NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AZ-04-1569-MoSB
WHITE MOUNTAIN COMMUNITIES HOSPITAL, INC.,	Bk. No. 00-06189-PHX-RTB
Debtor.	
DAVID WILLIAMS, M.D.,	
Appellant,	**M E M O R A N D U M**[1]
v.	
McDERMOTT & TRAYNER, P.C.,	
Appellee.	

Argued and Submitted on January 20, 2006
at Phoenix, Arizona

Filed - March 21, 2006

Appeal from the United States Bankruptcy Court
for the District of Arizona

Hon. Redfield T. Baum, Sr., Chief Bankruptcy Judge, Presiding.

Before: MONTALI, SMITH and BRANDT, Bankruptcy Judges.

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[1]This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

A law firm with knowledge of the debtor's bankruptcy performed work for the debtor without obtaining court approval of its employment as special counsel. In addition, the law firm was paid for its postpetition services even though it did not file a fee application or obtain court approval of the fees and payment. After the debtor's general bankruptcy counsel sent a letter demanding that the law firm refund the postpetition payments, the law firm filed an application for nunc pro tunc approval of its employment as special counsel. The law firm also filed a fee application seeking retroactive approval of the fees paid and fees remaining unpaid.

The debtor and a creditor opposed the nunc pro tunc employment application and the fee application. The debtor and the law firm eventually reached a stipulation whereby the law firm agreed to waive its prepetition claim of $38,381.05 and the unpaid $1,553.53 of its postpetition claim, and to refund to the estate $7,500 from the $28,632.50 it received from the debtor postpetition. In exchange, the debtor agreed to withdraw its objection to the law firm's nunc pro tunc employment application and to allow the law firm to retain $21,132.50 of the payments it received postpetition.

The creditor did not withdraw its objection to the law firm's fees and employment. Moreover, the creditor opposed the stipulation between the debtor and the law firm. Over the creditor's objection, the court entered an order approving the stipulation, authorizing the nunc pro tunc employment of the law firm, allowing the law firm's fees in the amount of $21,132.50, and permitting the law firm to retain the postpetition payments in

that amount. The creditor appealed and we AFFIRM.

I.
FACTS

Appellee McDermott & Trayner, P.C. ("McDermott") is a law firm based in California that provided legal advice to debtor White Mountain Communities Hospital, Inc. ("Debtor") on hospital regulatory and health care law matters. In 1999, Debtor's former chief executive officer, David Wanger ("Wanger") requested that McDermott represent Debtor. McDermott did so and as of the petition date of June 9, 2000, Debtor owed McDermott $38,530.35 for prepetition services.[2] At one point, McDermott was appointed as a member of the inactive creditors' committee in Debtor's case.

McDermott ceased working for Debtor when the petition was filed, but in December Wanger requested it to represent Debtor on some urgent health care regulatory issues affecting the hospital's license and Medicare certification. McDermott performed the work, but did not obtain court approval of its employment as special counsel. McDermott charged Debtor $27,950 in fees and $2,236.03 in costs for this postpetition work and was paid $28,632.50 by Debtor without court permission.[3]

At a hearing in February 2004 on estimation of Wanger's claim, Debtor's counsel questioned Wanger about his postpetition

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[2]In footnote 4 of his Opening Brief, the appellant states that McDermott filed its proof of claim on the petition date. This is incorrect. The claims register states that the claim date was June 29, 2000. It shows the petition date as June 9, 2000.

[3]Counsel for McDermott noted that McDermott sent monthly bills to Debtor for these services and was paid monthly, in the ordinary course of business.

retention of McDermott absent court approval.[4] In May 2004, the bankruptcy court approved confirmation of Debtor's plan of reorganization, but conditioned confirmation on Debtor pursuing "recovery of the attorney's fees improperly paid to [McDermott]." Debtor then sent a demand letter to McDermott for turnover of fees paid postpetition.

After receiving Debtor's demand letter, McDermott filed an application to appoint itself as special counsel nunc pro tunc (the "Employment Application"). McDermott claimed that its members were unfamiliar with bankruptcy procedure and law and the need to obtain court approval of their postpetition employment and payment. It further contended that Wanger had hired them on an urgent basis because Debtor could not obtain the needed services from Arizona counsel. McDermott also filed an application for compensation seeking retroactive approval of the $28,632.50 already paid and approval of the unpaid balance of $1,553.53 (the "Fee Application").

Debtor filed an objection to the Employment Application and the Fee Application, arguing that (1) McDermott was not disinterested because it had not unconditionally waived its prepetition claim of $38,381.05, (2) that Debtor had retained and obtained approval of Arizona counsel to represent it in matters concerning healthcare law and regulatory matters, (3) that

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[4]After this hearing, the court entered a minute entry criticizing Wanger for retaining McDermott postpetition and causing Debtor to pay McDermott for its postpetition services without obtaining court approval. "The retention and payment of McDermott by the debtor violated various provisions of the Bankruptcy Code, including but not limited to Section 327, 330 and 549. Wanger knew or should have known that the retention and payment of McDermott violated the requirements of the Code."

McDermott had not satisfactorily demonstrated lack of knowledge of bankruptcy law to justify their failure to obtain court approval of their employment and fees, (4) that the costs charged by McDermott reflected a percentage of fees paid instead of actual costs incurred, (5) that the bill for services included charges for bankruptcy work in which McDermott purportedly had no experience or knowledge, (6) that the time increments were in quarter-hours, which does not reflect reasonable or actual time on tasks, and (7) that some of the work performed by McDermott was duplicative of work performed by other counsel for Debtor.

Appellant David L. Williams, M.D. ("Williams), a creditor and former employee of Debtor, also objected to the Employment Application and to the fees and claim of McDermott.[5] Williams' primary objection was that the members of McDermott were not licensed to practice law in Arizona and thus the firm was representing Debtor "illegally." Williams also noted that McDermott had not demonstrated sufficient cause for nunc pro tunc employment.

McDermott filed replies to both objections. In the reply to Williams' objection, McDermott argued that it had consulted the Arizona state bar prior to commencing work for Debtor to insure

[5]The objection was entitled "Objection to Nunc Pro Tunc Application of McDermott Tranyer [sic] Attorneys and Counter Motion Objecting to Claim of McDermott, Trayner Attorneys." The substance is essentially an objection to the Employment Application, the Fee Application, and the proof of claim of McDermott seeking prepetition fees.

that its representation of Debtor did not violate Arizona law.[6] It also argued that hospital regulatory work was federal in nature and thus Arizona's regulations against the practice of law by attorneys not admitted in Arizona were preempted.

The reply to Debtor's objection focused primarily on Debtor's contentions that McDermott's fees and expenses were not actual and necessary and were not reasonable. McDermott also described the urgent basis of its postpetition work for Debtor, including responses to complaints by Williams to regulatory agencies.

On August 18, 2004, the bankruptcy court held a hearing on the Fee Application and the Employment Application. The court noted that it needed to examine McDermott's papers in more detail to determine if it satisfied the requirements of nunc pro tunc employment set forth in Okamoto v. THC Fin'l Corp. (In re THC Fin'l Corp.), 837 F.2d 389 (9th Cir. 1988). The court also overruled Williams' objection that McDermott had engaged in the unauthorized practice of law. The court gave McDermott an opportunity to file supplemental papers to demonstrate that it satisfied the THC factors for nunc pro tunc employment, gave Williams an opportunity to file a response to any supplemental pleadings by McDermott, and stated that it would take the matter under advisement without further hearing upon receipt of the supplemental papers and response.

After the hearing, McDermott filed supplemental documents (a

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[6]The state bar representative did not outright state that the law of Arizona permitted such representation; rather, she indicated that the state bar and the Arizona Supreme Court were not enforcing compliance with the rules against the unauthorized practice of law.

second affidavit of John A. McDermott) in support of its nunc pro tunc employment. Thereafter, Debtor and McDermott reached a settlement resolving Debtor's objections to the Fee Application and the Employment Application. They filed a stipulation (the "Stipulation") in which McDermott agreed to disgorge $7,500.00 of the postpetition fees it had been paid, to waive its postpetition claim of $1,553.53 and to waive its prepetition claim of $38,530.35. In exchange, Debtor withdrew its objection to the Fee Application and the Employment Application. The record is unclear whether notice of this Stipulation was served on all creditors.[7]

Williams filed an objection to the Stipulation; he did not raise or analyze the factors for approval of compromises in the Ninth Circuit and he did not argue that the procedure that the court fixed at the prior hearing was being abandoned. McDermott filed a reply. Subsequently, on November 8, 2004, the bankruptcy court entered its order approving the Stipulation, overruling Williams' objections to the Employment Application and the Fee Application, appointing McDermott as special counsel nunc pro tunc, and allowing McDermott to retain $21,132.50 in payments that it received postpetition. The record contains no findings of fact and conclusions of law to support this order, other than the conclusion by the court at the August 18 hearing that Williams' arguments regarding McDermott's alleged unauthorized practice of law were unavailing.

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[7]The record contains only the Stipulation (without any proof of service), Williams' objection to it, McDermott's reply to the objection, and the order. In its letter statement in support of McDermott on appeal, Debtor refers to its motion to approve the compromise. That motion is not a part of the excerpts of record.

Williams filed a timely notice of appeal on November 12, 2004. During the pendency of the appeal, the panel denied Williams' motion to certify to the Arizona Supreme Court the issue of whether McDermott had engaged in the unauthorized practice of law. It also granted a motion by Debtor to file a letter statement in support of McDermott's arguments and factual statements. The panel also denied requests by McDermott to supplement the record and to file a sur-reply brief.

II.
ISSUES

1. Did the bankruptcy court err in authorizing the nunc pro tunc employment of McDermott?

2. Did the bankruptcy court err in approving the Stipulation?

III.
STANDARD OF REVIEW

A bankruptcy court's entry of an order approving the nunc pro tunc employment of an estate professional is reviewed for an abuse of discretion. Atkins v. Wain, Samuel & Co. (In re Atkins), 69 F.3d 970, 973 (9th Cir. 1995). Similarly, we review a bankruptcy court's award of fees to professionals for abuse of discretion. Mehdipour v. Marcus & Millichap (In re Mehdipour), 202 B.R. 474, 478 (9th Cir. BAP 1996), aff'd, 139 F.3d 1303 (9th Cir. 1998).

The bankruptcy court's decision to approve a compromise is likewise reviewed for abuse of discretion. Martin v. Kane (In re A & C Properties), 784 F.2d 1377, 1380 (9th Cir. 1986), cert. denied sub nom. Martin v. Robinson, 479 U.S. 854 (1986). As noted by the Ninth Circuit in A & C Properties:

> The law favors compromise and not litigation for its own sake (citation omitted), and as long as the bankruptcy court amply considered the reasonableness of the compromise, the court's decision must be affirmed (citation omitted).

Id. at 1381. "Approving a proposed compromise is an exercise of discretion that should not be overturned except in cases of abuse leading to a result that is neither in the best interests of the estate nor fair and equitable for the creditors." CAM/RPC Electronics v. Robertson (In re MGS Marketing), 111 B.R. 264, 266-67 (9th Cir. BAP 1990).

Under the abuse of discretion standard, we cannot reverse the bankruptcy court's ruling unless we have a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. Marx v. Loral Corp., 87 F.3d 1049, 1054 (9th Cir. 1996).

IV.
DISCUSSION

A. Nunc Pro Tunc Employment

In the Ninth Circuit, nunc pro tunc approval of employment of professionals for the estate and a retroactive award of fees for services rendered without court approval is limited to "exceptional circumstances where an applicant can show both a satisfactory explanation for the failure to receive prior judicial approval and that he or she has benefited the bankruptcy estate in some significant manner." THC, 837 F.2d at 392; see also Atkins, 69 F.3d at 975-76; In re Gutterman, 239 B.R. 828, 830 (Bankr. N.D. Cal. 1999). Thus, in order to obtain court approval of its nunc pro tunc employment, McDermott was required not only to demonstrate that it qualified for employment under 11 U.S.C.

§ 327(e)[8] but also to explain satisfactorily its failure to apply for earlier court approval and to show that its services benefitted the estate. Atkins, 69 F.3d at 975-76.

Here, McDermott satisfactorily explained its failure to apply for court approval of its employment prior to commencing postpetition work for Debtor. McDermott does not perform bankruptcy work; according to Mr. McDermottt's second affidavit, the firm had never served as counsel to a client who was in bankruptcy prior to this case. It had never served as general or special counsel in any bankruptcy case. It performs highly specialized work in the health care regulatory field and its members are not familiar with bankruptcy practice and procedure.

Having represented Debtor on similar matters prepetition (in particular, responding to complaints by Williams to various regulatory agencies that Debtor had violated certain Medicare statutes and regulations), it agreed to represent Debtor postpetition in responding to further allegations by Williams of wrongdoing. In doing so, it billed Debtor on a monthly basis and was paid on a monthly basis. McDermott communicated with Debtor's general bankruptcy counsel, who -- despite its knowledge that McDermott was performing services benefitting Debtor -- never instructed McDermott of the necessity of obtaining court approval of its employment. Under such circumstances, McDermott has justified its failure to seek prior court approval of its employment. Id.

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[8]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

McDermott has also demonstrated that the work it performed postpetition benefitted the estate. As noted in Mr. McDermott's second affidavit, if Williams had prevailed in his continuing allegations against Debtor to the regulatory agencies, Debtor's licenses could have been revoked and Medicare could have suspended Debtor's authorization to treat patients covered by Medicare. By successfully defending against Williams' allegations (with which McDermott was already familiar from its prepetition work), McDermott benefitted the estate. In addition to performing this work, McDermott assisted Debtor in completing regulatory surveys and subpoena responses, thereby enabling Debtor to maintain its license and Medicare reimbursement. Id.

Having satisfied the two prongs for demonstrating "exceptional circumstances" justifying nunc pro tunc employment, McDermott was also required to show that it is qualified for employment as special counsel under section 327(e). Williams contends that McDermott could not do so because (1) McDermott was not "disinterested" because it was a prepetition creditor of Debtor; (2) McDermott did not have standing to seek its own employment as special counsel; and (3) McDermott was not authorized to render services to Debtor because none of its members was licensed to practice law in Arizona. Williams' arguments are not persuasive.

First, section 327(e) does not require special counsel to be "disinterested;" rather, an attorney who represents a debtor-in-possession or trustee as special counsel merely must hold or represent no interest adverse to the estate "with respect to the matter on which such attorney is to be employed." 11 U.S.C.

§ 327(e) (emphasis added). Holding a prepetition claim does not disqualify an attorney from being special counsel. In re Albert, 206 B.R. 636, 642 n.7 (Bankr. D. Mass. 1997) ("Although the Court has found that [attorney] holds a prepetition claim, he may still be employed [as special counsel]. The disinterestedness requirement contained in § 327(a) is not applicable to [special counsel]. Instead, pursuant to § 327(c) and (e), the court need only determine whether [attorney] holds an interest adverse to the estate."). Here, McDermott does not appear to hold any or represent any interest adverse to the estate with respect to the matters for which it was retained. The fact that McDermott held a prepetition claim against Debtor is irrelevant.[9]

Secondly, as the Ninth Circuit held in Atkins, a professional may seek nunc pro tunc employment under section 327 even over the objections of the trustee or debtor-in-possession. Atkins, 69 F.3d at 978. Thus, it is not a requirement that the debtor-in-possession file the application.

Finally, while McDermott may or may not have been authorized to practice law in Arizona, we need not decide that issue because the bankruptcy court has the power to approve out-of-state counsel to represent and advise a debtor. As the Ninth Circuit noted in Brown v. Smith (In re Poole), 222 F.3d 618, 620-21 (9th Cir. 2000), federal courts have the power to control the admission and discipline of attorneys that appear before it, notwithstanding

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[9]Even if holding a prepetition claim against Debtor were grounds for disqualification, McDermott's agreement to waive the claim resolved the issue.

contrary state law regulations governing the practice of law.[10] Id. at 620. Similarly, the bankruptcy court has the authority to approve out-of-state attorneys as special counsel for a debtor, even if that attorney is not licensed or otherwise authorized to practice law in the state where the bankruptcy court sits, and even if the attorney does not actually appear before the bankruptcy court but renders services to the estate elsewhere.

We therefore are not persuaded by Williams' arguments that the court erred in granting the Employment Application because McDermott was not authorized to practice law under Arizona state rules and regulations. If Williams believes that -- outside the context of the bankruptcy case -- McDermott engaged in the unauthorized practice of law, he should pursue his complaint with the appropriate Arizona courts or agencies responsible for the enforcement of attorney disciplinary rules.

B. Approval of Settlement

"The bankruptcy court has great latitude in approving compromise agreements." Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610, 619 (9th Cir. 1987). The court's discretion, however, is not unlimited; the compromise must be "fair and equitable" and "reasonable." Id.; A & C Properties, 784

[10]In Poole, the Ninth Circuit affirmed a bankruptcy court's denial of a trustee's motion to disgorge fees of a debtor's attorney, holding that a bankruptcy attorney admitted to practice before a federal district court is entitled to receive compensation even though he was not admitted to practice by the state bar where the federal court sat. In so holding, the Ninth Circuit stated that "[a]dmission to practice law before a state's courts and admission to practice before the federal courts in that state are separate, independent privileges. 'The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers . . . .'" Id. at 620 (citations omitted).

F.2d at 1381. In determining the fairness and reasonableness of a proposed settlement, the court must consider:

> (a) The probability of success in the litigation; (b) the difficulties, if any to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premise.

A & C Properties, 784 F.2d at 1381. While creditors' objections to a compromise must be afforded due deference, such objections are not controlling. Id. "The opposition of the creditors of the estate to approval of a compromise may be considered by the court, but is not controlling and will not prevent approval of the compromise where it is evident that the litigation would be unsuccessful and costly." Official Unsecured Creditors' Comm. v. Beverly Almont Co. (In re The General Store of Beverly Hills), 11 B.R. 539, 541 (9th Cir. BAP 1981).

The court may give weight to the opinions of the trustee, the parties and their attorneys. A & C Properties, 784 F.2d at 1384. "Rather than conducting a detailed evaluation of the merits of the state court action," the bankruptcy court's function is "to examine the proposed settlement to determine if it falls below the lowest point in the range of reasonableness." In re Hydronic Enterprise, Inc., 58 B.R. 363, 366 (Bankr. D. R.I. 1986).

In this case, the court approved the compromise without making findings setting forth how the Stipulation satisfied A & C Properties and Woodson. While the record would have been much clearer had the bankruptcy court identified, analyzed, and announced how it weighed each of the A & C Properties factors, we will not overturn the approval of the compromise merely because

the court did not explicate its consideration of the factors. Rather, "where the record supports approval of the compromise, the bankruptcy court should be affirmed." A & C Properties, 784 F.2d at 1383. Here, the record supports approval of the Stipulation.

With respect to the first factor, the probability of Debtor succeeding in its battle against McDermott was not particularly significant (particularly given the analysis above that nunc pro tunc employment was not error and that McDermott was not disqualified for holding an unsecured prepetition claim). In fact, the settlement resulted in McDermott waiving its prepetition fees even though the law did not require such a waiver. Additionally, the settlement resulted in McDermott disgorging a quarter of the fees it received and waiving the balance of its postpetition fees. Inasmuch as McDermott justified its nunc pro tunc employment (as discussed above), the estate may well have recovered more than it would have had the Employment Application and Fee Application been decided on the merits, thereby satisfying the second, third and fourth factors of A & C Properties.

In his reply brief, Williams implies that the court erred procedurally when it signed the Stipulation. He contends that McDermott did not supplement its applications (as directed by the court) to show that it satisfied the THC requirements for nunc pro tunc employment and that the court therefore erred in granting the "backdoor" Stipulation. Williams is wrong. McDermott did file a supplemental pleading (the second affidavit of John A. McDermott) in response to the court's directive. The Stipulation was reached after that supplemental response was filed. Williams was given an opportunity to, and did, object to the Stipulation. McDermott

responded to the objection and the court thereafter approved the Stipulation. Williams was given multiple opportunities to air his substantive objections to the Fee Application, the Employment Application and the Stipulation. The court, having an intimate knowledge of this bankruptcy case as well as the merits and nature of this dispute, approved the Stipulation. Williams was not deprived of any due process, and in fact did not specifically object to the procedure. Any objection he may now have regarding the process is waived.

V.
CONCLUSION

For the foregoing reasons, we AFFIRM.