

Timing is Everything: How to Get Paid by the Bankruptcy Estate

BY ANI BIESIADA, ESQ.



The U.S. Supreme Court's recent decision in *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696 (2020), has altered the standard practice of seeking nunc pro tunc retention orders for estate professionals in bankruptcy cases. **A nunc pro tunc order is an order that has an effective date for some date earlier than the actual date of entry. *Id.* at 700.**

The standard practice of seeking nunc pro tunc retention orders is primarily the consequence of the statutory framework for the compensation of estate professionals. Under sections 327 and 330 of the Bankruptcy Code and Rule 2014 of the Federal Rules of Bankruptcy Procedure, estate professionals cannot be compensated unless their retention is approved first. Rule 6003(a) prohibits courts from entering an order approving retention within 21 days of the commencement of the bankruptcy case, absent a showing that “relief is necessary to avoid immediate and irreparable harm.” Courts have determined that this rule means that estate professionals may not be

compensated for services rendered before the retention order is entered, creating a non-compensable gap period for estate professionals between the date of filing the retention application and the entry of the corresponding approval order. *In re Benitez*, No. 8-19-709230-reg, 2020 WL 1272258, at *6 (Bankr. E.D.N.Y. Mar. 13, 2020).

To avoid this issue, estate professionals routinely sought and obtained nunc pro tunc retention orders with an effective date of some date earlier than the actual date of entry (the date the estate professional began to render services or the filing date of the retention application). This practice is consistent

with the official comments to the 2011 Amendments to Rule 6003(a) that read, in part, that “[R]ule [6003(a)] is amended to clarify that it limits the timing of certain orders, but does not prevent the court from providing an effective date for such an order that may relate back to the time of the filing of the application or motion, or to some other date.”

Enter Acevedo

In *Acevedo*, the Supreme Court held the federal district court’s nunc pro tunc remand order could not revive the orders issued by the state court after the case was removed to the district court. The state court issued orders after the case was removed to federal district court, but before the federal court remanded the case back to the state court. *Acevedo*, 149 S.Ct. at 700-701. Because the state court had no jurisdiction over the case when it issued the orders, the orders were void. *Id.* To cure the jurisdictional defect (and give the state court orders effect), the federal court entered a nunc pro tunc remand order effective on a date before the state court orders were entered. *Id.* The Supreme Court stated that nunc pro tunc orders must reflect what the court had “allowed or ordered, but not entered, through inadvertence of the court.” *Id.* Put differently, *Acevedo* limits the use of nunc pro tunc relief to remedy ministerial or clerical errors made by the court.

As so often happens, this Supreme Court decision in *Acevedo*, which had a tenuous connection to bankruptcy, had a profound effect on bankruptcy practice.

At first blush, it appeared that *Acevedo* effectively barred estate professionals from seeking compensation during the gap period between the retention application and the entry of the corresponding approval order. However, in view of *Acevedo*, in *Benitez*, Judge Robert E. Grossman of the Bankruptcy Court for the Eastern District of New York revisited sections 327 and 330, finding nothing in the Bankruptcy Code or Rules that prevents the award of compensation for services rendered before the entry of a retention order. *Benitez* at 3. The court reasoned that “sections 327 and 330 collectively contain a single temporal limitation.” *Id.* at 6. That is, approval of retention must precede an award of compensation. After retention is approved, the estate

professional may seek compensation for services rendered at any time, including compensation for services rendered before the approved retention order was entered.

In *In re Superior Linen, LLC*, No. 16-15388 (Bankr. D. Nev. May 8, 2020), Judge Mike K. Nakagawa of the Bankruptcy Court for the District of Nevada adopted the reasoning set forth in *Benitez*, approving the Chapter 7 trustee’s *Application for Compensation for Schwartzer & Mcpherson Law Firm, Attorneys for Chapter 7 Trustee* (“Compensation Application”) for the award of fees and reimbursements of costs that had accrued as of the retention date on August 23, 2017, as opposed to the date of entry of the retention order on September 14, 2017.¹

The Ninth Circuit Bankruptcy Court of Appeals recently published a decision in *Merriman* clarifying the limits of *Acevedo*. *Merriman v. Fattorini (In re Merriman)*, 616 B.R. 31 (B.A.P. 9th 2020). At issue, among others, in *Merriman* was whether the bankruptcy court had the authority to retroactively annul the automatic stay. *Id.*

In *Merriman*, the debtor filed his bankruptcy petition for relief under Chapter 13 of the Bankruptcy Code. *Id.* at 385. Thereafter, without knowledge of the debtor’s bankruptcy case, the parties filed a complaint in state court asserting a claim against the debtor before the statute of limitations expired on the claim. *Id.* at 386. After learning of the debtor’s bankruptcy case, the parties filed a motion to retroactively annul the automatic stay to move forward with their claim in state court and avoid the statute of limitations expiring. *Id.* Obtaining this relief would effectively mean that the automatic stay was not in existence at the time the complaint was filed in state court. *Id.* The bankruptcy court found cause sufficient to grant the moving party’s motion to retroactively annul the automatic stay.

Id. On July 13, 2020, the Ninth Circuit Bankruptcy Court of Appeals affirmed the bankruptcy court’s decision. *Id.* at 386-87.

Before pressing on, it is important to note that the filing of the debtor’s bankruptcy petition triggers two events: (i) it creates a bankruptcy estate that consists of all property interests of the debtor, including litigation claims, under section 541(a); and (ii) the automatic stay under section 362(a) goes into effect, which prohibits efforts to exercise control over property of the estate, including the pursuit of litigation claims against the debtor. 11 U.S.C. §§ 541(a) and 362(a). With respect to the automatic stay, however, under section 362(d), if a party establishes cause, the court may grant the moving party relief from the automatic stay by “terminating, annulling, modifying, or conditioning such stay ...” 11 U.S.C. § 362(d).

With that in mind, the Ninth Circuit Bankruptcy Court of Appeals addressed the *Acevedo* effect on the bankruptcy court’s ability to retroactively annul the automatic stay. In reaching its decision, the *Merriman* court cites to and rejects a bankruptcy court’s interpretation of *Acevedo* as prohibiting a grant of retroactive or nunc pro tunc relief from the automatic stay. *Merriman* at 391-94; *In re Telles*,

No. 8-20-70325-reg, 2020 WL 2121254, at *1 (Bankr. E.D.N.Y. Apr. 30, 2020). The court reasoned that if *Acevedo* were to operate as interpreted in *Telles*, to proscribe all retroactive orders, *Acevedo* would render section 362(d) meaningless. *Merriman* at 394.

Instead, the court’s analysis begins by distinguishing the removal statute in *Acevedo*, which explicitly caused the state court to lose its jurisdiction, from the power vested with the bankruptcy courts under section 362(d). *Id.* at 393-94. The court reasoned that while district courts have the original and exclusive

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jurisdiction have over bankruptcy cases, district courts have original but not exclusive jurisdiction over all civil proceedings arising in, arising under, or related to a bankruptcy case. *Id.* at 394-95; 28 U.S.C. §§ 1334(a) and (b).

Congress left the judgment of where a claim may be litigated to the discretion of the bankruptcy court. *Merriman* at 394. The court explained that *Acevedo* had no effect on the bankruptcy court's ability to grant retroactive automatic stay relief under section 362(d). *Id.* at 393-95.

Benitez sidesteps *Acevedo* altogether. The *Merriman* decision bolsters the position that *Acevedo* is not a carte blanche proscription of nunc pro tunc orders, and that a court with jurisdiction may issue nunc pro tunc orders without running afoul of *Acevedo*. For now, it appears that *Benitez* has quelled the need to challenge the application of *Acevedo* to nunc pro tunc retention orders when no jurisdictional defect is present.

ENDNOTE:

1. Judge Mike Nakagawa's action was conducted at a hearing witnessed by the author and was not the subject of an opinion.

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