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ARTICLES & INSIGHTS

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Does Misleading or Deceptive Advertising Violate the Automatic Stay?

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Is it a violation of the automatic stay for a competitor of a Chapter 11 Debtor to target the Debtor's customers using false or misleading statements? U. S. District Court Judge Cathy Seibel of the Southern District of New York, reversing a \$19.2 million Bankruptcy Court judgment award, says not. *Windstream Holdings, Inc. v. Charter Commun'ns Inc.* (*In re Windstream Holdings, Inc.*, 2022 U.S. DIST. LEXIS 183574 (Oct.6, 2022)).

Telecommunications provider Windstream Holdings filed an Adversary Proceeding in the Bankruptcy Court for the Southern District of New York alleging that Charter Communications used a deceptive and misleading direct mail advertising campaign that violated 11 U.S.C. §362(a)(3). Windstream stated that the misleading advertising improperly allowed Charter to "exercise control over property of the estate." Charter sent more than 800,000 advertisements in markets where Windstream had numerous subscribers and was actually doing business. The advertisements informed subscribers and potential customers of Windstream's Chapter 11 filing, stating that the filing "means uncertainty" and questioned whether Windstream would be able to provide "the internet and TV services you rely on in the future." *Windstream* at *2. The advertisement offered to buy Windstream customers out of their contracts for up to \$500, stating that "Windstream's future is unknown, but [Charter] is here to stay." *Id.* at *3.

The Bankruptcy Court entered an Order granting Windstream's Motion for Summary Judgment as to liability, holding that "Charter was liable for violating the automatic stay through its advertising campaign, which the Bankruptcy Court described as 'an act to control property of the estate, namely, the debtor's customers or contracts with those customers.'" *Id.* at *5.

At the 4-day trial, Windstream introduced evidence that Charter's advertisements confused Windstream customers resulting in the loss of several thousand customers. Windstream tried to mitigate the damaging direct mail campaign aimed at its customers by offering credits and discounts, causing it to use valuable resources in a corrective advertising campaign. The Bankruptcy Court held for Windstream, sanctioned Charter, and Charter appealed.

Judge Seibel, utilizing the abuse of discretion standard of review, held that the advertising did not violate the automatic stay, finding that Charter's advertisements were not attempts to obtain or control Windstream's contracts with its customers, nor the exercise of control "over any goodwill that is cognizable as a property interest." *Id.* at *17.

Judge Seibel also held that the Defendants' advertising campaign did not "clearly and objectively interfer[e] with Windstream's customer contracts and goodwill and thus clearly . . . precluded by section 363(a)(3)'s plain terms and the caselaw applying them" and there was nothing that suggested that " 'improper' advertisements are methods of 'control,' but legitimate ones are not." *Id.* at *18. Finally, the Court held that §363(a)(3) "does not prohibit all conduct that harms or interferes with a debtor's business, but only that which amounts to an effort to obtain or control estate property." *Id.* at *18.

So, what does this ruling mean for Chapter 11 Debtors? Windstream still has non-bankruptcy law claims that survive under the Lanham Act, and various state law claims that may result in damages for Charter's actions. However, there is no clear guidance from the case as to what kind of actions would constitute the improper exercise of control over property of the estate. It is hard to imagine a set of facts more compelling than these. Perhaps, as the Court states in its conclusion, "advertising (even misleading advertising) is not typically understood to exercise control over property," and even false advertisements that were "improperly influential...is not an objectively obvious reading of the statute or case law." *Id.* at *31. The question remains - "*Can it ever be?*"

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