pension plan contribution,[184] (2) a debtor's right to receive payment pursuant to a contingency fee agreement,[185] and (3) a debtor's right to receive proceeds from the sale of a liquor license.[186] In all three situations, courts have found attachment of a security interest when the respective contingencies had not yet occurred; thus, necessarily, the debtor's right to the future funds existed before the event triggering the creation of the funds occurred.[187]

A. *Scenario 1: The Right to a Pension Plan Refund*

At the most basic level, a pension plan is a mechanism by which an employee receives income after retirement.[188] Depending on the type of pension plan established, the pension is funded in part by contributions from the employer.[189] Although a pension plan is created to last indefinitely, there are circumstances in which an employer may terminate its plan.[190] Under the Employee Retirement Income Security Act

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[182] *See* Cadle Co. v. Schlichtmann, 267 F.3d 14, 16 (1st Cir. 2001) (discussing the ability to take a security interest in a debtor's right to receive a contingency fee); *In re* Main St. Beverage Corp., 232 B.R. 303, 305 (D.N.J. 1998) (discussing the ability to take a security interest in a debtor's right to receive revenues from a state-approved sale of its liquor license); *In re* Long Chevrolet, Inc., 79 B.R. 759, 761 (N.D. Ill. 1987) (discussing the ability to take a security interest in a debtor's right to receive a pension refund).

[183] *See* Timothy F. Boyce, *Collateralizing Nonassignable Contracts, Licenses, and Permits: Half a Loaf Is Better Than No Loaf*, 52 Bus. Law. 559, 562, 569–71 (1997).

[184] *See* notes 188–224 and accompanying text.

[185] *See infra* notes 225–251 and accompanying text.

[186] *See infra* notes 252–281 and accompanying text.

[187] *See In re Long Chevrolet*, 79 B.R. at 765; *In re* Kluchman, 59 B.R. 13, 16 (Bankr. W.D. Pa. 1985); PNC Bank v. Berg, No. 94C-09-208-WTQ, 1997 WL 527978, at *9–10 (Del. Super. Ct. Jan. 31, 1997) (unpublished opinion).

[188] *Retirement Plans, Benefits, & Savings*, U.S. Dep't Lab., http://www.dol.gov/dol/topic/retirement/index.htm (last visited Oct. 12, 2012).

[189] *See Frequently Asked Questions About Pension Plans and ERISA*, U.S. Dep't Lab., http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html (last visited Oct 12, 2012).

[190] *Id.*

of 1974 ("ERISA"), an employer in such circumstances has the right to receive a refund of their contributions to the plan.[191]

When a debtor who is contributing to a pension plan seeks financing, a potential creditor may wish to use any future pension plan refund to secure the obligation.[192] To avoid invalidation of a security interest in the refund in bankruptcy under section 552(a) of the Code, a creditor must ensure that it has an enforceable pre-petition security interest in the collateral of which the refund is proceeds.[193] Specifically, the creditor will want to create a valid pre-petition security interest in the debtor's right to a pension plan refund.[194]

An employer's right to a pension plan refund for its contributions is guaranteed by federal statute.[195] The employer does not, however, automatically receive the refund upon termination of the plan.[196] Before the employer can obtain the refund, it must first pay all liabilities due under the plan to the employee beneficiaries.[197] The employer may then take possession of the remaining funds.[198]

According to the reasoning of the U.S. Bankruptcy Court for the District of Colorado, in the 2010 case *In re Tracy Broadcasting Corp.*, a debtor's right to a pension plan refund is subject to two contingencies: (1) the termination of the plan, and (2) the distribution of funds to all beneficiaries with claims against the pension plan.[199] Unlike in the original *In re Tracy* decision, however, courts faced with this scenario in the

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[191] *See* 29 U.S.C. § 1344(d)(1) (2006). In order for the refund to be given to the employer, the employer must have stated the right to such a distribution in its pension plan, paid all of its liabilities under the plan, and ensured that the refund would otherwise accord with the law. *See id.*

[192] *See In re Long Chevrolet*, 79 B.R. at 762; *In re* Nw. Acceptance Corp., 93 B.R. 243, 244 (Bankr. D. Or. 1988); *In re* Guterl Special Steel Corp., 91 B.R. 721, 722 (Bankr. W.D. Pa. 1988).

[193] *See* 11 U.S.C. § 552 (2006).

[194] *See In re Long Chevrolet*, 79 B.R. at 762; *In re Nw. Acceptance*, 93 B.R. at 244; *In re Guterl*, 91 B.R. at 722. The refund is proceeds of the debtor's right to receive a pension plan refund; thus, under section 552(b), a refund acquired post-petition would be subject to a valid security interest as long as the creditor had a valid pre-petition security interest in the debtor's right to receive the refund. *See* 11 U.S.C. § 552(a)–(b); U.C.C. § 9-102(a)(64) (2003).

[195] *See* 29 U.S.C. § 1344; *In re Long Chevrolet*, 79 B.R. at 765.

[196] *See* 29 U.S.C. § 1344(d).

[197] *See id.*; *In re Long Chevrolet*, 79 B.R. at 764. The Pension Benefit Guaranty Corporation must approve the allocation, and then actually distribute the funds before the debtor can receive a refund. *See In re Long Chevrolet*, 79 B.R. at 765; *In re Nw. Acceptance*, 93 B.R. at 247.

[198] *See* 29 U.S.C. § 1344(d).

[199] *See id.*; *In re Long Chevrolet*, 79 B.R. at 764; *In re* Tracy Broad. Corp., 438 B.R. 323, 330 (Bankr. D. Colo. 2010), *aff'd*, 469 B.R. 55 (D. Colo. 2011), *overruled by* 2012 WL 4874485 (10th Cir. 2012).

pension plan context have held that a security interest in an employer's right to a pension plan refund attaches pre-petition, even when the plan is not terminated until after commencement of the bankruptcy case.[200] Thus, the debtor's right to a refund, although subject to two conditions that have not yet occurred, is immediate enough to constitute sufficient rights in the collateral.[201]

In 1987, in *In re Long Chevrolet, Inc.*, the U.S. District Court for the Northern District of Illinois held that an employer's right to a pension plan refund existed at the time the security interest in the right was granted, even though the steps necessary to actually convey the refund had not yet been taken.[202] Long Chevrolet, the debtor, had excess contributions to the pension plan trust in the amount of $187,000.[203] General Motors Acceptance Corporation ("GMAC"), its creditor, had been granted a security interest in Long Chevrolet's general intangibles, including the debtor's right to a pension plan refund.[204] Subsequently, Long Chevrolet requested to use its excess contributions to reopen its business.[205] GMAC argued that Long Chevrolet could not spend the pension plan refund, as GMAC had a security interest in the funds by virtue of its security interest in the debtor's right to receive the refund.[206]

Long Chevrolet argued that it did not have a right to the pension plan refund until, at the earliest, the Pension Benefit Guaranty Corporation ("PBGC") determined all of the liabilities of the plan such that the amount that would be refunded to Long Chevrolet was certain.[207] The bankruptcy case commenced before that occurred, however, and thus, Long Chevrolet asserted that GMAC's security interest did not attach pre-petition.[208] GMAC argued that Long Chevrolet had the right

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[200] *See In re Nw. Acceptance*, 93 B.R. at 244; *In re Guterl*, 91 B.R. at 725. In this scenario, because the plan has not been terminated until after commencement of the case, neither contingency required for the employer to receive its refund has occurred. *See In re Nw. Acceptance*, 93 B.R. at 245; *In re Guterl*, 91 B.R. at 723.

[201] *See In re Nw. Acceptance*, 93 B.R. at 244; *In re Guterl*, 91 B.R. at 725.

[202] *See* 79 B.R. at 765.

[203] *Id.* at 761.

[204] *Id.* at 762. The right to a pension plan refund is a general intangible. *See In re Nw. Acceptance*, 93 B.R. at 250.

[205] *In re Long Chevrolet*, 79 B.R. at 761.

[206] *Id.*

[207] *Id.* at 762.

[208] *Id.*

to the pension plan refund at the time the pension plan was created, such that attachment occurred at the time of the grant.[209]

The court agreed with GMAC and found that the debtor's refund right arose under both statute and contract, by way of ERISA and the reservation of such right in the pension plan contract.[210] The court held that the debtor's right to the refund was not contingent, even though certain conditions needed to occur before the debtor could receive the refund.[211] Therefore, GMAC had an enforceable security interest in the debtor's right to a pension plan refund post-petition.[212]

The rationale underlying this holding was explicitly discussed the following year in *In re Northwest Acceptance Corp.*, where the U.S. Bankruptcy Court for the District of Oregon also held that an employer's right to a pension plan refund exists at the time the security interest is granted.[213] In *In re Northwest*, McGrew Brothers Sawmill, Inc., the debtor, granted Northwest, its lender, a security interest in its general intangibles, including the debtor's right to a pension plan refund and the proceeds thereof.[214] A year later, McGrew filed for bankruptcy.[215] Subsequently, McGrew terminated its pension plan, and, after the PBGC took the necessary steps, McGrew received its pension refund.[216] Northwest argued that the refund was proceeds of its pre-petition security interest in the debtor's right to receive a pension plan refund such that Northwest was entitled to the refund under the security agreement.[217] The bankruptcy trustee claimed that the debtor's right to the pension refund was too remote and contingent to allow a security interest in it to attach pre-petition because the plan was not terminated until after the bankruptcy case commenced.[218]

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[209] *Id.* at 764–65. GMAC argued that the contract establishing the pension plan identified that the debtor had the right to a pension refund such that, under ERISA, the debtor acquired the right at the time the contract was made. *See id.*

[210] *Id.* at 765.

[211] *See In re Long Chevrolet*, 79 B.R. at 765 ("[the] fact that Long had to wait for the PBGC to approve the allocation . . . does not mean that it had no right to that property prior to that time. . . . [U]nder [ERISA] and the pension plan contract, Long's right to the refund was fixed . . . .").

[212] *Id.* at 766.

[213] *See* 93 B.R. at 244.

[214] *Id.* at 244, 250.

[215] *Id.* at 245.

[216] *Id.*

[217] *Id.* at 244.

[218] *Id.* The bankruptcy trustee—and not the debtor itself—was the other party in this case, as it was the trustee who held the pension refund to administer as part of the estate. *Id.*

The court disagreed and held that the debtor's right to a pension plan refund came into existence when the pension plan was created.[219] The court went one step further than the court in *In re Long Chevrolet*, however, and identified the debtor's right to the pension plan refund as a reversion.[220] Thus, the debtor's right to a refund was neither contingent nor remote.[221] In classifying the nature of the conditions required for distribution of the refund, the court reasoned that it is the value of the right, not the right itself, which is subject to the contingencies.[222] The amount of the refund depends on the statutory conditions (mainly, the termination of the plan and the amount of liability asserted against the plan).[223] The right to the refund is absolute—even if that right is ultimately valueless because the conditions fail to occur.[224]

B. *Scenario 2: The Right to a Contingency Fee*

A contingency fee allows a client to delay payment for legal services pending the outcome of the case.[225] If the outcome is not favorable to the client, the client need not pay the legal fees.[226] The specific terms of such an arrangement are outlined in an agreement between the attorney and client before the attorney begins work on the case.[227] Some agreements—known as contingency agreements—state that the value of the fee to be paid is equal to a certain percentage of the client's recovery from the case.[228] Thus, there are potentially two contingencies that must occur before a lawyer receives payment from the cli-

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[219] *In re Nw. Acceptance*, 93 B.R. at 250.

[220] *Id.* at 249. A reversion is the "interest that is left after subtracting what the transferor has parted with from what the transferor originally had." BLACK'S LAW DICTIONARY, *supra* note 60, at 362. The debtor, through the creation of the pension plan, was not granting the participants all of the funds held in the trust. *In re Nw. Acceptance*, 93 B.R. at 248. Thus any excess funds in the trust would automatically revert back to the debtor. *Id.* at 248–49.

[221] *In re Nw. Acceptance*, 93 B.R. at 249. Reversion as a matter of law is not contingent or remote. *Id.*

[222] *See id.* ("[I]t is logical one may hold a vested reversionary interest with enjoyment postponed with a present value which, upon elimination of the prior possessory interest at some future date, may then be valueless.").

[223] *See id.*

[224] *See id.*

[225] BLACK'S LAW DICTIONARY, *supra* note 60, at 362.

[226] *Id.*

[227] *See Cadle*, 267 F.3d at 16; U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC, 519 F. Supp. 2d 515, 519 (E.D. Pa. 2007); *In re* Holstein, Mack, & Klein, 2000 WL 343795, at *1 n.2 (Bankr. N.D. Ill. 2000); *PNC Bank*, 1997 WL 527978, at *8.

[228] BLACK'S LAW DICTIONARY, *supra* note 60, at 362.

ent.[229] First, the outcome of the case must be favorable to the client; and second, the amount to be recovered by the plaintiff from the suit must be identified.[230]

Courts have allowed creditors to take security interests in a debtor's right to a contingency fee established in a contingency fee agreement.[231] Courts have found that when a debtor has a contingency fee contract pre-petition, but the requisite conditions for payment have not occurred at the time of petition, the security interest in the debtor's right to the contingency fee nevertheless survives bankruptcy.[232] In so holding, courts have used the same reasoning underlying the *In re Northwest* decision regarding pension plans.[233] The debtor has an absolute right to the contingency fee, even if the value of the fee depends on the occurrence of conditions that determine when and how much payment is due.[234]

In 1997, the Superior Court of Delaware, in *PNC Bank v. Berg*, held that a creditor may take a security interest in both an hourly fee contract and a contingency fee contract, and thus, by implication, in the debtor's right to legal fees arising under those contracts.[235] Although this case did not involve bankruptcy, the court engaged in a discussion of the debtor's right to payment arising under a contingency fee agreement.[236] The court held that a firm's right to payment under a fee contract, whether hourly or contingent, is a right to payment that has

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[229] *See id.*

[230] *See id.*

[231] *See, e.g.*, *Cadle*, 267 F.3d at 20; *In re Holstein*, 2000 WL 343795, at *8; *PNC Bank*, 1997 WL 527978, at *10.

[232] *See, e.g.*, *Cadle*, 267 F.3d at 20; *In re Holstein*, 2000 WL 343795, at *8; *PNC Bank*, 1997 WL 527978, at *10.

[233] *See U.S. Claims*, 519 F. Supp. 2d at 523; *In re Nw. Acceptance*, 93 B.R. at 249; *PNC Bank*, 1997 WL 527978, at *9.

[234] *See U.S. Claims*, 519 F. Supp. 2d at 523; *PNC Bank*, 1997 WL 527978, at *9.

[235] *See PNC Bank* 1997 WL 527978, at *9–10 (unpublished opinion). An hourly fee contract gives the attorney a right to payment that is earned upon the attorney's future completion of work on the case. *Id.* at *9. The value of the contract depends upon the number of hours worked. *Id.*

[236] *Id.* This case concerned attorneys who left a firm to create their own, and, in so doing, took client files related to cases for which their previous firm had contingency fee contracts. *Id.* at *2. The court sought to determine whether a creditor who had a security interest in the previous firm's accounts and general intangibles thus had an interest in the files related to the firm's contingency fee contracts such that the creditor could prevent the attorneys from taking them. *Id.* at *7. The court noted that the fee agreements were contract rights and thus fell under the category of accounts. *Id.* at *9. The court then engaged in a discussion of the nature of contingency fee contracts and the firm's rights to payment. *Id.*

not yet been earned.[237] The amount of payment—not the right to it—depends on the future events.[238] In the hourly fee situation, the value of the payment depends on how much work the attorney performs in the future.[239] Alternatively, with a contingency fee, it depends on the client's recovery in the case.[240] The court noted that the value of the contingency fee right may be more speculative than that of the hourly fee right, but that distinction is irrelevant for purposes of analyzing the existence of the underlying right to payment.[241]

Additionally, in the 2007 case, *U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC*, the U.S. District Court for the Eastern District of Pennsylvania also discussed the nature of a right to payment arising under a contingency fee contract.[242] This case dealt with the sales of accounts, including the sale of unmatured contingency fee contracts.[243] The court's reasoning can still be applied to cases involving security interests, though, because a sale of accounts is not enforceable unless a debtor-seller has rights in the collateral, just as he or she must have for the grant of a security interest to be enforceable.[244]

In this case, the court differentiated between the right to payment arising from a contingency fee contract and a plaintiff's right to payment arising in a tort suit that has yet to be decided.[245] In the latter case, the right to payment itself is what is contingent.[246] If the tort plaintiff loses its lawsuit, it does not mean that the value of the right to payment is zero—rather, there exists no right to payment at all.[247] A favorable outcome in a tort suit establishes the plaintiff's right to payment; before the court renders a judgment, however, there is no legal instrument under which a defendant has an obligation to pay the plaintiff.[248] Alternatively, the attorney's right to a contingency always exists.[249] The client has an obligation to pay, which is created by the terms

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[237] *Id.* at 9.

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] *PNC Bank*, 1997 WL 527978, at *9.

[242] 519 F. Supp. 2d at 522–23.

[243] *Id.* at 519, 524. An unmatured contingency fee is classified as an account under the UCC. *Id.* at 523; U.C.C. § 9-102(a)(2) (2003).

[244] U.C.C. § 9-203. Sales of accounts fall under the scope of Article 9, and are subject to the same attachment rules as security interests. *Id.* § 9-109.

[245] *U.S. Claims*, 519 F. Supp. 2d at 522–23.

[246] *Id.* at 523.

[247] *See id.*

[248] *Id.* at 522–23.

[249] *See id.*

of the contingency contract.[250] How much the client is obligated to pay is what depends on the outcome of the case.[251]

C. Scenario 3: The Right to Proceeds from the Sale of a Liquor License

An entity interested in serving liquor on its premises must obtain a liquor license.[252] Liquor licenses are created, defined, and regulated by each state.[253] Most state governments have instituted transfer restrictions on liquor licenses.[254] In these states, entities wishing to sell their liquor licenses must get government approval before any such transfer can occur, just as the holder of an FCC license must obtain FCC approval before transferring its license to a third party.[255]

The rights and restrictions associated with a liquor license vary depending on the state.[256] Thus, the determination of how to approach security interests in liquor licenses, as well as the assumptions of the nature of the liquor licenses themselves, vary by state.[257] Some courts have acknowledged a distinction between the right to use and the right to receive payment from the sale of a liquor license.[258] This distinction is similar to that made in the FCC licensing context; thus, the reasoning in these cases is most applicable to the facts of the FCC license situation.[259] These courts have found that, just as in the FCC context, a creditor may not take a security interest in a liquor license itself.[260] The debtor's rights under the license, however, may be subject to a security interest, and such an interest would survive bankruptcy.[261]

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[250] *Id.*

[251] *U.S. Claims*, 519 F. Supp. 2d at 523.

[252] *See* Linda L. Munden, *Retail Liquor Licenses and Due Process: The Creation of Property Through Regulation*, 32 Emory L.J. 1199, 1199–1200 (1983).

[253] *See id.*

[254] *See id.* at 1200, 1209–10, 1220–21, 1231.

[255] *See id*; *supra* notes 35–37 and accompanying text (discussing the FCC license transfer process).

[256] *See* Douglas Robert Brown, The Restaurant Manager's Handbook: How to Set Up, Operate, and Manage a Financially Successful Food Service Operation C1-15 (2003); Munden, *supra* note 252, at 1200.

[257] *See* Boyce, *supra* note 183, at 562 (explaining the different approaches courts have taken in deciding this issue).

[258] *Id.*

[259] *See In re* TerreStar Networks, Inc., 457 B.R. 254, 264 (Bankr. S.D.N.Y. 2011); *In re Tracy*, 438 B.R. at 330; *In re* O'Cheskey, 9 FCC Rcd. 986, 987 (1994). As such, this note limits its scope to these cases. *See infra* notes 260–349 and accompanying text.

[260] *See In re Main St.*, 232 B.R. at 310; *In re Kluchman*, 59 B.R. at 15.

[261] *See In re Kluchman*, 59 B.R. at 16. These rights would include the right to receive proceeds from the sale of the liquor license. *Id.* at 15.

In 1985, in *In re Kluchman*, the U.S. Bankruptcy Court for the Western District of Pennsylvania held that a creditor could have a valid security interest in the proceeds from the post-petition sale of a debtor's liquor license by virtue of its pre-petition security interest in the debtor's rights under the license.[262] The debtor had granted a security interest in its property rights and interests.[263] The court found that the liquor license itself is not a licensee's property, and thus could not be subject to a security interest.[264] The licensee does have certain rights under the license, however, including the right to receive revenues from an approved sale of the license.[265] These rights constitute property in which a security interest may be granted.[266]

The *In re Kluchman* court, by implication, found that the debtor's right to receive revenue from the sale of the license existed before the sale of the license occurred; therefore, the debtor had adequate rights in the collateral for attachment purposes.[267] The court reasoned that the creditor's security interest in the debtor's interest in its liquor license was perfected pre-petition.[268] Perfection by definition means that the security interest attached, which requires that the debtor have rights in the collateral.[269] At the time the bankruptcy case commenced, the liquor license had not yet been sold.[270] Consequently, the debtor had rights in the collateral—including its right to receive proceeds from the sale of the license—before any contingencies regarding the sale of the license occurred.[271] In so holding, the court necessarily determined that the right to receive proceeds from the sale of the liquor license was not too remote, even if the contingencies required for the sale had not yet occurred.[272] Thus, the court must have used the same rationale underlying the *In re Northwest* decision regarding pension plans, finding that the contingencies associated with the sale of a liquor

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[262] *Id.* at 16.

[263] *Id.* at 14.

[264] *See id.* at 15.

[265] *Id.*

[266] *See In re Kluchman*, 59 B.R. at 16. These rights fell within the category of property interests, and thus were covered by the security agreement. *See id.*

[267] *See id.*

[268] *See id.*

[269] U.C.C. §§ 9-203(b), 9-308(a) (2003).

[270] *In re Kluchman*, 59 B.R. at 14.

[271] *See id.* at 16; U.C.C. § 9-203(b).

[272] *See In re Kluchman*, 59 B.R. at 16. If the court had believed that the right itself was too remote without the occurrence of the relevant contingencies, they would not have been able to find that it attached pre-petition, because the contingencies did not occur until after commencement of the bankruptcy case. *See id.*

license do not make the right itself contingent or remote, but instead affect only the value of the right.[273]

Moreover, in 1998, in *In re Main Street Beverage Corp.*, the U.S. District Court for the District of New Jersey held that no valid security interest existed in the debtor's right to receive revenues from the sale of its liquor license.[274] Despite this unfavorable outcome, the rationale behind the court's decision does not contradict the idea that, in the FCC license context, a security interest in the debtor's right to receive sale revenues can attach pre-petition.[275] The court acknowledged that a liquor license has economic value that can be realized upon, for instance, the sale of the license to a third party.[276] This economic value, the court held, is not separable from the license itself.[277] Thus, as a debtor may not grant a security interest directly in its liquor license, and the economic value of the license is not separable from the license itself, the debtor may not grant a security interest in its right to receive the economic value from the license.[278]

In explaining its holding, the *In re Main Street* court noted that the governmental entity creating the license has the ability to dictate those rights to which the licensee is entitled.[279] Here, the state did not separate the economic value of the license from the license itself by giving the licensee the right to utilize the economic value of its liquor license as collateral.[280] The state did not expressly deny the ability of a debtor to grant a security interest in its right to receive proceeds from the sale of the license; the court noted, however, that mere refusal to deny does not equal permission where the state liquor laws do not so provide.[281]

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[273] *See In re Nw. Acceptance*, 93 B.R. at 249; *In re Kluchman*, 59 B.R. at 16.

[274] 232 B.R. at 310.

[275] *See id.*

[276] *See id.* at 309.

[277] *Id.* at 310.

[278] *Id.* at 309–10.

[279] *Id.* at 310 ("[T]he state legislature . . . may choose to redefine the nature of a liquor license under state law.").

[280] *In re Main St.*, 232 B.R. at 310. The state's approach is thus unlike that of the FCC. *See supra* notes 87–100 and accompanying text. *See also supra* notes 253, 256–258 (explaining that, because liquor licenses are created and defined by the state, each state is able to determine for itself to what extent a licensee may claim a right to receive revenue from the license).

[281] *In re Main St.*, 232 B.R. at 310.

IV. A Debtor Should Have Rights in the Sale Revenues of an FCC License at the Time the License Is Acquired

The question of when an FCC licensee acquires the right to receive sale revenues from its FCC license is extremely important.[282] If the right is not acquired until the sale is finalized, or even imminent, most debtors will not have rights in the collateral sufficient to create a valid security interest until after commencement of the bankruptcy case, when most sales occur.[283] This outcome would have a devastating effect on the broadcasting industry, as any such security interest would be invalid under section 552(a) of the Code.[284] In practice, then, lenders would be unable to use sale revenues from an FCC license as collateral; yet, broadcasters often have no other property in which to grant a security interest.[285] The inability of a lender to obtain collateral of a high value will result in the lender's unwillingness to provide enough financing, or any financing at all.[286] Without financing, it will be extremely difficult for new entities to enter the broadcasting market, as they will not be able to afford the expensive FCC license necessary to operate.[287] From a policy standpoint, then, it is essential that a licensee is able to pledge its right to receive sale revenues as collateral and have that security interest survive bankruptcy so that the licensee can obtain the necessary financing.[288]

Beyond policy, there are important parallels between the FCC licensing scheme and the three scenarios involving contingent rights to payment analyzed above.[289] The main similarity is the existence of contingencies that must occur before the debtor can receive the funds at

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[282] *See In re* Tracy Broad. Corp., 438 B.R. 323, 330 (Bankr. D. Colo. 2010), *aff'd*, 469 B.R. 55 (D. Colo. 2011), *overruled by* 2012 WL 4874485 (10th Cir. 2012); *supra* notes 38–49, 87–108 and accompanying text.

[283] *See In re* TerreStar Networks, Inc., 457 B.R. 254, 269 n.13 (Bankr. S.D.N.Y. 2011); *In re Tracy*, 438 B.R. at 330.

[284] *See* 11 U.S.C. § 552(a) (2006) (invalidating after-acquired property clauses when the property has not been acquired at the time the bankruptcy case is commenced); Sepinuck, *supra* note 4, at 6.

[285] *See In re TerreStar*, 457 B.R. at 269; Montero, *supra* note 5. Although creditors could technically use sale revenues as collateral, such a security interest will be meaningless if it cannot survive bankruptcy due to the fact that most sales occur post-petition. *See In re TerreStar*, 457 B.R. at 269 & n.13.

[286] *See* Sepinuck, *supra* note 4, at 6.

[287] *See id.*

[288] *See In re TerreStar*, 457 B.R. at 269; Sepinuck, *supra* note 4, at 6.

[289] *See In re* Long Chevrolet, Inc., 79 B.R. 759, 765 (N.D. Ill. 1987); *In re Tracy*, 438 B.R. at 330; Black's Law Dictionary, *supra* note 60, at 362; Munden, *supra* note 252, at 1200, 1209–10, 1220–21, 1231; *supra* notes 182–281 and accompanying text (analyzing the contexts of pension plan refunds, contingency fee payments, and liquor license sale revenues).

issue.[290] This is the key characteristic underlying the question of when the debtor acquires rights; thus, situations that embody this characteristic should be treated the same way.[291] Although the FCC context differs in certain ways from each of the other analyzed industries, these differences are not determinative of when a debtor acquires the right to future payment.[292] Thus, courts faced with the issue of when a licensee's right to receive revenues for the sale of its FCC license should apply the rationale put forth by the U.S. Bankruptcy Court for the District of Oregon in the 1988 case *In re Northwest Acceptance Corp.*, which underlies the treatment of the analogous question in the context of pension plan refunds, contingency fee agreements, and liquor license sale revenues.[293]

A. *Comparing the Right to Receive Sale Revenues from an FCC License with Other Rights to Receive Future Funds*

There are several parallels between the telecommunications industry and each of the three scenarios outlined in Part III above.[294] Most notably, all four situations involve taking a security interest in a right to something that may never have future value.[295] If a pension plan is never terminated, then a debtor's right to a pension plan refund is value-

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[290] *See In re Long Chevrolet*, 79 B.R. at 765 (explaining the contingencies required for receipt of a pension plan refund); *In re Tracy*, 438 B.R. at 330 (explaining the contingencies required for receipt of FCC license sale revenues); Black's Law Dictionary, *supra* note 60, at 362 (explaining the contingencies required for receipt of a contingency fee); Munden, *supra* note 252, at 1200, 1209–10, 1220–21, 1231 (explaining the contingencies required for receipt of liquor license sale revenues).

[291] *See In re Tracy*, 2012 WL 4874485, at *13 (framing the issue before the court as "whether the licensee's right in the sale proceeds . . . is too speculative to support attachment . . . ." because of the presence of the two conditions of sale); *In re Tracy*, 438 B.R. at 330 (explaining that the issue of whether the debtor has rights in the collateral arises because of the existence of conditions that must be met before the license can be sold).

[292] *See* Cadle Co. v. Schlichtmann, 267 F.3d 14, 20 (1st Cir. 2001); *In re* Main St. Beverage Corp., 232 B.R. 303, 310 (D.N.J. 1998); *In re Long Chevrolet*, 79 B.R. at 765; *In re* Nw. Acceptance Corp., 93 B.R. 243, 249 (Bankr. D. Or. 1988).

[293] *See In re Long Chevrolet*, 79 B.R. at 765; *In re Nw. Acceptance*, 93 B.R. at 249; *In re* Kluchman, 59 B.R. 13, 16 (Bankr. W.D. Pa. 1985); PNC Bank v. Berg, No. 94C-09-208-WTQ, 1997 WL 527978, at *9–10 (Del. Super. Ct. Jan. 31, 1997) (unpublished opinion).

[294] *See* 47 U.S.C. § 301 (2006); Benjamin et al., *supra* note 3, at 5; Boyce, *supra* note 183, at 562; Munden, *supra* note 252, at 1199–1200; *supra* notes 182–281 and accompanying text. For instance, both the telecommunications industry and the liquor industry are highly regulated markets in which an entity may not participate without a government-issued license. *See* 47 U.S.C. § 301; Benjamin et al., *supra* note 3, at 5; Boyce, *supra* note 183, at 562; Munden, *supra* note 252, at 1199.

[295] *See In re Tracy*, 438 B.R. at 330; *In re Nw. Acceptance*, 93 B.R. at 249; *PNC Bank*, 1997 WL 527978, at *9; Munden, *supra* note 252, at 1200, 1209–10, 1220–21, 1231.

less.[296] If a case with a contingency fee agreement is not resolved in the client's favor, then the attorney will not collect any legal fees.[297] If either (1) there is no willing buyer, or (2) the state government does not give permission for a transfer to occur, then there will be no sale of a liquor license and thus no sale revenues.[298] Similarly, if the FCC license is not sold, but instead reverts back to the FCC after it expires, then the licensee will receive no value from its right to receive revenues from the sale of its license.[299]

Admittedly, the sale of an FCC license is not perfectly analogous to any of the three types of contingent rights identified above.[300] None of the differences, however, warrant refusal to apply the *In re Northwest* rationale regarding pension plans to the FCC context.[301] It is true that the *In re Northwest* court found that the debtor had a reversionary right to the pension refunds, thus making the right not contingent as a matter of law.[302] It is equally true, though, that the *In re Long Chevrolet* court did not make such a finding, yet also determined that it is not a debtor's right to a pension refund—but the value of the refund itself—that is contingent.[303] Although the presence of a reversionary interest might make the absoluteness of the right more clear, the *In re Long Chevrolet* court demonstrated that this interest is not necessary to support such a finding.[304]

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[296] *See* 29 U.S.C. § 1344(a) (2006). That right is also valueless if the liabilities equal or exceed the amount in the fund. *See id.* § 1344(d)(1).

[297] *See* U.S. Claims, Inc. v. Flomenhaft & Cannata, LLC, 519 F. Supp. 2d 515, 523 (E.D. Pa. 2007); Black's Law Dictionary, *supra* note 60, at 362.

[298] *See* Munden, *supra* note 252, at 1200, 1209–10, 1220–21, 1231. Again, these contingencies exist only in states that have enacted laws requiring that a licensee obtain government consent before transferring their liquor license. *See supra* notes 252–261 and accompanying text.

[299] *See In re Tracy*, 438 B.R. at 330. The sale of an FCC license requires both (1) locating a willing buyer and (2) FCC approval of the transfer. *See In re Tracy*, 2012 WL 4874485, at *6; *In re TerreStar*, 457 B.R. at 269; *In re Tracy*, 438 B.R. at 330. Just as in the liquor license scenario, this would occur if either no buyer is found or if the government denies the transfer request. *See In re Tracy*, 438 B.R. at 330.

[300] *See Cadle*, 267 F.3d at 20; *In re Main St.*, 232 B.R. at 310; *In re Long Chevrolet*, 79 B.R. at 765; *In re Nw. Acceptance*, 93 B.R. at 249.

[301] *See Cadle*, 267 F.3d at 20; *In re Main St.*, 232 B.R. at 310; *In re Long Chevrolet*, 79 B.R. at 765; *In re Nw. Acceptance*, 93 B.R. at 249. *See supra* notes 199—224 and accompanying text (describing the rationales behind the *In re Long Chevrolet* and the *In re Northwest Acceptance* decisions).

[302] *See* 93 B.R. at 249.

[303] *See* 79 B.R. at 765.

[304] *See id.*

Additionally, the right to a pension refund is granted by statute, whereas a licensee's right to sale revenues is not.[305] This, too, is irrelevant for purposes of applying the *In re Northwest* rationale.[306] The FCC has the authority to create the licenses and to determine what rights they bestow upon the holder.[307] The FCC has stated that the license gives the holder a right to receive revenues resulting from a sale of the license.[308] Both the pension refund and the FCC license, then, deal with a right that is explicitly given to the debtor.[309] The authority that grants that explicit right should not matter, as long as the grantor has the appropriate power to do so.[310]

In the contingency fee context, there is one main difference that a court might seek to rely on in declining to extend the *In re Northwest* rationale to the FCC license context.[311] The contingency fee cases do not involve a bifurcation of rights.[312] The thing giving rise to the right—the contingency fee contract itself—is the asset in which a creditor wants to take a security interest.[313] In the FCC license context, this would be analogous to taking an interest in the license itself.[314] This is not what occurs in the FCC situation, however.[315] Instead, those creditors seek to take an interest directly in the right to receive sale revenues that arises under the license.[316] This difference is not relevant, however, because whether the security interest in the FCC context is valid depends on whether the debtor's right to payment is a contingent right.[317] This

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[305] *See In re Long Chevrolet*, 79 B.R. at 765; *In re* O'Cheskey, 13 FCC Rcd. 986, 10,656, 10,660 (1994).

[306] *See In re Nw. Acceptance*, 93 B.R. at 249.

[307] Benjamin et al., *supra* note 3, at 62–63.

[308] *See In re O'Cheskey*, 9 FCC Rcd. at 987 & n.7.

[309] *See In re Long Chevrolet*, 79 B.R. at 765; *In re O'Cheskey*, 13 FCC Rcd. at 10,660.

[310] *See In re Long Chevrolet*, 79 B.R. at 765; *In re O'Cheskey*, 13 FCC Rcd. at 10,660. The FCC has the appropriate power to grant the right because it is the creator of the license. *See* Benjamin et al., *supra* note 3, at 62–63. ERISA, as a federal law, also possesses the appropriate power. *Retirement Plans, Benefits, & Savings: Employee Retirement Income Security Act (ERISA)*, U.S. Dep't Lab., http://www.dol.gov/dol/topic/retirement/erisa.htm (last visited Oct. 12, 2012).

[311] *See Cadle*, 267 F.3d at 20; *PNC Bank*, 1997 WL 527978, at *10; *In re O'Cheskey*, 9 FCC Rcd. at 987.

[312] *See Cadle*, 267 F.3d at 20; *In re* Holstein, Mack, & Klein, 2000 WL 343795, at *8 (Bankr. N.D. Ill. 2000); *PNC Bank*, 1997 WL 527978, at *10.

[313] *See Cadle*, 267 F.3d at 20; *In re Holstein*, 2000 WL 343795, at *8; *PNC Bank*, 1997 WL 527978, at *10.

[314] *See In re O'Cheskey*, 9 FCC Rcd. at 987 & n.7.

[315] *See In re TerreStar*, 457 B.R. at 264.

[316] *See id.*; *In re Tracy*, 438 B.R. at 330.

[317] *See In re Tracy*, 2012 WL 4874485, at *13 (framing the issue before the court as "whether the licensee's right in the sale proceeds . . . is too speculative to support attachment"); *In re Tracy*, 438 B.R. at 330.

analysis is also essential to the matter at issue in the contingency fee cases.[318] It does not matter *why* the issues are important in each particular situation; the fact that the same question—whether the debtor's right to payment is a contingent right—is being answered in both situations allows courts in the FCC license context to apply the same rationale as in the contingency fee context.[319]

Looking to the liquor license industry, one may argue that, under *In re Main Street*, courts should invalidate a security interest in a licensee's right to sale revenues from its FCC license post-petition.[320] Considering the *In re Main Street* and *In re Kluchman* cases together, however, it is clear that the holding in *In re Main Street* should not be applied to the FCC context.[321] The FCC, unlike the state in *In re Main Street*, has acknowledged that a licensee's right to receive revenues from the sale of its license is separable from the license itself.[322] Furthermore, the FCC has explicitly granted licensees the ability to use this right as collateral.[323] Thus, the concern of the court in *In re Main Street*—that the entity responsible for creating license rights did not create the right that the licensee was attempting to assert—is not an issue in the FCC context.[324] Instead, the holding of the *In re Kluchman* court should be applied; the presence of conditions that must be met before a license may be sold does not mean that the debtor's right to receive proceeds from such a sale does not come into existence until one or more of those conditions occur.[325]

B. *Courts Should Apply the* In re Northwest *Rationale to the FCC Licensing Context*

The key factor in the debate over when a debtor acquires the right to receive future funds is the uncertainty of whether the triggering conditions will occur.[326] This key characteristic exists in all four contin-

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[318] *See U.S. Claims*, 519 F. Supp. 2d at 522–23; *PNC Bank*, 1997 WL 527978, at *9.

[319] *See U.S. Claims*, 519 F. Supp. 2d at 522–23; *In re Tracy*, 438 B.R. at 330; *PNC Bank*, 1997 WL 527978, at *9.

[320] *See* 232 B.R. at 310; *supra* notes 274–281 and accompanying text (explaining the *In re Main Street* holding and rationale).

[321] *See In re Main St.*, 232 B.R. at 310; *In re Kluchman*, 59 B.R. at 16.

[322] *See In re O'Cheskey*, 9 FCC Rcd. at 987 & n.7.

[323] *In re O'Cheskey*, 13 FCC Rcd. at 10,660.

[324] *See In re Main St.*, 232 B.R. at 310; *In re O'Cheskey*, 9 FCC Rcd. at 987 & n.7.

[325] *See In re Kluchman*, 59 B.R. at 16.

[326] *See In re Tracy*, 2012 WL 4874485, at *13 (framing the issue before the court as "whether the licensee's right in the sale proceeds . . . is too speculative to support attachment"); *In re TerreStar*, 457 B.R. at 269 (discussing the problems with conditioning attach-

gent right situations.[327] As explained above, any differences between the FCC licensing context and the other three industries are insignificant for purposes of determining when the debtor acquires its right to receive future funds.[328] The existence of this key similarity, combined with the absence of any significant differences, means that, logically, courts should treat all four situations the same.[329] Thus, courts should apply the *In re Northwest* rationale that underlies the treatment of pension plan refunds, contingency fee agreements, and liquor license sale revenues to the FCC licensing context.[330]

Application of *In re Northwest* would require courts to hold that an FCC licensee acquires the right to receive revenue from the approved sale of its FCC license at the time it acquires the license; neither a sale, nor FCC approval of a sale, need be forthcoming.[331] This result makes sense given the structure of the telecommunications industry and its reliance on outside financing.[332] Additionally, such an outcome is consistent with the treatment of the right to receive future funds in other industries.[333] Finally, the *In re Northwest* rationale is logical when applied to the FCC context.[334]

The FCC has explicitly granted the debtor the right to receive the revenues from any sale of its FCC licensee of conveying ownership of the license.[335] The question is what the *value* of those sale revenues will

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ment on the occurrence of two events— "a sale and FCC approval"); *In re Tracy*, 438 B.R. at 330 (explaining that the relevant "question is: did the Debtor have sufficient 'rights in the collateral'" and basing the answer to that question on the fact that the right was "subject to two contingencies").

[327] *See id.*; *In re Nw. Acceptance*, 93 B.R. at 249; *PNC Bank*, 1997 WL 527978, at *9; Munden, *supra* note 252, at 1200, 1209–10, 1220–21, 1231.

[328] *See Cadle*, 267 F.3d at 20; *In re Main St.*, 232 B.R. at 310; *In re Long Chevrolet*, 79 B.R. at 765; *In re Nw. Acceptance*, 93 B.R. at 249.

[329] *See Cadle*, 267 F.3d at 20; *In re Main St.*, 232 B.R. at 310; *In re Long Chevrolet*, 79 B.R. at 765; *In re Tracy*, 438 B.R. at 330; *In re Nw. Acceptance*, 93 B.R. at 249; *PNC Bank*, 1997 WL 527978, at *9; Munden, *supra* note 252, at 1200, 1209–10, 1220–21, 1231.

[330] *See In re Long Chevrolet*, 79 B.R. at 765; *In re Nw. Acceptance*, 93 B.R. at 249; *In re Kluchman*, 59 B.R. at 16; *PNC Bank*, 1997 WL 527978, at *9–10.

[331] *See In re Nw. Acceptance*, 93 B.R. at 249.

[332] *See* Sepinuck, *supra* note 4, at 6. The fact that (1) a telecommunications provider's most valuable asset is its FCC license, (2) the provider and potential creditors will want to use that license's sale revenues as collateral for loans, and (3) telecommunications providers rely on outside financing to participate in the market all mean that a rule rendering the use of the sale revenues as collateral effectively worthless would devastate the telecommunications industry. *See id.*; *supra* notes 38–49 and accompanying text.

[333] *See In re Long Chevrolet*, 79 B.R. at 765; *In re Kluchman*, 59 B.R. at 16; *PNC Bank*, 1997 WL 527978, at *9–10.

[334] *See In re Nw. Acceptance*, 93 B.R. at 249.

[335] *See In re O'Cheskey*, 9 FCC Rcd. at 987 & n.7.

be.[336] The conditions at issue—whether there is a buyer of the license and whether the FCC approves the sale—determine the *amount* of the sale revenues.[337] As such, it is the *value* of the right, not the *existence* of that right, that is contingent.[338] If a buyer is found and the FCC approves the sale, the specific contract with the buyer would determine the amount of the sale revenues, just as the liabilities recognized by the PBGC determine the residual funds constituting the debtor's pension plan refund.[339] If there is no buyer, or the FCC denies the transfer, the value of the right to receive sale revenues would be zero; similarly, if a pension plan is not terminated or the liabilities of the plan exceed the amount of money in the fund, the value of the right to receive a refund would be zero.[340]

The distinction made in the contingency fee context between a tort plaintiff's right to payment and an attorney's right to payment illustrates a situation when the right itself, and not the value of the right, would be contingent.[341] It is the tort judgment that creates the plaintiff's right to payment; thus, the plaintiff does not have a right to payment until it acquires a favorable judgment.[342] Similarly, the right to receive sale proceeds is created by the FCC license.[343] To enjoy the rights under an FCC license, the debtor must first obtain an FCC license.[344] Thus, holding that the right to payment itself is too remote may be appropriate when a broadcasting entity grants a security interest in its right to sale revenues, but has not yet obtained an FCC license.[345] In that case, the right to receive sale revenues would itself be a contingent right—contingent on the acquisition of a license.[346] Conversely, a debtor who has already acquired an FCC license is like the attorney who has already obtained a contingency fee contract.[347] Both have a

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[336] *See In re Nw. Acceptance*, 93 B.R. at 249.

[337] *See id.*

[338] *See id.*

[339] *See* 29 U.S.C. § 1344(d) (2006); *In re Tracy*, 438 B.R. at 330; *supra* notes 195–198 and accompanying text.

[340] *See* 47 U.S.C. § 310(d) (2006); 29 U.S.C. § 1344(d).

[341] *See U.S. Claims,* 519 F. Supp. 2d at 523; *supra* notes 242–251 and accompanying text (explaining the difference between a tort plaintiff's right to payment and a contractual right to payment).

[342] *Id.* at 522–23. Similar reasoning can be applied to the contingency fee situation. *See id.* It is the contingency fee contract that gives rise to the right to payment; thus, an attorney must have an existing contract in order to have a right to the contingency fee. *See id.*

[343] *See In re O'Cheskey*, 9 FCC Rcd. at 987 & n.7.

[344] *See U.S. Claims,* 519 F. Supp. 2d at 522–23; *In re O'Cheskey*, 9 FCC Rcd. at 987 & n.7.

[345] *See U.S. Claims,* 519 F. Supp. 2d at 522–23.

[346] *In re O'Cheskey*, 9 FCC Rcd. at 987 & n.7.

[347] *See U.S. Claims,* 519 F. Supp. 2d at 523; *In re O'Cheskey*, 9 FCC Rcd. at 987 & n.7.

property interest in an item that bestows upon them a right to payment.[348] The right is established by the property interest; it is the value of that right that depends on the occurrence of certain conditions.[349]

Conclusion

The question of when an FCC licensee acquires the right to receive revenues from the sale of its license is complicated, due to the fact that any sale of an FCC license cannot occur until there is a contract for sale and approval from the FCC. The existence of contingencies in future rights to payment, however, is not a new phenomenon. In several industries, such a right has been found to exist upon acquisition of the item from which the right to payment stems—in the FCC context, this would be upon acquisition of the FCC license itself. Given the similarities between the FCC licensing scheme and these industries, and the presence of only inconsequential differences, there is no reason to treat FCC licensing any differently.

Such an outcome is not only logical, but also ensures that lenders have sufficient collateral to finance broadcasting entities. An FCC license is often the most valuable asset a telecommunications provider has; as such, it is vital that a provider is able to grant a security interest in the sale revenues of its license in order to obtain financing from lenders. A rule that prevents a security interest in the sale revenues of an FCC license from surviving in bankruptcy effectively renders such a security interest worthless, and will prevent broadcasting entities from obtaining financing. Determining that a right to receive revenues exists at the moment when the telecommunications provider acquires the FCC license allows for continued financing of existing broadcasting entities and of new entities seeking to enter the telecommunications market.

Regardless of how compelling this policy rationale may be, many courts may refuse to reach the conclusion that these security interests should attach at the time they are created based on policy alone. Additionally, it is fathomable that future courts will be swayed by the reasoning in the original *In re Tracy* decision and, without a contrary legal argument, will reach the same result. Thus, it is important to find a legal basis for holding that a licensee's right to receive sale revenues exists at the time the license is acquired, even though neither condition ultimately required for sale has occurred. Looking at other rights to pay-

[348] *See U.S. Claims*, 519 F. Supp. 2d at 522–23; *In re O'Cheskey*, 9 FCC Rcd. at 987 & n.7.

[349] *See U.S. Claims*, 519 F. Supp. 2d at 523.

ment with similar contingencies—pension plan refunds, contingency fee payments, and liquor license sale revenues—provides the legal basis that many courts need. It is the value of the right to payment, and not the right to payment itself, that depends on the contingencies. Thus, the debtor's right to receive sale revenues from an FCC license is not contingent, and exists at the time the item creating the right—the FCC license—is acquired.

Jennifer Kent