

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

IN RE: ) Chapter 11  
)  
PRIMARY HEALTH SYSTEM, INC., ) Case No. 99-0615-MFW  
et al., )  
) Jointly Administered  
Debtors. )  
\_\_\_\_\_)  
BIOTECH MARKETING, INC., )  
)  
Appellant, )  
)  
v. ) Civil Action No. 01-272-SLR  
) (Appeal No. 01-19)  
PRIMARY HEALTH SYSTEM, INC., )  
et al., )  
)  
Appellees. )

**MEMORANDUM ORDER**

At Wilmington this 28th day of March, 2002;

IT IS ORDERED that the February 22, 2001 order of the United States Bankruptcy Court for the District of Delaware denying appellant's motion for nunc pro tunc approval of employment under section 327 of the bankruptcy code and/or for approval of the allowance and payment of administrative expense claim is affirmed for the reasons that follow:

1. This court has jurisdiction to hear an appeal from the bankruptcy court pursuant to 28 U.S.C. § 158(a). In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. See Am. Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 80 (3d

Cir. 1999). With mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991) (citing Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981)).

2. During the pendency of debtors' Chapter 11 case, appellant entered into an agreement with debtors which provided that debtors would retain appellant to serve as exclusive agent for debtors in selling some of their equipment. Debtors failed to seek the bankruptcy court's approval of the agreement. After executing the agreement, debtors filed several sale motions with the bankruptcy court that included provisions providing for the payment of commissions to appellant for its services. These sales failed to close, and debtors instead sold the equipment at auction with the assistance of appellant. The motion filed with the bankruptcy court seeking approval of this sale did not provide for payment of appellant's commission.

3. In the case at bar, appellant contends that the bankruptcy court applied the incorrect legal standard in denying its request for nunc pro tunc retention as a professional and, in the alternative, that the bankruptcy court abused its discretion

when implementing the "extraordinary circumstances" test as stated by the Third Circuit.

4. The United States Court of Appeals for the Third Circuit requires that nunc pro tunc approval of the employment of a professional person should be limited to "cases where extraordinary circumstances are present." In re Arkansas Co., 798 F.2d 645, 649 (3d Cir. 1986). The Third Circuit stated:

[W]e part company with those courts that have suggested that inadvertence or oversight of counsel may constitute excusable neglect sufficient to relieve the parties of the consequences of their inaction. We agree instead with the approach of those courts that limit the grant of retroactive approval to cases where prior approval would have been appropriate and the delay in seeking approval was due to hardship beyond the professional's control. While this may be a harsh rule, a more lenient approach would reward laxity by counsel and might encourage circumvention of the statutory requirement.

To summarize, we hold that retroactive approval of appointment of a professional may be granted by the bankruptcy court in its discretion but that it should grant such approval only under extraordinary circumstances. Such circumstances do not include the mere neglect of the professional who was in a position to file a timely application. When considering an application, the bankruptcy court may grant retroactive approval only if it finds, after a hearing, that it would have granted prior approval, which entails a determination that the applicant satisfied the statutory requirements of 11 U.S.C. §§ 327(a) and 1103(a) that the applicant be disinterested and not have an adverse interest, and that the services performed were necessary under the circumstances. Thereafter, in exercising its discretion, the bankruptcy court must consider whether the particular circumstances in the

case adequately excuse the failure to have sought prior approval. This will require consideration of factors such as whether the applicant or some other person bore responsibility for applying for approval; the amount of delay after the applicant learned that initial approval had not been granted; the extent to which compensation to the applicant will prejudice innocent third parties; and other relevant examples.

In re Arkansas, 798 F.2d at 649-50 (citations omitted).

5. After conducting an evidentiary hearing, the bankruptcy court correctly applied the "extraordinary circumstances" standard when it noted that, although appellant could have obtained prior approval of the retention agreement, the particular circumstances of this case do not qualify as "extraordinary." The bankruptcy court noted that it would have been reasonable for appellant to wait until the sale hearing or notice of the sale hearing before entering into a retention agreement, that appellant delayed filing a motion for nunc pro tunc approval for over three months after it received notice that it would not be receiving a commission, and that it would be difficult to determine the scope and terms of the agreement and intentions of the parties at this late stage of the proceedings. The court finds no abuse of discretion in this analysis.

Sue L. Robinson  
United States District Judge