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Feature

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Semantic Differences Have Practical Consequences

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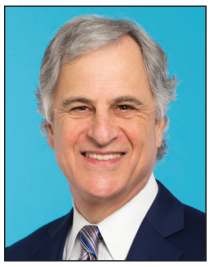

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In June 2020, the U.S. Supreme Court limited the use of *nunc pro tunc*[1] orders in *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano* ("*Acevedo*").[2] The decision has had two opposing interpretations in the bankruptcy courts: one concluding that the ruling limits a bankruptcy court's power to annul the automatic stay, and the other concluding an interpretation that would render "annulment" meaningless.

Neither interpretation gets it fully right. Both courts confuse the issue by confusing the terms "*nunc pro tunc*," "annulment" and "retroactive relief," even though the Supreme Court never addressed annulment or retroactive relief in *Acevedo*. The Court was clear: *Nunc pro tunc* orders are for rectifying what the court intended but did not do due to error or inadvertence. Implicit in the distinction is that annulment and retroactive relief are different kinds of orders entirely and thus unaffected by the decision.

The confusion surrounding the terms is long-standing and emanates from a lack of precision in the discussion about the power to annul generally. This article explains the importance of the semantic differences among *nunc pro tunc* orders, annulment and retroactive relief. Failure to delineate the terms carefully threatens the essential equitable powers of the bankruptcy court, such as the power to annul the automatic stay.

By clarifying the differences among the terms and addressing some of the previous missteps made by bankruptcy and appellate courts, this article intends to show that the Supreme Court delivered a narrow ruling in *Acevedo*, and the ruling is thus limited in its reach. Furthermore, the precise nature of the ruling should be applied when granting retroactive approval of employment under §§ 327 and 330 of the Bankruptcy Code.

Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano

Current and former employees of Catholic schools in Puerto Rico sued the Catholic Church, an archdiocese, the school superintendent, three schools and the pension trust, seeking restoration of a terminated employee pension plan. The Puerto Rico courts (Court of First Instance, Puerto Rico Court of Appeals and Puerto Rico Supreme Court) reached different conclusions on who was a proper defendant.

On Feb. 6, 2018, while the litigation was pending on remand in the Court of First Instance, the trust filed a chapter 11 case. Citing bankruptcy "related to" jurisdiction, the Archdiocese removed the pension litigation to the U.S. District Court for Puerto Rico. The bankruptcy court dismissed the bankruptcy case on March 13, 2018.[3] The Court of First Instance issued payment and seizure orders on March 16, 26 and 30, 2018.

On Aug. 20, 2018, the district court remanded the removed case to the Puerto Rico Court of First Instance because of the dismissal of the bankruptcy case. Although it issued its order on Aug. 20, 2018,[4] the District Court remanded the case *nunc pro tunc* effective as of March 13, 2018, the date of dismissal of the bankruptcy case and before the Court of First Instance issued its orders.

Clarifying the proper use of a *nunc pro tunc* order, the Supreme Court held that *nunc pro tunc* orders are intended to "reflect the reality" of what had occurred, not "make the record what it is not."[5] Put colorfully, the Court stated that "*nunc pro tunc* orders

1 Latin for "now for then." *Black's Law Dictionary* (11th ed. 2019).
2 140 S. Ct. 696 (2020).
3 *Id.* at 700.
4 *Id.*
5 *Id.* (citing *Missouri v. Jenkins*, 495 U.S. 33 (1990)).

are not some Orwellian vehicle for revisionist history-creating 'facts' that never occurred in fact."[6] Interpreted properly, *Acevedo* could correct the common misuse of *nunc pro tunc*. Interpreted improperly, *Acevedo* could erode vital powers of bankruptcy courts to enforce the Bankruptcy Code.

The two main interpretations of *Acevedo* are articulated in *In re Telles*[7] and *In re Merriman*.[8] The former interprets the Supreme Court's ruling to effectively eliminate the ability of bankruptcy courts to annul the automatic stay; the latter reads *Acevedo* as instruction pertaining to jurisdictional issues only, thus leaving the bankruptcy court's ability to annul intact.

In re Telles

Wilmington Trust purchased property at a foreclosure sale "two days after the Debtor [David Telles] filed a bankruptcy petition."[9] Wilmington Trust's purchase was deemed void because it was in violation of the automatic stay, but it sought stay relief to the day of the bankruptcy filing, arguing that the debtor had abused the bankruptcy laws.[10]

The court held that Wilmington Trust's argument had been advanced and accepted in the past, but "the landscape of the law is different post-*Acevedo*." The court dismissed Wilmington Trust's relief request on the grounds that to annul the automatic stay effective as of the date of the bankruptcy filing, the court would have to enter a *nunc pro tunc* order: "The Bankruptcy Court cannot grant the *nunc pro tunc* relief sought by Wilmington [Trust] because there was never a determination by this Court vacating the stay prior to the foreclosure sale."[11]

In re Merriman

Ferdinand and Deann Fattorini filed a wrongful-death action against Shawne Merriman; several months later, Merriman filed for bankruptcy. Within a few days after learning of the bankruptcy, the Fattorinis asked the court to annul the stay so they could continue to litigate the wrongful-death action.[12] The bankruptcy court annulled the stay, and Merriman appealed.

The appellate court found that *Acevedo* did not pertain "to the bankruptcy court's power to annul the automatic stay under § 362(d)."[13] Rather, § 362(d) "explicitly grants the court the power to modify the stay to permit another court or entity to exercise control over an asset or claim."[14] Turning to the language of § 362(d), the court held that it is "absolutely clear that Congress expressly gave such power, including the power retroactively to grant relief."[15]

Confusing the Terms

This misunderstanding of the terms "*nunc pro tunc*," "annulment" and "retroactive relief" long preceded *Acevedo*. It presents itself clearly in the court of appeals decisions about whether acts taken in violation of the automatic stay are void or voidable and in cases where bankruptcy courts wish to grant retroactive approval of employment and compensation of officers under §§ 327 and 330.

Nunc Pro Tunc vs. Annulment

In *In re Albany Partners Ltd.*,[16] the Eleventh Circuit, holding that acts taken in violation of the stay are void, noted the inclusion of both of the words "annul" and "terminate," and delineated the difference: "The word 'annulling' in this provision evidently contemplates the power of bankruptcy courts to grant relief from the stay, which has retroactive effect; otherwise its inclusion, next to 'terminating,' would be superfluous." In *Sikes v. Global Marine Inc.*,[17] the Fifth Circuit, holding that acts taken in violation of the stay are merely voidable, noted that "[t]he power to annul authorizes retroactive relief even unto the date of the filing of the petition giving rise to the automatic stay."

In *Albany Partners*, the Eleventh Circuit's analysis of annulment's inclusion in § 362(d) lies under the heading "Retroactive Relief,"[18] signaling that annulment is a type of "retroactive relief," but not the only type. The Eleventh Circuit did not mix the terms and never referred to a "retroactive annulment" or a *nunc pro tunc* order.

By contrast, *Sikes* understood annulment to operate retroactively. However, the Fifth Circuit confused the terms "annul" and "modify." The court stated that the power to annul "authorizes retroactive relief even unto the date of the filing of the petition giving rise to the automatic stay."[19] But to change the date of the effectiveness of the automatic stay is to modify it. Annulment acts as though the stay never happened and therefore operates only on the date of the filing.

Turning back to the competing interpretations of *Acevedo*, *Telles* failed to distinguish the difference between an annulment and a *nunc pro tunc* order, and that failure led the court to hold that *Acevedo* effectively destroys a bankruptcy court's power to annul. The *Telles* court looked at "annulment" as "[granting] relief from the automatic stay *nunc pro tunc*,"[20] as opposed to an annulment being a separate kind of judicial order.[21] *Acevedo*, on the other hand, made no mention of the word "annulment," because an annulment is not a *nunc pro tunc* order, nor is it an order that has to be entered *nunc pro tunc*.

Although *Merriman* reached the opposite conclusion of *Telles*, the bankruptcy appellate panel also confused the terms. From the introduction, the court framed the issue as being whether the bankruptcy court abused its discretion order "retroactively annulling" the automatic stay.[22] Placing "retroactively" before "annulling" implies that annulment could work some other way, like in the present.

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6 *Id.* (citing *United States v. Gillespie*, 666 F. Supp. 1137, 1139 (N.D. Ill. 1987)).
7 No. 8-20-70325-REG, 2020 WL 2121254 (Bankr. E.D.N.Y. April 30, 2020).
8 616 B.R. 381 (B.A.P. 9th Cir. 2020).
9 *Telles*, 2020 WL 2121254, at *1.
10 *Id.*
11 *Id.* at *5.
12 *Merriman*, 616 B.R. at 385.
13 *Id.* at 393.
14 *Id.*
15 *Id.*
16 749 F.2d 670, 675 (11th Cir. 1984).
17 881 F.2d 176 (5th Cir. 1989).
18 749 F.2d at 674.
19 *Sikes*, 881 F.2d at 178. *See also In re Soares*, 107 F.3d 969, 977 (1st Cir. 1997) (similarly improperly distinguishing between modification and annulment).
20 No. 8-20-70325-REG, 2020 WL 2121254, at *1 (Bankr. E.D.N.Y. April 30, 2020).
21 *Telles* is not the only court to use "annulment" and "*nunc pro tunc*" incorrectly like this. *See, e.g., In re Schumann*, 546 B.R. 223, 228 (Bankr. D.N.M. 2016) ("Section 362(d)(1) provides for relief from the automatic stay upon a finding of 'cause' and contemplates *nunc pro tunc* relief."); *In re 1278 Vill. Run Tr.*, 577 B.R. 830, 835 (Bankr. N.D. Ga. 2017) ("[T]he automatic stay is hereby ANULLED [sic] *nunc pro tunc* to the Filing Date."); *Koutsagelos v. PII SAM LLC*, No. 12-CV-1703 NGG, 2013 WL 2898120, at *5 (E.D.N.Y. June 13, 2013) (examining whether "the Bankruptcy Court applied the correct legal standard in granting *nunc pro tunc* relief from the automatic stay").
22 *In re Merriman*, 616 B.R. 381, 385 (B.A.P. 9th Cir. 2020).

Annulment and *nunc pro tunc* orders are similar only in that they operate retroactively, but fundamentally they are different judicial tools. Annulment is a power given by Congress;[23] *nunc pro tunc* orders are within a court's inherent power to correct judicial records.[24] The Supreme Court understood this difference; the Court never mentioned annulment because there was no intent to implicate the annulment power.

Despite the lack of linguistic precision, the *Merriman* court showed an understanding of how annulment and *nunc pro tunc* orders operate differently and recognized that annulment "has the effect of treating [the automatic stay] as if it had never existed."[25] This is not the relief described by the Supreme Court in *Acevedo*, which clarified that *nunc pro tunc* orders are intended to fix errors made through inadvertence.

Nunc Pro Tunc vs. Retroactive Relief

Separate from annulment and *nunc pro tunc* orders, courts can provide retroactive relief; *Acevedo* did not intend to proscribe such relief. The U.S. Bankruptcy Court for the Eastern District of California addressed retroactive approval of compensation concerns after *Acevedo* in *In re Miller*.[26] *Miller* concerned a chapter 7 trustee's request for retroactive approval of a counsel's appointment and compensation for the services provided.[27] The debtor inadvertently failed to list a pending personal-injury claim and contingency-fee agreement when she filed for bankruptcy. In September 2017, although a discharge was entered and the bankruptcy case was closed as a no-asset case, the debtor's pre-petition counsel continued to work on the personal-injury case until the claim settled in May 2019. The trustee reopened the case and filed an application to employ and compensate the debtor's counsel, but not until July 2020.[28]

In examining the trustee's request, the court looked to *Acevedo*, but appropriately recognized the implications: "*Acevedo* is ... not a *per se* prohibition of all retroactive relief in all instances. *Acevedo* curtails only the inherent authority of federal courts to grant retroactive relief by *nunc pro tunc* orders."[29] Ultimately, the court rejected the trustee's request for "*nunc pro tunc* approval of employment," but granted retroactive relief for compensation to counsel for the services rendered before employment was approved.[30]

Miller's reasoning demonstrates that "retroactive approval" implies a relief different from *nunc pro tunc* or annulment orders. Annulment is inapplicable because there is no record to erase. Similarly, a *nunc pro tunc* order is inapplicable because there is no record to correct. Retroactive approval, as it pertains to § 327, is an entirely different form of relief. The power to approve retroactively does not come from a bankruptcy court's inherent *nunc pro tunc* power but is derived from an implicit power in the Bankruptcy Code.[31] Bankruptcy courts hold the power to approve employment retroactively because such approval can be granted without a *nunc pro tunc* order.[32]

Acevedo does not preclude attorneys from receiving compensation for services rendered before court approval of employment, and the previous function of retroactive approval remains unchanged. However, *Acevedo* does require bankruptcy courts to use the correct language when granting retroactive approval: Bankruptcy courts are authorized to achieve the same results, but they must use the correct analyses to get there.

Conclusion

Merriman was correct when it said that the logical result of *Telles* "would essentially prohibit relief from the automatic stay in all circumstances, including granting prospective relief, where the movant seeks to exercise control over an estate asset."[33] The logical result of failing to delineate among "*nunc pro tunc*," "annulment" and "retroactive relief" properly is that bankruptcy courts would be stripped of key equitable powers, explicit and implicit, including the power to annul under § 362(d) and their power to grant retroactive approval under §§ 327 and 330. These semantical differences can potentially cause severe consequences.

Acevedo implicitly tells courts that delineating among the terms is imperative. At a minimum, acquiescing to the improper use of *nunc pro tunc* orders will no longer be tolerated. By looking to *Telles* and *Merriman*, bankruptcy courts can see the practical consequences of using imprecise language. Courts should refer to the Supreme Court's holding in *Acevedo* as a guide to clearing up the use of all three terms. abi

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23 Similar to the powers bestowed in §§ 327 and 330. *See infra* "*Nunc Pro Tunc* vs. Retroactive Relief" section.
24 *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696, 701.
25 616 B.R. at 388.
26 620 B.R. 637 (Bankr. E.D. Cal. 2020).
27 *Id.* at 639.
28 *Id.*
29 *Id.* at 641.
30 *Id.* at 643.
31 *Id.* at 640 ("As a general matter, authority for federal courts to make retroactive orders derives either from inherent authority, statute, or rule.").
32 *See In re Hunanyan*, No. 1:21-BK-10079-MT, 2021 WL 2389273, at *2 (Bankr. C.D. Cal. June 10, 2021) ("The court has explicit authority under 11 U.S.C. § 327 to approve this employment application without resorting to equitable principles or issuing *nunc pro tunc* orders."); *In re Benitez*, Case No. 8-19-70230-reg, ECF 21 (Bankr. E.D.N.Y. March 13, 2020) (same).
33 *In re Merriman*, 616 B.R. 385, 394 (B.A.P. 9th Cir. 2020).