



Judge in the United States Bankruptcy Court for the Eastern District of New York Interprets Supreme Court Holding on Nunc Pro Tunc Retentions

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In this case, the debtor filed a petition for relief under chapter 7. An interim chapter 7 trustee was appointed to the case (the “Trustee”), a meeting of the creditors was held and the Trustee filed a notice of discovery for the debtor’s assets. Three months after the discovery notice, the debtor received a discharge. The Trustee then filed a motion to retain counsel (the “Motion”) one year after the filing and eleven (11) months after counsel had begun to provide services to the estate. In the Motion, the Trustee sought approval for general counsel going back to the beginning of the case. Judge Grossman denied the Motion.

Judge Grossman examined various sections of title 11 of the Bankruptcy Code and the US Supreme Court’s holding in *Roman Catholic Archdiocese of San Juan Puerto Rico v. Acevedo Feliciano* ([View Previous Client Alert](#)) to assess whether the Trustee’s Motion for nunc pro tunc retention should be approved.

The Judge interpreted the Supreme Court’s ruling in *Acevedo Feliciano* ultimately holding that the use of nunc pro tunc orders to approve the retention of estate professionals retroactively to some date prior to the actual date of court approval of retention is inappropriate. Retroactive approval of the retention of an estate professional is not mandated under the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure. Judge Grossman noted that the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure (the “Rules”) do not preclude an award for reasonable compensation under section 330 for services rendered prior to an order approving the retention of a professional.

Notably, Judge Grossman held that while a professional must be retained in accordance with the Bankruptcy Code and Rules, once having been retained, the bankruptcy court is free to compensate him/her for services rendered to the estate at any time, pre and post-court approval, based on section 330 of Bankruptcy Code.

However, late-filed retention applications will be subject to heightened scrutiny and nunc pro tunc retentions will no longer be required or granted.

Judge Grossman also reviewed Second Circuit precedent regarding a per se rule that denies compensation to a professional who renders pre-appointment services to a debtor. The Court distinguished various cases and ultimately held that there is no per se prohibition against awarding reasonable compensation to an estate professional or actual and necessary services rendered to the estate prior to the date of court approval for retention.

Based on the facts of the case the Court could not evaluate whether it was necessary for the Trustee to retain general counsel, whether the delay in seeking retention of counsel was reasonable and whether looking back, counsel provided any benefit to the estate. There was no basis for the Trustee to retain general counsel.

Despite analysis and reference to the Supreme Court's decision in *Acevedo Feliciano*, questions still remain on whether there is a blanket prohibition on making orders effective as of an earlier date where there has been no prior formal order entered by a court. There are also creative approaches and alternative methods available to address the need for compensating professionals for services rendered prior to approval of a retention. The best advice is to have an order of retention entered as soon as work begins, limiting the need to apply alternative methods for retention and compensation.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding these provisions, or any other aspect of bankruptcy law, please contact Michael Traison at [312.860.4230](tel:312.860.4230)

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