

## Did the Supreme Court really ban *Nunc Pro Tunc* Orders?

By Dana L. Robbins

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The U.S. Supreme Court in *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, No. 18-921, 2020 WL 871715, at \*1 (U.S. Feb. 24, 2020) in a *per curiam* opinion that turned on a state court's jurisdiction *after* a case has been removed to district court, but *before* remand, held that a *nunc pro tunc* order cannot save actions taken by the state court in the interim period. The procedural history of the case is complex and not particularly dispositive given the high court's finding of a jurisdictional defect.

The Catholic Church in Puerto Rico created a trust to administer a pension plan for employees of Catholic schools called the Pension Plan for Employees of Catholic Schools Trust (Trust). Active and retired employees sued in the Puerto Rico Court of First Instance alleging that the Trust eliminated the employees' pension benefits. The Court of First Instance denied a preliminary injunction requiring the payment of benefits, but the Puerto Rico Supreme Court reversed in favor of the employees, finding that if the "if the Trust did not have the necessary funds to meet its obligations, the participating employers would be obligated to pay." *Id.* And the Supreme Court remanded to the Court of First Instance to determine which defendants in the case had "legal personalities" such that they would be responsible for continuing to pay the pensions.

After remand to the Court of First Instance, the Archdiocese filed its notice of removal and removed the case to the United States District Court for the District of Puerto Rico. *Id.* at \*3. The Archdiocese contended that the Trust filed for Chapter 11 bankruptcy, and the litigation between the Catholic Church and the employees was sufficiently related to the bankruptcy to give rise to federal jurisdiction. But the Bankruptcy Court dismissed the Trust's bankruptcy proceeding on March 13, 2018. Thus, ostensibly terminating the basis for removal of the suit against the church entities.

The Court of First Instance then issued its order directing the "Roman Catholic and Apostolic Church in Puerto Rico" to make payments to the employees in accordance with the pension plan. *Id.* Ten days later, the Court issued a second order requiring the Church to deposit \$4.7 million in a court account within 24 hours. *Id.* The next day, the Court issued a third order, requiring the sheriff to "seize assets and moneys of . . . the Holy Roman Catholic and Apostolic Church, and any of its dependencies, that are located in Puerto Rico." *Id.* It was not until nearly five months later, on August 20, 2018, that the District Court entered its order remanding the case to the Court of First Instance. *Id.* The August 20, 2018 order, however, provided that it was *nunc pro tunc* to March 13, 2018—the date the Trust's bankruptcy was dismissed. *Id.*

Several appeals followed. Ultimately, the Puerto Rico Supreme Court relying on the Treaty of Paris of 1898, found that all church entities in Puerto Rico—including schools and parishes— are liable for the debts of their related Catholic institutions. The Catholic Church in Puerto Rico filed a petition for *certiorari* in January 2019, contending that rulings by the Puerto Rico Supreme Court violated the Free Exercise and Establishment Clauses of the First Amendment. The Supreme Court granted the petition and ruled on Puerto Rico’s lack of jurisdiction without reaching the merits of the First Amendment.

The Supreme Court began its analysis by discussing the jurisdictional effect of removing a case to federal court. The Supreme Court observed that once a notice of removal is filed, “the State court shall proceed no further unless and until the case is remanded.” *Id.* at \*3 (quoting 28 U. S.

C. §1446(d)). Thus, 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.” *Id.* (citing *Kern v. Huidekoper*, 103 U. S. 485, 493 (1881)).

While the District Court remanded the case to the Court of First Instance by way of a *nunc pro tunc* judgment stating that the order “shall be effective as of March 13, 2018,” the Supreme Court found that federal courts may issue *nunc pro tunc* orders only to “reflect[ ] the reality” of what has already occurred. *Id.* (quoting *Missouri v. Jenkins*, 495 U.S. 33, 49, 110 S.Ct. 1651, 109 L.Ed.2d 31 (1990)). In other words, the Supreme Court stated that “[s]uch a decree presupposes a decree allowed, or ordered, but not entered, through inadvertence of the court.” *Id.* (quoting *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U.S. 376, 390, 32 S.Ct. 277, 56 L.Ed. 476 (1912)). The Supreme Court reasoned that a court “cannot make the record what it is not” by creating facts that never occurred. *Id.* at \*4. Because nothing occurred in the District Court case on March 13, 2018, the case remained in federal court until the District Court on August 20, 2018 rendered its decision on the motion to remand, which was pending before it. *Id.* Thus, the Supreme Court held that all actions taken by the Court of First Instance before remand including the payment and seizure orders were void.

The practical import of this opinion can be vast or constrained to its set of facts. The main distinguishing factor for most practitioners is that the state court in *Roman Catholic Archdiocese of San Juan, Puerto Rico* had no jurisdiction after the removal. So any actions taken were void *ab initio*. Whereas, after a case is filed, the court presumably has jurisdiction conferred and then enters a retroactive order. This is yet to be seen. To be sure, the Supreme Court did not ban all *nunc pro tunc* orders. But it is important to keep in mind when requesting this form of relief from the court that a court “cannot make the record what it is not.”

**To discuss further, please contact one of the authors:**

[Dana L. Robbins](mailto:drobbins@burr.com) at [drobbins@burr.com](mailto:drobbins@burr.com) (813) 367-5760 or

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