NUNC PRO TUNC
RETENTION AND COMPENSATION OF PROFESSIONALS, THEN AND NOW

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Most bankruptcy practitioners are familiar with the latin term, "*nunc pro tunc*" meaning "now for then". When used in legal proceedings, *nunc pro tunc* generally refers to giving retroactive effect to a court order. Such orders have traditionally been used to correct an error or omission in the record. *Stansell v. Revolutionary Armed Forces of Colombia*, 771 F.3d 713 (11th Cir. 2014). It has been long recognized that federal courts may issue *nunc pro tunc* orders to reflect the reality of what has already occurred. *Missouri v. Jenkins*, 495 U.S. 33 (1990). The United States Supreme Court recently revisited the topic of *nunc pro tunc* orders and narrowly prescribed the circumstances upon which such relief is permissible in *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano.* — U.S.—–, 140 S. Ct. 696, 206 L.Ed.2d 1 (2020). This paper examines the efficacy and availability of *nunc pro tunc* relief in bankruptcy proceedings pre and post *Acevedo* focusing on the employment and compensation of professionals.

NUNC PRO TUNC EMPLOYMENT AND COMPENSATION PRE-ACEVEDO

In the years preceding *Acevedo*, requests for *nunc pro tunc* orders had become almost commonplace in bankruptcy courts. 2021 No. 1 *Norton Bankr. L. Advisor NL1*, January 2021. Practitioners often sought such relief related to the employment and compensation of estate professionals. The Bankruptcy Code provides the statutory framework by which professionals may be retained and compensated. Section 327 of Title 11 governs the employment of professional persons. It states in relevant part:

> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers,

> or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. §327(a).

Federal Rule of Bankruptcy Procedure 2014 dictates the procedure for applying for an order of employment. Rule 2014(a) provides:

> An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Fed. R. Bankr. P. 2014(a).

Section 330 of Title 11 governs compensation of professional persons, providing in part:

> (a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103--
> (A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, ombudsman, professional person, or attorney and by any paraprofessional person employed by any such person; and
> (B) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a).

Although some Courts interpreted the above statutes to prohibit compensation of professionals for services rendered prior to the effective date of the court order approving their retention, such decisions were in the minority. *See Lavender v. Wood Law Firm*, 785 F.2d 247 (8th Cir.1986)(holding that attorney hired to represent a debtor-in-possession must give notice to creditors and receive court approval before being compensated by the estate); *see also, In re Eureka Upholstering Co.*, 48 F. 2d 95 (2d Cir. 1931). Most Courts agreed that bankruptcy courts possessed the power to issue *nunc pro tunc* orders upon a proper showing. See *Matter of Triangle Chemicals, Inc.*, 697 F.2d 1280 (5th Cir. 1983)(holding that the bankruptcy court had discretion, as a court of equity to consider whether approval of attorney's employment should be granted *nunc pro tunc*); *Matter of Laurent Watch Co., Inc.*, 539 F.2d 1231 (9th Cir.1976)(finding a *nunc pro tunc* order appointing an attorney was not forbidden); *In re TJN, Inc., 194 B.R. 396* (Bankr.D.S.C. 1996) (recognizing that a majority of courts have held that the bankruptcy courts have the discretion to enter *nunc pro tunc* retention orders).

Many courts allowing *nun pro tunc* approval have done so because section 327 of the Bankruptcy Code and Bankruptcy Rule 2014 neither expressly sanction nor forbid the post facto authorization of professional services. See, e.g., *In re Singson*, 41 F.3d 316 (7th Cir. 1994)(noting that nothing in the statute forbids or even reproves belated authorization and timing is a matter of sound judicial administration rather than legislative command). Hence, relying on equitable principles, courts developed various approaches to determine whether such relief was appropriate in a given case. *In re Arkansas Co.*, 798 F.2d 645 (3d Cir. 1986)(agreeing with circuits holding that bankruptcy courts may authorize retroactive employment of counsel and other professionals under their broad equity power and discussing the appropriate standard to be employed in considering such applications).

Some courts, consistent with *In re Arkansas,* noted that post facto applications for employment of a professional may be granted if it can be shown that: (1) the employment satisfies the statutory requirements; and (2) the delay in seeking court approval resulted from extraordinary circumstances. See *In re Jarvis*, 53 F.3d 416 (1st Cir. 1995). Under this "extraordinary circumstances" approach, courts consider various factors including: (1) whether the applicant or some other person bore responsibility for applying for approval; (2) whether the applicant was under time pressure to begin service without approval; (3) the amount of delay after the applicant learned that initial approval had not been granted; and (4) the extent to which compensating the applicant will prejudice innocent third parties. Some other courts set even more heightened requirements. *See In re Eureka Upholstering Co*., 48 F. 2d 95 (2d Cir. 1931). At any rate, tardiness occasioned merely by oversight did not qualify as an extraordinary circumstance under the second prong of the test.

Other courts, (including courts in the 11th Circuit) adopted a more lenient standard holding that a movant seeking retroactive approval of a professionals employment must show that: (1) the professional would have been qualified for employment at the onset and throughout the period for which the services were to be compensated; and (2) the movant's failure to obtain prior approval at an earlier time is excusable. *See In re Fisher*, Case No 16-1911, (Bankr. S.D. Ala. March 27, 2019 (doc. 93); *In re Osprey Utah, LLC*, Case No. 16-2270 (Bankr. S.D. Ala. Mar. 27, 2018) (doc. 295); *Matter of Concrete Products, Inc*., 208 B.R. 1000 (Bankr. S.D. Ga. 1996). Under this approach, the determination of whether "excusable neglect" sufficient to justify the failure to file a timely application exists, requires the court to consider all the circumstances surrounding the party's omission or negligence, including: the danger of prejudice to the debtor, the length of the delay and the potential effect on judicial proceedings, the reason for the delay, including whether

it was within the reasonable control of the movant, and whether the movant acted in good faith. *Matter of Concrete Products*, at 1008 (citing *Pioneer Inv. Servs. v. Brunswick Assocs*., 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)).

ACEVEDO

The Supreme Court's ruling in *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano* significantly curtails the availability of *nunc pro tunc* relief. 140 S. Ct. 696 (2020). In *Acevedo*, active and retired employees of Catholic schools ("Employees") filed suit against the Roman Catholic and Apostolic Church of Puerto Rico ("Church"), Archdiocese of San Juan("Archdiocese"), Superintendent of Catholic Schools of the Archdiocese of San Juan, three Catholic schools, and the trust for employees' pension plan ("Trust"), alleging that the Trust had terminated the pension plan, thereby eliminating the employees' pension benefits. The Puerto Rico Court of First Instance ("Trial Court") denied a preliminary injunction requiring the payment of benefits and the Employees appealed. The Puerto Rico Court of Appeals affirmed and the Employees appealed again. The Puerto Rico Supreme Court reversed and remanded the case to the Trial Court.

The Archdiocese later removed the case to federal court, based on the Trust's Chapter 11 bankruptcy filing. The Bankruptcy Court dismissed the Trust's bankruptcy the next month. Five months later, the District Court entered a *nunc pro tunc* order ("Remand Order") remanding the matter to the Trial Court setting forth the bankruptcy dismissal date as its effective date. In the interim between the bankruptcy dismissal and the entry of the Remand Order, the Trial Court issued orders requiring payments, deposits of money and seizure of church assets (collectively "Seizure Orders"). An appeal of the Seizure Orders ensued and the Puerto Rico Court of Appeals

reversed. Thereafter, the Puerto Rico Supreme Court reversed again and reinstated the preliminary injunction. The Archdiocese then petitioned for Writ of Certiorari to the United States Supreme Court. The Supreme Court did not address the substantive arguments raised on appeal as it determined that the Trial Court lacked jurisdiction to enter the Seizure Orders which were entered before the Remand Order was entered because such order could not be given retroactive effect. The Opinion set forth the Court's holding as follows:

> . . . Once a notice of removal is filed, the State court shall proceed no further unless and until the case is remanded." 28 U. S. C. §1446(d).2. The state court "los[es] all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment [are] not ... simply erroneous, but absolutely void." *Kern v. Huidekoper*, 103 U.S. 485, 493, 26 L.Ed. 354 (1881). "Every order thereafter made in that court [is] coram non judice," meaning "not before a judge." *Steamship Co. v. Tugman,* 106 U.S. 118, 122, 1 S.Ct. 58, 27 L.Ed. 87 (1882); *Black's Law Dictionary* 426 (11th ed. 2019). *See also* 14C C. Wright, A. Miller, E. Cooper, J. Steinman, & M. Kane, Federal Practice and Procedure § 3736, pp. 727–729 (2018). Since the Trial Court issued the Seizure Orders after the proceeding was removed to federal district court, but before the federal court remanded the proceeding it had no jurisdiction and the Seizure Orders were therefore void. . .

Acevedo at 700.

The Opinion also delineated the limited instances when *nunc pro tunc* orders are appropriate by further stating:

> . . . federal courts may issue nunc pro tunc orders, or "now for then" orders, Black's Law Dictionary, at 1287, to "reflect the reality" of what has already occurred, *Missouri v. Jenkins,* 495 U.S. 33, 49, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990). "Such a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court." *Cuebas y Arredondo v. Cuebas y Arredondo,* 223 U.S. 376, 390, 32 S.Ct. 277, 56 L.Ed. 476 (1912). . .
> . .Put colorfully, "[n]unc pro tunc orders are not some Orwellian vehicle for revisionist history—creating 'facts' that never occurred in fact." *United States v. Gillespie*, 666 F.Supp. 1137, 1139 (ND Ill. 1987). Put plainly, the court "cannot make the record what it is not." *Jenkins,* 495 U.S. at 49, 110 S.Ct. 1651.

Acevedo at 700-701.

Thus, *Acevedo* dictates that: (1) orders entered by courts lacking jurisdiction are void; (2) removal of a matter to federal court deprives the lower court of jurisdiction unless and until the matter is remanded; (3) *nunc pro tunc* orders cannot cure jurisdictional defects; and (4) *nunc pro tunc* orders cannot be used to re-write history.

APPLICABILITY OF ACEVEDO ON CURRENT BANKRUPTCY PRACTICE

Given the Supreme Court's strong language in *Acevedo* regarding *nunc pro tunc* orders, bankruptcy courts have been left to determine whether retroactive relief remains available in matters in which it has traditionally been requested. While *Acevedo* indubitably curtails the usage of such relief in many instances, it seems not all is lost with regard to the employment and compensation of professionals.

General Application of Acevedo

Courts have heeded *Acevedo*'s admonitions and declined to issue *nunc pro tunc* orders when such relief would "make a record what it is not" or purport to resolve a jurisdictional defect. *In re Ramirez,* No. 13-52576-CAG, 2021 WL 4256790, (Bankr. W.D. Tex. September 17, 2021). Illustrations of courts declining to revise history have arisen when parties seek *nunc pro tunc* orders in an attempt to address their failure to timely file for the relief requested. *See e.g*., *In re Nilhan Dev., LLC,* 620 B.R. 385 (Bankr. N.D. Ga. 2020) (finding that *Acevedo* prohibited granting *nunc pro tunc* authorization of a loan transaction outside the ordinary course of business which did not comport with §364); *Travelers Indem. Co. of Am. v. Harris*, No. 3:19-cv-00722-GSC, 2021 WL 2401025, at n.1 (S.D. Ill. June 11, 2021)(recognizing *Acevedo* disallows using a *nunc pro tunc*

order to correct a party's untimely filing); *McNeill v. Hinson*, No. 3:18-cv-00189-MR, 2020 WL 8617627, at 1 (W.D.N.C. Dec. 8, 2020) (explaining that *Acevedo* prevents courts from *nunc pro tunc* ordering that a pleading was timely filed when it was not because doing so would revise the record to reflect a fact that did not occur); *In re Parker*, 624 B.R. 222 (Bankr. W.D. Pa. 2021) (finding that *Acevedo* prevents *nunc pro tunc* reinstatement of the automatic stay because the Court was not previously asked to do so); *In re Zvoch*, 618 B.R. 734 (Bankr. W.D. Pa. 2020) (granting *nunc pro tunc* order "would not reflect reality" when the need for the order arose from the debtor's failure to seek pre-approval for a car financing agreement, not the court's inadvertence).

Post *Acevedo*, courts have also recognized their inability to cure jurisdictional issues by *nunc pro tunc* orders. Such instances can arise in the interplay between bankruptcy filings and state court proceedings. *See e.g.*, *In re Telles*, No. 8-20-70325-reg, 2020 WL 2121254 (Bankr. E.D.N.Y. Apr. 30, 2020) (finding that courts cannot grant *nunc pro tunc* relief from the automatic stay to cure a jurisdictional defect in a state court action over the property of the estate). Thus, *Acevedo* has impacted the way bankruptcy courts view requests for retroactive relief and has limited the instances in which *nunc pro tunc* relief is granted.

Effect of Acevedo *on Employment and Compensation of Professionals Under §327 and §330 of the Bankruptcy Code*

Although Acevedo limits the use of *nunc pro tunc* orders, it is not an absolute bar to retroactive compensation of professionals in all instances. *In re Benitez*, No. 8-19-70230-REG, 2020 WL 1272258 (Bankr. E.D.N.Y. Mar. 13, 2020). Bankruptcy Courts evaluating requests for retroactive relief post *Acevedo* have noted that it curtails only the inherent authority of federal courts to grant such relief and does not prohibit relief which is otherwise allowed by the Code and

Rules. *Id.*; s*ee also, In re Miller,* 620 B.R 637 (Bankr. E.D. Cal 2020). Courts have continued to interpret the statutory provisions found in Sections 327 and 330 of the Bankruptcy Code as well as Rule 2014 of Bankruptcy Procedure to allow compensation of professionals for work performed prior to approval of their retention when otherwise warranted.

The Bankruptcy Court for the Eastern District of New York was one of the first courts to consider the effect of *Acevedo* on the employment and compensation of professionals. *In re Benitez*, 2020 WL 1272258. In *Benitez*, the Chapter 7 Trustee sought employment of general counsel *nunc pro tunc*, requesting that such retention be considered retroactive eleven months before the motion was filed. The Court recognized that *Acevedo* necessitated a sua sponte review of the availability of *nunc pro tunc* retentions. *Id.* Upon such review, the *Benitez* Court determined that it was no longer appropriate to utilize *nunc pro tunc* orders to approve the retention of estate professionals retroactive to the actual date of court approval.

However, the *Benitez* Court did not find the prohibition against *nunc pro tunc* relief dispositive on whether it could award compensation for services rendered before the approval of employment. Instead, it determined that retroactive retention of an estate professional is not required because neither the Code nor the Rules preclude an award of reasonable compensation or reimbursement of actual and necessary expenses for services rendered prior to an order approving retention of the professional. *Id.* at 2. The decision explained that §327 and §330 collectively only contain a single temporal limitation: to be eligible for compensation from the estate, retention must first be approved. *Id.* at 3 (citing, *Lamie v. U.S Tr.*, 540 U.S. 526, 538-39 (2004). Acknowledging that some courts have interpreted the terminology in Rule 2014 (referring to persons "to be employed and services "to be rendered") to allow only prospective approval, the *Benitez* Court expressly disagreed with such interpretation stating that, " . . .The better view is that

the rule does not explicitly require prior approval . . . and prior approval should not be read into it . . ." *Id*. at 3 (citing *In re Jarvis*, 53 F.3d 416 (1st Cir. 1995); *Matter of Singson*, 41 F.3d 316 (7th Cir. 1994)). Thus, under the *Benitez* rationale, once retention is approved, the bankruptcy court may award compensation for services rendered to the estate at any time, pre and post approval, under §330. The *Benitez* Court further explained that the *nunc pro tunc* nomenclature should no longer be used with regard to retention and compensation of professionals because it was unnecessary.

Although the *Benitez* Court indicated its willingness to employ statutory provisions to award compensation to professionals pre and post approval of employment, it cautioned practitioners that late filed applications should be subject to heightened scrutiny. *Id.* at 5. In particular, it noted that such applications must set forth the reason for the delay in seeking approval, the services already performed, the approximate billed time, the results obtained and any future services contemplated. The decision also highlighted the risk associated with late applications in that a hindsight analysis may reveal that the services performed may not have benefited the estate. Such was the result in *Benitez* when the Court denied the Motion to Retain because it did not provide sufficient evidence to determine whether the services were necessary and reasonable considering the results obtained.[1]

Most courts which have considered applications for retrospective employment of professionals post *Acevedo* have concluded, consistent with *Benitez*, that retroactive compensation is not prohibited. *In re Ramirez*, 2021 WL 4256790, (Bankr. W.D. Tex. September 17, 2021); *see*

1 The docket revealed that in the nearly one-year period prior to the filing of the Motion to Retain, the Trustee or counsel filed a notice of assets, drafted two letters seeking information and turnover of assets, moved for turnover and examined the Debtor at the 341 meeting. The Court noted that except for the Motion to Compel, the actions taken were functions of the Trustee and as only $1579.28 was yielded more information was needed.

also, In re Wellington, 628 B.R. 19, 25 (Bankr. M.D. N.C. 2021)(noting that although *Acevedo* may have eliminated *nunc pro tunc* retention orders, courts are not prohibited from compensating professionals under §330 for work performed prior to the effective date of employment because such work is common in bankruptcy litigation); *In re Moore*, 2021Wl 3777538 (Bankr. W. D. Ark. August 25, 2021)(finding that while *nunc pro tunc* relief as defined in *Acevedo* was not available, it did not change the existing authority of bankruptcy courts to approve employment that commenced before the motion was brought because Congress did not impose a temporal limitation in §327); *Hagler, et al. v. High Tension Ranch, LLC,* et al., No. 3:20-CV-00564-GCM, 2021 WL3622149 (W.D.N.C. Aug. 16, 2021)(concluding that the retroactive approval of attorneys was not contravened because *Acevedo*'s *nunc pro tunc* "nomenclature was imprecise" and retroactive approval does not violate the statute or relevant rule); *In re Mohiuddin*, 627 B.R. 875 (Bankr. S.D. Tex. 2021)(finding that orders retroactively authorizing employment permissible as they do not alter the historical landscape of the case).

The recent decision of *In* re *Mallinckrodt PLC* also concluded that *Acevedo* does not prohibit courts from retroactively approving employment when otherwise appropriate. No. BR 20-12522-JTD, 2022 WL 906462 (D. Del. Mar. 28, 2022). *Mallinckrodt* involved challenges to the Debtors' motions for authorization to retain ordinary course professionals and special counsel *nunc pro tunc* to the Petition Date.[2] At the hearing, although counsel for the opposing parties acknowledged that *nunc pro tunc* was the custom and practice, and admitted filing hundreds, if not thousands of such motions throughout his career, he argued that *Acevedo* overruled that established precedent and practice. *Id.* at. 3. The Bankruptcy Court held that the application to approve special counsel met the requirements of 327(e) and rejected the opponents reliance on *Acevedo*.

2 The Motion was filed two days after the Petition Date.

On appeal, the District Court agreed that the employment application satisfied the requirements of §327(e) and held that the Bankruptcy Court was well within its discretion in following the established case law and retroactively approving the employment of counsel. *Id.* at 7. The Court explained that *Acevedo* did not overrule Third Circuit precedent because it: (1) did not consider any issues of bankruptcy law; (2) was limited in scope; and (3) only disallowed the use of *nunc pro tunc* orders to create jurisdiction where jurisdiction did not exist. *Id.* at 8. The District Court further recognized that in many cases because of bankruptcy notice requirements, retroactive relief is not only permissible, but practically required.[3]

While many bankruptcy courts have determined that *Acevedo* does not completely prohibit retroactive employment of professionals, justification for such relief must still be shown. *In re McLemore*, 2022 WL 3629415 (Bankr. M.D. Ala. 2022). In *McLemore,* the Court denied an application for employment which was filed two months after counsel became aware of the bankruptcy.[4] Judge Sawyer explained that retroactive employment orders are still permissible post *Acevedo* when the professional qualifies for appointment and the failure to timely seek employment was sufficiently excusable. *Id.* at 5 (noting that factors to be considered surrounding the omission include: prejudice to the debtor, the length of delay, the potential effect on the judicial proceedings, the reason for the delay, whether the delay was within the reasonable control of the movant and whether the movant acted in good faith). Under the facts of the case, the Court found that counsel failed to demonstrate excusable neglect to justify the untimely application because the necessity for the *nunc pro tunc* request could have been prevented by a simple PACER search at

3 For instance, the Court noted that, "the concept of retroactive compensation is incorporated into the Federal Rules of Bankruptcy Procedure," including "Bankruptcy Rule 6003(a), [under which] an application for employment may not be approved within the first 21 days of a bankruptcy case, absent a need to avoid immediate and irreparable harm." *Id.* at 9.

4 This was also nine months after the claim arose, three months after the settlement. Further, the proceeds of $16,788.26 had already been improperly distributed to the Debtor in violation of the terms of the confirmed plan.

the beginning of the representation. As a result, counsel's attorney's fees and expenses were not allowed, the court found that the attorney's actions or inactions directly resulted in the conversion of estate property, and the law firm was directed to pay $40,000.00 (the full amount of the settlement) to the Chapter 13 Trustee. *Id.* at 9.

CONCLUSION

Although in the wake of *Acevedo*, the prior practices of some bankruptcy courts in liberally granting *nunc pro tunc* relief has ended, outcomes have largely remained the same in the area of professional retention and compensation. Most bankruptcy courts have continued to allow retroactive approval of professional compensation (although most no longer dubbing it *nunc pro tunc* relief) when it would have been allowed under prior law. That said, practitioners should remain mindful that even without the constraints of *Acevedo*, late filed retention motions and compensation applications can put the proponent in a precarious situation. Depending on the circumstances and the pre-*Acevedo* standards Courts have used to evaluate such requests, the risk remains that retroactive relief may be denied. Therefore, as a matter of best practice, requests to employ and compensate professionals should be promptly filed.