No. 15-

IN THE

Supreme Court of the United States

CASIMIR CZYZEWSKI, *et al.*,

Petitioners,

v.

JEVIC HOLDING CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 507 of the Bankruptcy Code grants payment priority to some unsecured claims, including claims for certain wages and employee benefits earned before the bankruptcy filing. 11 U.S.C. § 507(a)(4), (5). Such priority claims must be paid in full before other unsecured claims may be paid from estate assets. The debtor in this chapter 11 case agreed to settle a cause of action belonging to the estate. Rather than distributing the settlement proceeds under a confirmed plan of reorganization, the debtor then sought a "structured dismissal" of the bankruptcy case. The dismissal order provided that the settlement proceeds would be paid to general unsecured creditors, rather than to petitioners, former employees of the debtor whose claims have priority over those of general unsecured creditors under § 507(a)(4) and (5).

The question presented, on which the courts of appeals are divided, is:

Whether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme.

PARTIES TO THE PROCEEDING

Petitioners, appellants below, are Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, Daniel C. Richards, and a certified class of all others similarly situated.

Respondents, appellees below, are Jevic Holding Corp.; Jevic Transportation, Inc.; Creek Road Properties, LLC; the CIT Group/Business Credit, Inc.; Sun Capital Partners, Inc.; Sun Capital Partners IV, LP; Sun Capital Partners Management IV, LLC; and the Official Committee of Unsecured Creditors.

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PETITION FOR A WRIT OF CERTIORARI

Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, and Daniel C. Richards, on behalf of themselves and all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Third Circuit (App. 1a-32a) is reported at 787 F.3d 173. The opinion of the district court (App. 35a-43a) is unreported but available at 2014 WL 268613. The opinion of the bankruptcy court (App. 53a-66a) is unreported.

JURISDICTION

The Third Circuit entered judgment on May 21, 2015, and denied a timely petition for rehearing en banc on August 18, 2015. App. 1a, 67a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The appendix reproduces §§ 103, 507, 726, and 1129 of the Bankruptcy Code (11 U.S.C.) and Federal Rule of Bankruptcy Procedure 9019. App. 69a-91a.

INTRODUCTION

Petitioners represent a certified class of nearly 1,800 truck drivers who were fired without warning when their employer, Jevic Transportation, entered chapter 11 bankruptcy. As a result of their sudden termination, the drivers had claims against the bankruptcy estate for unpaid wages and benefits—claims that were entitled to priority of payment over the claims of general unsecured creditors under § 507 of the Bankruptcy Code. *See* 11 U.S.C. § 507(a)(4), (5).

Yet the drivers received *nothing* for their claims, even though *lower*-priority creditors were paid by the estate. That outcome, as is not disputed, would have been impermissible either in a chapter 11 plan or in a chapter 7 liquidation. The bankruptcy court approved it here as part of a "structured dismissal"—an order that dismisses a chapter 11 case while distributing the remaining estate assets. As the Fifth Circuit has held, however, the Bankruptcy Code does not permit the distribution of settlement proceeds outside a plan in a way that violates statutory payment priorities. In affirming the bankruptcy court's order, the Third Circuit expressly rejected the Fifth Circuit's rule. It also sparked a major controversy.

The question presented by this case is critical to chapter 11 bankruptcy practice. As this Court has repeatedly recognized, the single most important principle of chapter 11 is the rule of absolute priority—the rule that senior creditors are paid before junior creditors, who are paid before equity. A chapter 11 plan that does not respect payment priorities cannot be confirmed. Likewise, a bankruptcy estate that is liquidated under chapter 7 must comply strictly with the payment priorities Congress has specified.

"Structured dismissals" of chapter 11 cases, which neither reorganize the debtor nor liquidate the estate under chapter 7, but dispose of the estate's remaining assets by court order, are becoming more and more common. Permitting such structured dismissal orders—or indeed any order approving a settlement—to distribute settlement proceeds in violation of the Code's payment priorities, as the Third Circuit did here, is an invitation to debtors and junior creditors to evade the requirements of a chapter 11 plan or a chapter 7 liquidation and thereby squeeze out senior creditors. That loophole contravenes the text, structure, and purpose of the Bankruptcy Code, as well as this Court's precedent. And its validity is the subject of a clear and acknowledged circuit split that is squarely presented in this case. This Court should grant review and hold that settlement proceeds may not be distributed in violation of the Bankruptcy Code's priority scheme.

STATEMENT

A. Statutory Background

The Bankruptcy Code contains an intricate set of provisions governing the order of priority of payments to creditors when the assets of the bankruptcy estate are distributed. When, as is commonly the case, there are insufficient assets in the estate to satisfy all claims, these priorities determine who is paid and who is not. 3 *Norton Bankruptcy Law and Practice* § 49:1 (3d ed. 2015). Higher-priority claims are entitled to be paid in full before lower-priority claims are paid anything—a system often likened to a waterfall, with payments cascading down to lower levels of priority only after all higher-priority claims are satisfied. *See, e.g.*, 4 *Collier on Bankruptcy* ¶ 507.02[1] (16th ed. 2015).

The order of priority for unsecured claims is set out in § 507, which currently contains ten categories. Priority is afforded to, for example, unpaid domestic support obligations, 11 U.S.C. § 507(a)(1); expenses incurred during the bankruptcy case to administer the bankruptcy estate, *id.* § 507(a)(2); and some federal, state, and local taxes, *id.* § 507(a)(8).

This case involves claims for unpaid wages and employee benefits, which have long been afforded priority by the Code. *See* 11 U.S.C. § 507(a)(4), (5). Congress established these priorities "to alleviate in some degree the hardship that unemployment usually brings to workers and their families" when a business enters bankruptcy. *United States* v. *Embassy Rest., Inc.*, 359 U.S. 29, 32 (1959); *see also Howard Delivery Serv., Inc.* v. *Zurich Am. Ins. Co.*, 547 U.S. 651, 658-659 (2006). Indeed, employees are "usually the hardest hit financially by a bankruptcy," as they often have no other source of income. 4 *Collier* ¶ 507.06[1]. The wage priority is also an important inducement to employees not to "abandon a failing business for fear of not being paid," which would worsen the prospects of repayment for all other creditors. H.R. Rep. No. 95-595, at 187 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6147-6148.

The § 507 priority scheme applies in all bankruptcy cases. *See* 11 U.S.C. § 103(a). In a chapter 11 case like this one, the priority scheme comes into play in various ways depending on the outcome of the case. A chapter 11 case can traditionally result in one of three outcomes: (1) it can result in a confirmed plan of reorganization; (2) it can be converted to chapter 7 liquidation proceedings; or (3) it can be dismissed.

A plan of reorganization can be confirmed over the objection of a class of creditors only if it respects both payment priorities under § 507 and the broader principle of absolute priority, under which senior claims are paid before junior claims and all creditors are paid before equity. Indeed, to be confirmed, a chapter 11 plan must pay most priority claims under § 507 (including unpaid wage claims) in full on the effective date of the plan, absent consent to different treatment. *See* 11 U.S.C. § 1129(a)(9)(A), (B). More broadly, to be confirmed, a chapter 11 plan must provide all nonconsenting classes of creditors with "fair and equitable" treatment, *id.* § 1129(b)(1)—a term of art meaning that the plan must comply with absolute priority. *See, e.g.*, *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 202 (1988).

A chapter 11 debtor may not be able to confirm a plan, for many reasons. For instance, the bankruptcy court may find that the reorganized debtor's business plan is not feasible. *See* 11 U.S.C. § 1129(a)(11). Or the debtor may not be able to satisfy the requirement that administrative and other priority claims be paid in full on the effective date, *see id.* § 1129(a)(9)—a situation often called "administrative insolvency." In that situation, the debtor may convert the chapter 11 case to chapter 7. *See id.* § 1112(a). Under chapter 7, a trustee will be appointed to liquidate the estate's assets and distribute them among creditors. *Id.* § 704(a)(1). Following distribution to secured creditors of any value derived from their collateral, the trustee must distribute the estate's assets to unsecured creditors with priority claims, in the order set out by § 507. *See id.* § 726(a)(1). Only then may the estate's remaining assets, if any, be used to pay general unsecured claims. *See id.* § 726(a)(2).

A chapter 11 case may also be dismissed entirely, rather than converted to chapter 7. *See* 11 U.S.C. § 1112(b). In that event, estate property revests in the entity that held it immediately before the commencement of the chapter 11 case (typically, the debtor). *Id.* § 349(b)(3). Creditors retain their claims against the debtor and are free to enforce them pursuant to nonbankruptcy law.

Accordingly, chapter 11 by its terms does not expressly contemplate the distribution of estate property on account of a creditor's prepetition claims by any means other than the distributions made under a confirmed plan of reorganization. That said, it has become increasingly common in modern bankruptcy practice for courts to authorize such distributions. Specifically, courts have with increasing frequency authorized the distribution of estate assets in connection with (a) sales of estate assets and (b) settlements of estate causes of action. *See, e.g., In re General Motors Corp.*, 407 B.R. 463, 486-493 (Bankr. S.D.N.Y. 2009) (authorizing distribution of sale proceeds prior to confirmation), *aff'd on* *other grounds*, 428 B.R. 43 (S.D.N.Y. 2010); *In re Chrysler LLC*, 405 B.R. 84, 94-100 (Bankr. S.D.N.Y. 2009) (same), *appeal dismissed as moot*, 592 F.3d 370 (2d Cir. 2010) (per curiam); King, *Rethinking 363 Sales*, 17 Stan. J. L. Bus. & Fin. 260, 271-275 (2012).

Where the distribution of the proceeds of a sale or settlement comports with the Bankruptcy Code's priority scheme, courts have generally found such distributions to be a permissible use of the bankruptcy court's authority, under § 105(a) of the Bankruptcy Code, to issue appropriate orders to "carry out the provisions of this title." 11 U.S.C. § 105(a); *see, e.g.*, *General Motors*, 407 B.R. at 495 (sale did not "dictate or restructure the rights of the creditors"); *Chrysler*, 405 B.R. at 97 ("Not one penny of value of the Debtors' assets is going to anyone other than the First-Lien Lenders.").

Bankruptcy court orders authorizing the distribution of the proceeds of sales and settlements in a manner that conflicts with the Code's priority scheme, however, are far more controversial. Recently, that question has arisen in connection with "structured dismissals" like the order entered in this case. The use and misuse of such orders has become the subject of intense debate in the bankruptcy community. *See, e.g.*, Pernick & Dean, *Structured Chapter 11 Dismissals*, 29 Am. Bankr. Inst. J. 1, 57-58 (June 2010) (describing structured dismissal as "the quickest and most cost-effective way to conclude your chapter 11 case"); Eitel, *Structured Dismissals, or Cases Dismissed Outside of Code's Structure?*, 30 Am. Bankr. Inst. J. 20, 59 (Mar. 2011) (while "parties may … look for the 'quickest and most cost-effective' exit from chapter 11, the supposed expediency of a structured dismissal should not trump the statutory protections it alters or ignores").[1] And, as discussed further below, the Third Circuit's decision here, approving such an order, deepened an existing circuit split on the question whether settlement proceeds may be distributed in violation of priority rules.

B. The Jevic Bankruptcy

1. The debtor in this chapter 11 case, Jevic Transportation, was a New Jersey-based trucking company. App. 2a. In 2006, after a period of financial distress, a private equity firm, Sun Capital Partners, acquired Jevic in a leveraged buyout. *Id.*[2] In substance, Sun acquired Jevic in a transaction financed by borrowing against Jevic's assets. Shortly after the acquisition, Jevic refinanced the substantial debt it had incurred in the buyout with a consortium of lenders led by the CIT Group, granting CIT a lien on all of Jevic's assets. App. 2a, 36a; CAJA 734.

By the end of 2007, Jevic was in default on its loan from CIT. CAJA 1161. CIT entered into a forbearance agreement with Jevic in which CIT agreed not to foreclose on Jevic's assets securing the loan, in exchange for, among other things, Sun's agreement to guarantee

[1] *See also* Carey et al., *Structured Dismissals* (Am. Bankr. Inst. 2013), https://abi-org-corp.s3.amazonaws.com/cle/materials/2013/Nov/StructuredDismissals.pdf (collecting materials on prevalence of structured dismissals in modern bankruptcy practice).

[2] As is common, multiple business entities were used to effectuate the transaction and to organize Jevic's affairs after the buyout. *See, e.g.*, CAJA 734, 1141. Following the court of appeals, this petition refers collectively to the debtors (Jevic Holding Corp., Jevic Transportation LLC, and Creek Road Properties LLC) as "Jevic," and to the firms affiliated with Jevic's private equity ownership (Sun Capital Partners, Inc., Sun Capital Partners IV, LP, and Sun Capital Partners Management IV, LLC) as "Sun."

$2 million of Jevic's debt. *Id.* The forbearance agreement expired in May 2008, with Jevic still in default. CAJA 735. On May 19, Jevic notified its employees that they would be fired. App. 2a. It filed a chapter 11 petition the next day. App. 3a.

2. Petitioners are representatives of a certified class of nearly 1,800 truck drivers whom Jevic laid off without warning before or shortly after filing for bankruptcy. App. 3a; CAJA 1137-1138 (class certification). Petitioners brought suit against Jevic and Sun for violations of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109, and a similar New Jersey law, the Millville Dallas Airmotive Plant Job Loss Notification Act, N.J. Stat. Ann. §§ 34:21-1 to -7, which require employers to provide notice to employees before such a termination. App. 37a.

At summary judgment, petitioners prevailed on their state-law claims against Jevic but not on their claims against Sun. *See In re Jevic Holding Corp.*, 496 B.R. 151, 165 (Bankr. D. Del. 2013); *In re Jevic Holding Corp.*, 492 B.R. 416, 433 (Bankr. D. Del. 2013), *aff'd*, 526 B.R. 547 (D. Del. 2014), *appeal docketed*, No. 14-4331 (3d Cir. Nov. 5, 2014). For reasons described below, petitioners "never got the chance to present a damages case in the Bankruptcy Court, but they estimate their claim to have been worth $12,400,000, of which $8,300,000 was a priority wage claim under 11 U.S.C. § 507(a)(4)." App. 5a-6a.

3. An official committee of Jevic's general unsecured creditors also brought suit on behalf of Jevic's estate against Sun and CIT, challenging the leveraged buyout as a preference and fraudulent transfer. App. 3a; *see* 11 U.S.C. § 547 (providing that estate can recover assets preferentially transferred to particular

creditors within a certain period before the bankruptcy filing); *id.* § 548 (providing that estate can recover certain assets transferred either with the intent to hinder, delay, or defraud creditors or for which the debtor received less than reasonably equivalent value). The suit alleged that "Sun, with CIT's assistance, 'acquired Jevic with virtually none of its own money,'" that "the ill-advised leveraged buyout had hastened Jevic's bankruptcy by saddling it with debts that it couldn't service," and that Jevic's failure was "'the foreseeable end of a reckless course of action in which Sun and CIT bore no risk but all other constituents did.'" App. 3a.

In September 2011, the committee's complaint survived dismissal. CAJA 732-763. The bankruptcy court held that the complaint stated plausible claims for preference and fraudulent transfer. The court dismissed other claims without prejudice, and the committee responded by filing an amended complaint in October 2011. CAJA 764. Had the committee prevailed, it would have been able to avoid all of CIT's and Sun's liens on Jevic's assets and to recover for the estate the value of the property transferred from Jevic to CIT and Sun to finance the buyout—potentially more than $100 million. CAJA 770-772.

C. Settlement And Dismissal

Jevic's bankruptcy case was administratively insolvent—meaning that the administrative and priority claims against the estate exceeded the value of the estate's unencumbered assets. As explained above, in that situation, the Bankruptcy Code expressly contemplates only two options: conversion to chapter 7 or dismissal of the case. Jevic, however, decided to pursue a settlement of the estate's claims and a structured dismissal that would distribute the proceeds among its creditors.

In June 2012, Jevic, Sun, CIT, and the committee of general unsecured creditors filed a joint motion seeking court approval of a settlement and structured dismissal to resolve the estate's claims against Sun and CIT, distribute the settlement proceeds, and dismiss the bankruptcy case. App. 4a-5a; CAJA 361-381. Under the terms of the settlement and structured dismissal, CIT would pay $2 million on account of various administrative priority claims, including the committee's attorneys' fees. Sun would assign a lien it claimed to hold on Jevic's remaining $1.7 million in cash to a trust to pay certain other administrative and tax claims and then to pay general unsecured claims on a pro rata basis. The fraudulent transfer action and the bankruptcy case would both be dismissed, and the settling parties would release all claims against one another. App. 4a-5a.

The proposed structured dismissal deliberately skipped over petitioners in the distribution of estate assets. It is undisputed that petitioners had priority claims against the estate arising from Jevic's violation of the New Jersey equivalent of the WARN Act. *Supra* p. 9. Yet petitioners received nothing on account of those claims, even though lower-priority general unsecured creditors were paid. Sun demanded that petitioners receive no money as part of the settlement, since petitioners were also separately suing Sun on their WARN Act and analogous state-law claims, and Sun refused to provide petitioners any funds that could be used to finance that litigation. CAJA 1363; *see* App. 6a n.4.

Both petitioners and the U.S. Trustee objected to the settlement and structured dismissal on the ground that it violated the § 507 priority scheme. App. 7a. As the U.S. Trustee explained, the fraudulent transfer action had been brought *on behalf of the estate*; the settlement proceeds accordingly "must be for the benefit of the estate" and subject to the Code's priority scheme governing distribution of estate property. CAJA 530.

The bankruptcy court "acknowledge[d] that the proposed distributions are not in accordance with the absolute priority rule" but nevertheless approved the settlement and entered the structured dismissal. App. 58a. In the bankruptcy court's view, the Code provisions requiring compliance with the priority scheme in chapter 11 were inapplicable "because this is not a plan, and there is no prospect here of a confirmable plan." *Id.* The court was also swayed by what it perceived as the "dire circumstances" of the case. App. 57a. Jevic's only remaining funds were subject to liens held by CIT and Sun—leaving, in the court's opinion, insufficient resources to prosecute the fraudulent transfer action "creditably" or to confirm a chapter 11 plan. App. 56a.

The bankruptcy court noted but rejected alternatives to the structured dismissal. The court acknowledged that the case could be converted to chapter 7, where the estate would be liquidated according to the Code's priority scheme. However, the court accepted Sun's assertion that Sun "would not do this deal in a Chapter 7" case, meaning that there would be no funding for the estate to pursue the fraudulent transfer action. App. 58a. The court also noted that counsel might be retained to litigate the fraudulent transfer suit on a contingency basis, but it asserted that the fraudulent transfer action was "not a slam dunk" and that, although Jevic and Sun effectively paid $3.7 million to settle that suit, "any lawyer" who took the case on contingency "should have his head examined." App. 60a-61a. The bankruptcy court therefore concluded that it could exercise its residual equitable authority under § 105(a) to "issue any order … that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code to approve the settlement and structured dismissal. *See* App. 46a (order "[*p*]*ursuant to*" § 105(a)).

D. Appeal

The district court affirmed. Like the bankruptcy court, the district court acknowledged that the settlement "does not follow the absolute priority rule" but reasoned that the settlement need not do so because it "is not a reorganization plan." App. 42a.[3]

A divided panel of the Third Circuit also affirmed. The majority was troubled by the settlement's deviation from the Code's priority scheme, saying that the case was a "close call." App. 21a; *see also* App. 16a (noting that the argument for requiring compliance with § 507 "is not without force"). But, the court of appeals reasoned, the absolute priority rule as codified in § 1129(b)(2) applies by its terms only to plans, and no specific Code provision addresses priority-skipping distributions of settlement proceeds made outside plans. App. 17a. As to that question, the majority recognized that "[t]wo of [its] sister circuits have grappled with whether the priority scheme of § 507 must be followed when settlement proceeds are distributed," and that those courts had reached divergent results. App. 17a-19a. *Compare In re AWECO, Inc.*, 725 F.2d 293, 298

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[3] The district court also found the appeal "equitably moot"—that is, the court found not that the appeal was moot under Article III but that it would be inequitable to award petitioners the relief they sought—but the court of appeals did not so hold. App. 43a; *see* App. 24a (Scirica, J., dissenting) (explaining that equitable mootness doctrine "applies only where there is a confirmed plan of reorganization").

(5th Cir. 1984), *with In re Iridium Operating LLC*, 478 F.3d 452, 464 (2d Cir. 2007).

The majority expressly rejected "the per se rule of *AWECO*" from the Fifth Circuit, instead opting to follow the Second Circuit's decision in *Iridium*. App. 19a-20a. Thus, it held that class-skipping settlements may be approved "in a rare case," if the bankruptcy court has "'specific and credible grounds to justify [the] deviation.'" App. 2a, 21a (alteration in original). And it found such grounds here, endorsing the bankruptcy court's view that no better alternative was available. App. 21a-22a. Even so, the majority cautioned that "[s]ettlements that skip objecting creditors in distributing estate assets raise justifiable concerns about collusion among debtors, creditors, and their attorneys and other professionals." App. 20a.

Judge Scirica dissented. In his view, "by approving the settlement, the bankruptcy court's order undermined the Code's essential priority scheme" by "skip[ping] over an entire class of creditors" in distributing estate property. App. 23a, 29a-30a. While he left open the possibility that in "extraordinary circumstances" the Code might permit a settlement that deviates from the priority scheme, he found that the settlement here was designed as "an impermissible end-run around the carefully designed routes by which a debtor may emerge from Chapter 11 proceedings." App. 24a, 27a-28a. Judge Scirica also warned that, contrary to the majority's assertion, the circumstances here were not "*sui generis*" and that it is "not difficult to imagine another secured creditor who wants to avoid providing funds to priority unsecured creditors." App. 31a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A SQUARE AND ACKNOWLEDGED SPLIT AMONG THE CIRCUITS ON THE QUESTION PRESENTED

There is an acknowledged conflict among the courts of appeals on the question presented—a question that could hardly be more fundamental to bankruptcy practice. In the Fifth Circuit, all distributions of settlement proceeds in a bankruptcy case (absent consent) must comply with the Code's priority scheme. In the Second Circuit, distributions of settlement proceeds made outside a plan need not adhere to the priority scheme. The decision below considered this existing circuit split, rejected the Fifth Circuit's rule, and chose to follow the Second Circuit's approach. The Court should grant review to restore uniformity to federal bankruptcy law on this question of exceptional importance.

1. The Fifth Circuit has adopted a per se rule (App. 20a) under which any distribution of settlement proceeds must be "fair and equitable" to all creditors, a term of art that includes strict compliance with the Code's priority scheme. *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984). As a result, bankruptcy courts in the Fifth Circuit may not approve a settlement that distributes the proceeds to lower-priority creditors over the objection of higher-priority creditors whose claims have not been paid in full.

In *AWECO*, junior creditor United brought a $27 million breach-of-contract suit against the debtor. 725 F.2d at 295. The debtor and United ultimately sought approval of a settlement that paid $5.3 million of estate property to United to settle this nonpriority, unsecured claim. *Id.* at 295-296. The IRS held tax claims entitled to priority under the provision now codified at 11 U.S.C. § 507(a)(8), and it objected to the settlement. *Id.* In its view, the settlement would violate the Code's priority scheme because, after paying United's nonpriority claim, the estate might have insufficient assets to pay all priority claims in full. *Id.* at 296-297. The bankruptcy court nonetheless approved the settlement. *Id.* at 297.

The Fifth Circuit reversed, holding that a bankruptcy court lacks authority to approve such a settlement. It found that "[a] court may approve ... a compromise or settlement only when it is 'fair and equitable.'" 725 F.2d at 298 (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 424 (1968)). "The words 'fair and equitable' are terms of art—they mean that 'senior interests are entitled to full priority over junior ones.'" *Id.* Thus, "a bankruptcy court abuses its discretion in approving a settlement with a junior creditor unless the court concludes that priority of payment will be respected as to objecting senior creditors." *Id.*

2. In the Second Circuit, by contrast, a bankruptcy court may approve a pre-plan settlement that distributes estate assets in violation of the Code's priority rules. *In re Iridium Operating LLC*, 478 F.3d 452, 464 (2d Cir. 2007).

In *Iridium*, the official committee of unsecured creditors brought two lawsuits on behalf of the estate: one against Motorola and one against various prepetition lenders. 478 F.3d at 457-458. Motorola was itself a priority creditor, holding approximately $700 million in administrative claims. *Id.* at 459 n.8. Faced with the challenge of funding two separate and complex lawsuits, the committee sought to settle with Iridium's lenders. *Id.* at 457. The settlement allocated $37.5 million in cash to a litigation trust created to pursue the Motorola litigation. *Id.* at 459. If the litigation proved successful, any proceeds recovered in the suit would be distributed according to a future chapter 11 plan. *Id.* at 459-460. However, the settlement also provided that any funds remaining in the trust at the conclusion of the litigation would be distributed to general unsecured creditors, potentially skipping over priority creditor Motorola. *Id.* The bankruptcy court approved the settlement over Motorola's objection.

On appeal, the Second Circuit considered and declined to follow *AWECO*, refusing to adopt a per se rule against distributions of settlement proceeds outside a plan that violate the Code's priority scheme. 478 F.3d at 464-465. The court instead opted for what it described as a less "rigid" approach. *Id.* at 464. Under that approach, compliance with the priority scheme is the "most important factor" for a bankruptcy court to consider, but the court may nevertheless approve a pre-plan settlement that distributes assets contrary to the priority scheme if other factors "weigh heavily" in favor of approval. *Id.* at 464-465. The court remanded for application of that rule, tasking the bankruptcy court with determining whether "specific and credible grounds" justified the potential class-skipping feature of the settlement. *Id.*

3. The decision below recognized that the Fifth and Second Circuits had reached irreconcilable holdings on the question whether a distribution of settlement proceeds outside a plan must comply with the Code's priority scheme. The Third Circuit "agree[d] with the Second Circuit's approach in *Iridium*" and expressly rejected the Fifth Circuit's contrary approach in *AWECO*. App. 19a-20a. Accordingly, a bankruptcy court in the Third Circuit may now approve a distribution of settlement proceeds outside a plan that "skip[s]

a class of objecting creditors in favor of more junior creditors." App. 15a.[4]

The law of the Second and Third Circuits is thus squarely at odds with that of the Fifth Circuit on an important and recurring question of bankruptcy law that implicates one of the fundamental features of the Code—the priority scheme. Had Jevic filed for bankruptcy in Texas rather than Delaware, the class-skipping structured dismissal approved in this case would have been rejected. Given that the Third Circuit denied rehearing en banc in this case, and the Second and Fifth Circuits have been at odds since at least 2007, this split among the courts of appeals will not heal itself. It requires this Court's intervention.

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[4] In a subsequent decision, the Third Circuit held that the proceeds of an asset sale could be distributed in a manner that was inconsistent with the Bankruptcy Code's priority scheme, but rested that decision on its conclusion that the proceeds in question were not property of the bankruptcy estate. *In re ICL Holding Co.*, 802 F.3d 547, 558 (3d Cir. 2015). In that case, general unsecured creditors objected to a sale of the estate's assets to a secured creditor that was credit-bidding its claim (that is, not paying cash). To resolve that objection, the buyer agreed that it would also deposit $3.5 million in cash in trust for the general unsecured creditors—skipping over the United States' priority tax claim. The Third Circuit held that the $3.5 million was not subject to the Bankruptcy Code's priority scheme because it was not property of the bankruptcy estate, but property of the buyer. "[T]he Bankruptcy Code's creditor-payment hierarchy only becomes an issue when distributing estate property." *Id.* at 557. The United States has obtained an extension of time in which to file a petition for rehearing en banc. *See* Order, *In re ICL Holding Co.*, No. 14-2709 (3d Cir. Nov. 3, 2015). However, this case is a superior vehicle for addressing the question presented, because—in contrast to *ICL Holding*—there is no dispute that the settlement proceeds here were estate property.

II. THE THIRD CIRCUIT'S DECISION IS INCORRECT

The rule adopted in the Second and Third Circuits—which permits distributions of settlement proceeds to creditors outside a plan in violation of the Bankruptcy Code's priority rules—cannot be squared with the text, structure, or purpose of the Code. As explained above, chapter 11 contemplates only one method of distributing estate assets to creditors: the confirmation of a plan that complies with the requirements of § 1129. Perhaps the most central of those requirements is adherence to the basic rule of absolute priority, including the specific priorities set out in § 507. *See* 11 U.S.C. § 1129(a)(1), (9), (b). If the distribution of estate assets at issue here had been embodied in a plan, it is undisputed that the plan could not have been confirmed.

If a debtor cannot confirm a chapter 11 plan, the Code provides two options. The debtor can convert the case to chapter 7, and the trustee will liquidate the estate's assets and distribute them according to the Code's priority rules. *See* 11 U.S.C. §§ 704, 726(a)(1). The distribution at issue here thus could not have occurred in chapter 7. Alternatively, the chapter 11 case can be dismissed, in which case the estate assets revert to their prior owners and creditors are free to pursue their claims to those assets under nonbankruptcy law. *See id.* § 349(b).

What happened here is contemplated nowhere in the Bankruptcy Code. Indeed, nothing in chapter 11 expressly authorizes distributions to creditors outside a confirmed plan. Some courts have nonetheless found such distributions permissible when they comport with bankruptcy law's priority scheme. *See In re Chrysler LLC*, 405 B.R. 84, 97 (Bankr. S.D.N.Y. 2009) ("Not one penny of value of the Debtor's assets is going to anyone other than the First-Lien Lenders."). It is not necessary to reach that broader question to resolve this case, however, because even if such distributions are permissible when they comport with the Bankruptcy Code's priority scheme, distributions that evade the Code's priority scheme are not.

1. As a textual matter, the priority scheme in § 507 applies in all chapter 11 cases at all times, even prior to the approval of a plan. *See* 11 U.S.C. § 103(a). And where Congress intended to permit nonconsensual departures from the order of priority it set out in § 507, it said so clearly. For example, the Code provides that lenders who extend unsecured postpetition credit to a debtor may be repaid on a superpriority basis. 11 U.S.C. § 364(d). In other circumstances, the bankruptcy court may order less favorable treatment of particular claims that would otherwise enjoy priority, or may enforce a private agreement to that effect. *See id.* § 510(a), (c) (equitable subordination). In cases converted to chapter 7, special rules give priority to post-conversion administrative expenses over pre-conversion administrative expenses. *Id.* § 726(a), (b). And in chapter 9, which governs municipal bankruptcies, Congress expressly provided that only specific portions of § 507 would apply. *Id.* § 901(a). There is no comparable provision here.

The bankruptcy court justified its departure from the Code's priority scheme not by pointing to any provision of the Code permitting such a departure, but by deciding that "the paramount interest of the creditors mandates approval" of the settlement and structured dismissal. App. 61a. The court concluded that a settlement that violated the Code's priority scheme was better than no settlement—accepting Sun's claims that it would not have settled unless petitioners went unpaid—and that the court therefore had the "equitable" authority under § 105(a) of the Bankruptcy Code to approve the settlement. Likewise, the Third Circuit defended the bankruptcy court's decision on the ground that, while "unsatisfying," it was the "least bad alternative." App. 21a.

But that judgment was not the bankruptcy court's to make. Section 105(a) permits bankruptcy courts to enter orders "necessary and appropriate to carry out the provisions of" the Code. But it "is not boundless and should not be employed as a panacea for all ills confronted in the bankruptcy case." 2 *Collier* ¶ 105.01[2].[5]

This Court, in fact, recently rejected an attempt to use § 105(a) in such a manner, holding that "[s]ection 105(a) confers authority to 'carry out' the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits." *Law* v. *Siegel*, 134 S. Ct. 1188, 1194 (2014). In *Law*, the Court reversed the Ninth Circuit's approval of an order sanctioning a debtor for egregious misconduct by denying him the benefit of the homestead exemption afforded him by the Code. *Id.* at 1198. Because the Code already contained a "mind-numbingly detailed[] enumeration" of the cir-

[5] Similarly, in the context of the dismissal of a bankruptcy case, § 349(b) grants the bankruptcy court a residual equitable authority to depart from the principle that dismissal restores the parties' prebankruptcy rights. *See* 11 U.S.C. § 349(b)(3) ("*Unless the court, for cause, orders otherwise*, a dismissal of a case … revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title." (emphasis added)). But like the § 105 authority, this residual power cannot be invoked in a manner that conflicts with the express terms of the Code. "'Cause' under § 349(b) means an acceptable reason. Desire to make an end run around a statute is not an adequate reason." *In re Sadler*, 935 F.2d 918, 921 (7th Cir. 1991).

cumstances in which exemptions are available, this Court concluded, the bankruptcy court could not, based on its own assessment of the equities, vary from those provisions. *Id.* at 1196.

The same is true here. Congress has made the considered judgment that the assets of a bankruptcy estate should be distributed in accordance with the priorities it has specified, and the bankruptcy court lacked any equitable authority to contravene that priority scheme. *See also United States* v. *Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) (§ 105 does not provide bankruptcy courts with a "roving commission to do equity."); *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 92 (2d Cir. 2003) (same); *United States* v. *Pepperman*, 976 F.3d 123, 131 (3d Cir. 1992) (same); *Disch* v. *Rasmussen*, 417 F.3d 769, 777 (7th Cir. 2005) (§ 105 does not give the judge "'free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be,' or [to] use the court's equitable power to circumvent the Code" (citation omitted)).

Indeed, this Court has repeatedly held that equitable considerations—a bankruptcy judge's own personal evaluation of the best or "least bad" result in a given case—cannot justify departures from the statutory priority scheme. In *Norwest Bank Worthington* v. *Ahlers*, the Court reversed a decision of the Eighth Circuit approving a plan permitting equity owners of a farming business to retain property even though unsecured claims were not paid in full. 485 U.S. 197, 200-201, 207 (1988). The Court considered and rejected arguments that the equitable power of the bankruptcy court justified this "exception" to absolute priority. *Id.* at 206-207. "The Court of Appeals may well have believed that the petitioners or other unsecured creditors would be better off if respondents' reorganization plan was confirmed. But that determination is for the creditors to make in the manner specified by the Code." *Id.* at 207. "[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code." *Id.* at 206.

Similarly, in *United States* v. *Noland*, the Court rejected a bankruptcy court's effort to "equitably subordinate" claims with statutory priority to lower-priority claims. 517 U.S. 535, 540 (1996). In *Noland*, the United States had claims for taxes, interest, and penalties entitled to priority under §§ 503 and 507. *Id.* at 537. The bankruptcy court, while acknowledging the claims' priority status, nonetheless ruled that the claim for tax penalties should be subject to equitable subordination under § 510(c) of the Code based on the "relative equities" of the matter. *Id.* In its view, affirmed by the Sixth Circuit, estate assets were better used for "compensating actual loss claims," rather than providing additional recovery for the IRS. *Id.* This Court soundly rejected that effort to second-guess Congress's priority scheme, holding that courts cannot rewrite the Code's priority scheme to produce outcomes that they believe to be fairer. *Id.* at 540-541, 543.

2. The Second and Third Circuit's rule is also discordant with this Court's case law addressing absolute priority, a central structural feature of the Bankruptcy Code.

The concept of absolute priority developed in equity practice to protect junior creditors from the danger that senior creditors and equity holders would collude during reorganizations to benefit themselves at the expense of the junior creditors. *See, e.g.*, *Louisville Trust Co.* v. *Louisville, New Albany & Chi. Ry. Co.*, 174 U.S.

674, 684 (1899); *Northern Pac. Ry. Co.* v. *Boyd*, 228 U.S. 482, 508 (1913); *see also* Baird, *Elements of Bankruptcy* 64-65 (6th ed. 2014). To forestall such collusion, this Court required "rigid adherence" to the "'fixed principle'" that stockholders (having the lowest priority) could not receive any of the value of the reorganized enterprise over the objection of more senior creditors unless those creditors were paid in full. *Kansas City Terminal Ry. Co.* v. *Central Union Trust Co.*, 271 U.S. 445, 454 (1926).

In *Case* v. *Los Angeles Lumber Products Co.*, the Court held that this principle had been codified when Congress amended the Bankruptcy Act of 1898 to require that any plan of reorganization be "fair and equitable" to creditors. 308 U.S. 106, 114-115 & n.6 (1939). The Court explained that "[t]he words 'fair and equitable' … are words of art," *id.* at 115, which had come in cases like *Boyd* to mean a "rule of full or absolute priority," *id.* at 117. Therefore, in requiring that a reorganization plan be "fair and equitable" to all creditors, Congress mandated that the "'dissenting class of [senior] creditors must be provided for in full before any junior class can receive or retain any property'" under a chapter 11 plan. *Norwest Bank*, 485 U.S. at 202.

The "fair and equitable" requirement was incorporated into the Code to protect against the same dangers of collusion that this Court recognized a century ago. *See Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, at 255 (1973) (warning of "the ability of a few insiders, whether representatives of management or of major creditors, to use the reorganization process to gain an unfair advantage"); *see also* Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69, 123 (1991) ("For over fifty years, the absolute priority rule has been the cornerstone of reorganization practice and theory.").

And, as this case demonstrates, those same dangers can arise when settlement proceeds are distributed outside a plan. In *TMT Trailer Ferry*, a case involving a settlement that was approved as part of a plan of reorganization, this Court thus held that the requirement that a plan be fair and equitable "appl[ies] to compromises just as to other aspects of reorganizations." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 424 (1968). The Court explained that the "fair and equitable" standard "incorporates the absolute priority doctrine." *Id.* at 441.

Strict adherence to absolute priority when distributing settlement proceeds is critical to effectuate and protect the choices Congress made in affording some claims priority over others. The claims at issue here are illustrative. Congress chose to give priority to claims by employees of the debtor for unpaid wages, salaries, or commissions, 11 U.S.C. § 507(a)(4), and unpaid contributions to an employee benefit plan, *id.* § 507(a)(5), for good and sound reasons. "First, employees are typically not as able as large institutional creditors to diversify their credit portfolio so as to minimize the impact of their employer filing bankruptcy." Keating, *The Fruits of Labor*, 35 Ariz. L. Rev. 905, 907 (1993). Employees do not choose to extend credit to a debtor; to the contrary, they are likely to be reliant on prompt payment of their paycheck. "Second, in a case where the employer is attempting to reorganize in bankruptcy, the employees will almost always be crucial to the success of such an undertaking." *Id.* Affording priority to claims for unpaid wages "encourage[s] employees to stand by an employer experiencing financial difficulty." 4 *Collier* ¶ 507.06[1]. Accordingly, Congress chose to grant employees a "special right to payment … [out of] the assets from which other creditors will be able to realize value." *Id.* ¶ 507.02[1][d].

The Third Circuit here construed the Bankruptcy Code to permit the debtor to evade the "special right to payment" Congress granted workers and instead pay general unsecured creditors with no such special right. Such deals, in which two constituencies collaborate to "squeeze out" a priority creditor, are precisely what the absolute priority rule was designed to prevent. It should make no difference that the distribution in this case was not made under a plan; absolute priority is the backbone of chapter 11's distribution scheme, and the Bankruptcy Code cannot sensibly be read to permit its circumvention in this manner.

III. THE QUESTION PRESENTED IS IMPORTANT AND LIKELY TO RECUR

This case presents one of the most important unresolved questions in business bankruptcy law. Because the Third Circuit's decision opens the door to similar schemes to evade the Code's priority rules, it has attracted an enormous amount of attention among the bankruptcy bench and bar, and has been subject to significant criticism. Indeed, the American Bankruptcy Institute's blue-ribbon Chapter 11 Commission, which undertook a multiyear study of chapter 11, found *Jevic*'s endorsement of a structured dismissal that "violate[d] the absolute priority rule" "particularly troubling," and recommended a clarifying amendment to the Bankruptcy Code expressly prohibiting such structured dismissals. American Bankruptcy Institute Commission To Study the Reform of Chapter 11, *2012-2014 Final Report and Recommendations* 269-273 (2014), http://commission.abi.org/full-report.

1. The question whether the Code's priority scheme may be circumvented by an order approving the distribution of settlement proceeds prior to (or, in the case of structured dismissals, instead of) confirmation of a plan is of central importance to chapter 11 practice. The panel majority asserted that a class-skipping distribution like the one here would be justified only in rare cases. However, as Judge Scirica explained in his dissent, the circumstances in this case are not particularly exceptional. Debtors often become administratively insolvent. A debtor in such circumstances has always had options: to negotiate with creditors and persuade them to take less so that a plan can be confirmed, to convert the case to chapter 7, or to dismiss it. Under the first two of those routes, the bankruptcy priority scheme is kept intact, and under the third, the creditors retain the ability to enforce their claims against the debtor after dismissal. The Third Circuit's rule invites future debtors in this situation instead simply to freeze out priority creditors with inconvenient statutory rights by negotiating a settlement and structured dismissal with other constituencies.

Nor are such class-skipping settlements likely to be confined to those cases where there is no "viable alternative," as the panel majority stated. App. 22a. Here, an alternative settlement that complied with the absolute priority rule was "impossible" only because a senior creditor (Sun) claimed that it would not accept it. App. 6a n.4, 24a-25a. Settling parties should not be able to avoid complying with the Bankruptcy Code's priority scheme merely by claiming that they will not settle if they are required to respect priority. As commentators and practitioners have already explained, the decision below will thus serve as a roadmap to the approval of future class-skipping structured dismissals.[6]

Indeed, bankruptcy law is replete with examples of remedies initially approved only as "exceptional," but that ultimately become commonplace. The Third Circuit's own case law holds, for instance, that a nonconsensual release of the claims of a third party against a nondebtor entity is permitted only in "extraordinary cases," *In re Continental Airlines*, 203 F.3d 203, 212 (3d Cir. 2000), but such releases are now incorporated as a matter of routine in virtually every large chapter 11 plan of reorganization, *see* Silverstein, *Hiding in Plain View*, 23 Emory Bankr. Dev. J. 13, 18 (2006) (describing third-party releases as "increasingly common"). The U.S. Trustee, an office within the Department of Justice, has opposed the very idea of a "structured dismissal" for precisely this reason—namely, that elaborate structured dismissal orders are a dangerous

[6] *See, e.g.*, Lipson & Walsh, ABA Business Bankruptcy Committee Newsletter, *In re Jevic Holding Corp.* 3 (May 21, 2015), http://apps.americanbar.org/buslaw/committees/CL160000pub/newsletter/201507/fa_3.pdf ("While [the opinion] purports to be narrow, it would seem to invite further litigation to test its boundaries."); Kajon, *Third Circuit Upholds Structured Dismissal, Despite Deviation From Bankruptcy Code's Priority Scheme* (June 3, 2015), http://www.stevenslee.com/third-circuit-upholds-structured-dismissal-despite-deviation-from-bankruptcy-codes-priority-scheme ("It remains to be seen what circumstances will qualify as rare…. [W]hile the Third Circuit opined that 'the Code forbids structured dismissals when they are used to circumvent the plan confirmation process or conversion to Chapter 7,' it appears that the settling parties in *Jevic* used a structured dismissal to do just that."); Goffman et al., *Third Circuit Provides Road Map for Structured Dismissals* (May 28, 2015), https://www.skadden.com/sites/default/files/publications/Third_Circuit_Provides_Road_Map_for_Structured_Dismissals.pdf (similar).

means for parties to evade compliance with the structural protections the Bankruptcy Code provides. *See* Eitel et al., *Structured Dismissals, or Cases Dismissed Outside the Code's Structure?*, 30 Am. Bankr. Inst. J. 20, 20 (Mar. 2011). The Third Circuit's decision can serve only to facilitate future efforts to avoid compliance with the priority scheme.

That risk is particularly acute because the Third Circuit hears an outsized number of bankruptcy cases, given that Delaware is the most common state in which to incorporate. The bankruptcy court for the District of Delaware frequently hosts the nation's largest and most complex bankruptcy cases: Almost half of bankruptcy cases involving at least $50 million in assets and liabilities commenced nationwide between November 2013 and March 2015 were filed in Delaware.[7]

2. Moreover, the Third Circuit's decision will affect negotiations in a great many chapter 11 cases, even if those cases never result in distribution of settlement proceeds outside a plan. As this Court has noted, absent the protections provided by absolute priority, there is a serious danger of collusion between senior and junior classes of creditors or interest-holders at the expense of those caught in between. *See Bank of Am. Nat'l Trust & Sav. Ass'n* v. *203 North LaSalle St. P'ship*, 526 U.S. 434, 444 (1999) ("The reason for such a limitation [absolute priority] was the danger inherent in any reorganization plan proposed by a debtor, then and now, that the plan will simply turn out to be too good a deal for the debtor's owners."). The Third Circuit's de-

[7] *See* GAO, *Corporate Bankruptcy: Report to the Senate Judiciary Committee Chairman*, app'x III, at 41-44 (Sept. 2015), http://www.gao.gov/assets/680/672696.pdf (explaining statistics).

cision to bless class-skipping settlements outside a plan makes that danger real for priority creditors.

This threat—that parties to a bankruptcy case may collude to achieve a settlement that freezes out a disfavored intermediate class of priority creditors—will loom large in future negotiations. A core function of the absolute priority rule, and the associated hierarchy of priorities the Code creates, is to provide a predictable backdrop against which negotiations can take place. *See* Blum & Kaplan, *The Absolute Priority Doctrine in Corporate Reorganizations*, 41 U. Chi. L. Rev. 651, 653 (1974) ("The absolute priority doctrine can be characterized as a way of structuring negotiations so that they are sufficiently disciplined to be held within permissible areas and to permit judicial review."). That is why creditors have always been free to consent to accept less favorable treatment than that required by the priority rules—and also precisely why they should not be forced to accept such treatment.

> In effect, the cramdown and its ancillary requirements are the heart of the leverage conferred to the debtor by the Code. All negotiations in chapter 11 take place around it. To the extent that each party has the power under the Bankruptcy Code to force the other to yield, that power is reflected in the terms of any consensual plan.

Warren, *A Theory of Absolute Priority*, 1991 Ann. Surv. Am. L. 9, 30.

Here, for example, it may well have been possible to negotiate a settlement on terms to which all creditors would consent, but Sun refused to pay any consideration to petitioners. Citing the "impossibility" of alternatives, the bankruptcy court then permitted Sun to obtain a release of liability in the settlement and structured dismissal without having to pay the full consideration that would have been required had the priority scheme been respected.

The bargaining position of priority creditors is substantially undermined if the absolute priority rule is not in fact absolute. Their leverage—and thus the settlement value of the claims they hold—is affected in *every* case, because of the risk that future "*Jevic*" settlements will be approved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2015

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-1465

IN RE: JEVIC HOLDING CORP., *et al.*,
Debtors

OFFICIAL COMMITTEE OF UNSECURED CREDITORS
on behalf of the bankruptcy estates
of Jevic Holding Corp., *et al.*

v.

CIT GROUP/BUSINESS CREDIT INC.,
in its capacity as Agent;
SUN CAPITAL PARTNERS, INC.;
SUN CAPITAL PARTNERS IV, LP;
SUN CAPITAL PARTNERS MANAGEMENT IV, LLC

CASIMIR CZYZEWSKI; MELVIN L. MYERS;
JEFFREY OEHLERS; ARTHUR E. PERIGARD
and DANIEL C. RICHARDS, on behalf of themselves
and all others similarly situated,
Appellants

On Appeal from the United States District Court
for the District of Delaware
(D.C. Nos. 13-cv-00104 & 1-13-cv-00105)
District Judge: Honorable Sue L. Robinson

Argued January 14, 2015
Before: HARDIMAN, SCIRICA and BARRY,
Circuit Judges
(Filed: May 21, 2015)

OPINION OF THE COURT

HARDIMAN, Circuit Judge

This appeal raises a novel question of bankruptcy law: may a case arising under Chapter 11 ever be resolved in a "structured dismissal" that deviates from the Bankruptcy Code's priority system? We hold that, in a rare case, it may.

I

A

Jevic Transportation, Inc. was a trucking company headquartered in New Jersey. In 2006, after Jevic's business began to decline, a subsidiary of the private equity firm Sun Capital Partners acquired the company in a leveraged buyout financed by a group of lenders led by CIT Group. The buyout entailed the extension of an $85 million revolving credit facility by CIT to Jevic, which Jevic could access as long as it maintained at least $5 million in assets and collateral. The company continued to struggle in the two years that followed, however, and had to reach a forbearance agreement with CIT—which included a $2 million guarantee by Sun—to prevent CIT from foreclosing on the assets securing the loans. By May 2008, with the company's performance stagnant and the expiration of the forbearance agreement looming, Jevic's board of directors authorized a bankruptcy filing. The company ceased substantially all of its operations, and its employees received notice of their impending terminations on May 19, 2008.

The next day, Jevic filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the District of Delaware. At that point, Jevic owed about $53 million to its first-priority senior secured creditors (CIT and Sun) and over $20 million to its tax and general unsecured creditors. In June 2008, an Official Committee of Unsecured Creditors (Committee) was appointed to represent the unsecured creditors.

This appeal stems from two lawsuits that were filed in the Bankruptcy Court during those proceedings. First, a group of Jevic's terminated truck drivers (Drivers) filed a class action against Jevic and Sun alleging violations of federal and state Worker Adjustment and Retraining Notification (WARN) Acts, under which Jevic was required to provide 60 days' written notice to its employees before laying them off. *See* 29 U.S.C. § 2102; N.J. Stat. Ann. § 34:21-2. Meanwhile, the Committee brought a fraudulent conveyance action against CIT and Sun on the estate's behalf, alleging that Sun, with CIT's assistance, "acquired Jevic with virtually none of its own money based on baseless projections of almost immediate growth and increasing profitability." App. 770 (Second Am. Compl. ¶ 1). The Committee claimed that the ill-advised leveraged buyout had hastened Jevic's bankruptcy by saddling it with debts that it couldn't service and described Jevic's demise as "the foreseeable end of a reckless course of action in which Sun and CIT bore no risk but all other constituents did." App. 794 (Second Am. Compl. ¶ 128).

Almost three years after the Committee sued CIT and Sun for fraudulent conveyance, the Bankruptcy Court granted in part and denied in part CIT's motion to dismiss the case. The Court held that the Committee had adequately pleaded claims of fraudulent transfer and preferential transfer under 11 U.S.C. §§ 548 and 547. Noting the "great potential for abuse" in leveraged buyouts, the Court concluded that the Committee had sufficiently alleged that CIT had played a critical role in facilitating a series of transactions that recklessly reduced Jevic's equity, increased its debt, and shifted the risk of loss to its other creditors. *In re Jevic Holding Corp.*, 2011 WL 4345204, at *10 (Bankr. D. Del. Sept. 15, 2011) (quoting *Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1073 (3d Cir. 1992)). The Court dismissed without prejudice the Committee's claims for fraudulent transfer under 11 U.S.C. § 544, for equitable subordination of CIT's claims against the estate, and for aiding and abetting Jevic's officers and directors in breaching their fiduciary duties, because the Committee's allegations in support of these claims were too sparse and vague.

In March 2012, representatives of all the major players—the Committee, CIT, Sun, the Drivers, and what was left of Jevic—convened to negotiate a settlement of the Committee's fraudulent conveyance suit. By that time, Jevic's only remaining assets were $1.7 million in cash (which was subject to Sun's lien) and the action against CIT and Sun. All of Jevic's tangible assets had been liquidated to repay the lender group led by CIT. According to testimony in the Bankruptcy Court, the Committee determined that a settlement ensuring "a modest distribution to unsecured creditors" was desirable in light of "the risk and the [re]wards of litigation, including the prospect of waiting for perhaps many years before a litigation against Sun and CIT could be resolved" and the lack of estate funds sufficient to finance that litigation. App. 1275.

In the end, the Committee, Jevic, CIT, and Sun reached a settlement agreement that accomplished four things. First, those parties would exchange releases of their claims against each other and the fraudulent conveyance action would be dismissed with prejudice. Second, CIT would pay $2 million into an account earmarked to pay Jevic's and the Committee's legal fees and other administrative expenses. Third, Sun would assign its lien on Jevic's remaining $1.7 million to a trust, which would pay tax and administrative creditors first and then the general unsecured creditors on a pro rata basis.[1] Lastly, Jevic's Chapter 11 case would be dismissed. The parties' settlement thus contemplated a structured dismissal, a disposition that winds up the bankruptcy with certain conditions attached instead of simply dismissing the case and restoring the status quo ante. *See In re Strategic Labor, Inc.*, 467 B.R. 11, 17 n.10 (Bankr. D. Mass. 2012) ("Unlike the old-fashioned one sentence dismissal orders—'this case is hereby dismissed'—structured dismissal orders often include some or all of the following additional provisions: 'releases (some more limited than others), protocols for reconciling and paying claims, "gifting" of funds to unsecured creditors[, etc.]'" (citation omitted)).

There was just one problem with the settlement: it left out the Drivers, even though they had an uncontested WARN Act claim against Jevic.[2] The

[1] This component of the agreement originally would have paid all $1.7 million to the general unsecured creditors, but the United States Trustee, certain priority tax creditors, and the Drivers objected. The general unsecured creditors ultimately received almost four percent of their claims under the settlement.

[2] Although Sun was eventually granted summary judgment in the WARN Act litigation because it did not qualify as an employer of the Drivers, *In re Jevic Holding Corp.*, 492 B.R. 416, 425 (Bankr. D. Del. 2013), the Bankruptcy Court entered summary

Drivers never got the chance to present a damages case in the Bankruptcy Court, but they estimate their claim to have been worth $12,400,000, of which $8,300,000 was a priority wage claim under 11 U.S.C. § 507(a)(4). *See* Drivers' Br. 6 & n.3; *In re Powermate Holding Corp.*, 394 B.R. 765, 773 (Bankr. D. Del. 2008) ("Courts have consistently held that WARN Act damages are within 'the nature of wages' for which § 507(a)(4) provides."). The record is not explicit as to why the settlement did not provide for any payment to the Drivers even though they held claims of higher priority than the tax and trade creditors' claims.[3] It seems that the Drivers and the other parties were unable to agree on a settlement of the WARN Act claim, and Sun was unwilling to pay the Drivers as long as the WARN Act lawsuit continued because Sun was a defendant in those proceedings and did not want to fund litigation against itself.[4] The settling parties also accept the Drivers'

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judgment against Jevic because it had "undisputed[ly]" violated the state WARN Act, *In re Jevic Holding Corp.*, 496 B.R. 151, 165 (Bankr. D. Del. 2013).

[3] For example, Jevic's chief restructuring officer opaquely testified in the Bankruptcy Court: "There was no decision not to pay the WARN claimants. There was a decision to settle certain proceedings amongst parties. The WARN claimants were part of that group of people that decided to create a settlement. So there was no decision not to pay the WARN claimants." App. 1258.

[4] Sun's counsel acknowledged as much in the Bankruptcy Court, stating:

> [I]t doesn't take testimony for Your Honor … to figure out, Sun probably does care where the money goes because you can take judicial notice that there's a pending WARN action against Sun by the WARN plaintiffs. And if the money goes to the WARN plaintiffs, then you're funding somebody who is suing

contention that it was "the paramount interest of the Committee to negotiate a deal under which the [Drivers] were excluded" because a settlement that paid the Drivers' priority claim would have left the Committee's constituents with nothing. Appellees' Br. 26 (quoting Drivers' Br. 28).

B

The Drivers and the United States Trustee objected to the proposed settlement and dismissal mainly because it distributed property of the estate to creditors of lower priority than the Drivers under § 507 of the Bankruptcy Code. The Trustee also objected on the ground that the Code does not permit structured dismissals, while the Drivers further argued that the Committee breached its fiduciary duty to the estate by "agreeing to a settlement that, effectively, freezes out the [Drivers]." App. 30–31 (Bankr. Op. 8–9). The Bankruptcy Court rejected these objections in an oral opinion approving the proposed settlement and dismissal.

The Bankruptcy Court began by recognizing the absence of any "provision in the code for distribution and dismissal contemplated by the settlement motion," but it noted that similar relief has been granted by other courts. App. 31 (Bankr. Op. 9). Summarizing its assessment, the Court found that "the dire circumstances that are present in this case warrant the

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> you who otherwise doesn't have funds and is doing it on a contingent fee basis.

App. 1363; *accord* Appellees' Br. 26. This is the only reason that appears in the record for why the settlement did not provide for either direct payment to the Drivers or the assignment of Sun's lien on Jevic's remaining cash to the estate rather than to a liquidating trust earmarked for everybody but the Drivers.

relief requested here by the Debtor, the Committee and the secured lenders." *Id.* The Court went on to make findings establishing those dire circumstances. It found that there was "no realistic prospect" of a meaningful distribution to anyone but the secured creditors unless the settlement were approved because the traditional routes out of Chapter 11 bankruptcy were impracticable. App. 32 (Bankr. Op. 10). First, there was "no prospect" of a confirmable Chapter 11 plan of reorganization or liquidation being filed. *Id.* Second, conversion to liquidation under Chapter 7 of the Bankruptcy Code would have been unavailing for any party because a Chapter 7 trustee would not have had sufficient funds "to operate, investigate or litigate" (since all the cash left in the estate was encumbered) and the secured creditors had "stated unequivocally and credibly that they would not do this deal in a Chapter 7." *Id.*

The Bankruptcy Court then rejected the objectors' argument that the settlement could not be approved because it distributed estate assets in violation of the Code's "absolute priority rule." After noting that Chapter 11 plans must comply with the Code's priority scheme, the Court held that settlements need not do so. The Court also disagreed with the Drivers' fiduciary duty argument, dismissing the notion that the Committee's fiduciary duty to the estate gave each creditor veto power over any proposed settlement. The Drivers were never barred from participating in the settlement negotiations, the Court observed, and their omission from the settlement distribution would not prejudice them because their claims against the Jevic estate were "effectively worthless" since the estate lacked any unencumbered funds. App. 36 (Bankr. Op. 14).

Finally, the Bankruptcy Court applied the multifactor test of *In re Martin*, 91 F.3d 389 (3d Cir. 1996), for evaluating settlements under Federal Rule of Bankruptcy Procedure 9019. It found that the Committee's likelihood of success in the fraudulent conveyance action was "uncertain at best," given the legal hurdles to recovery, the substantial resources of CIT and Sun, and the scarcity of funds in the estate to finance further litigation. App. 34-35 (Bankr. Op. 12-13). The Court highlighted the complexity of the litigation and expressed its skepticism that new counsel or a Chapter 7 trustee could be retained to continue the fraudulent conveyance suit on a contingent fee basis. App. 35-36 (Bankr. Op. 13–14) ("[O]n these facts I think any lawyer or firm that signed up for that role should have his head examined."). Faced with, in its view, either "a meaningful return or zero," the Court decided that "[t]he paramount interest of the creditors mandates approval of the settlement" and nothing in the Bankruptcy Code dictated otherwise. App. 36 (Bankr. Op. 14). The Bankruptcy Court therefore approved the settlement and dismissed Jevic's Chapter 11 case.

C

The Drivers appealed to the United States District Court for the District of Delaware and filed a motion in the Bankruptcy Court to stay its order pending appeal. The Bankruptcy Court denied the stay request, and the Drivers did not renew their request for a stay before the District Court. The parties began implementing the settlement months later, distributing over one thousand checks to priority tax creditors and general unsecured creditors.

The District Court subsequently affirmed the Bankruptcy Court's approval of the settlement and dismissal of the case. The Court began by noting that the Drivers "largely do not contest the bankruptcy court's factual findings." *Jevic Holding Corp.*, 2014 WL 268613, at *2 (D. Del. Jan. 24, 2014). In analyzing those factual findings, the District Court held, the Bankruptcy Court had correctly applied the Martin factors and determined that the proposed settlement was "fair and equitable." *Id.* at *2–3. The Court also rejected the Drivers' fiduciary duty and absolute priority rule arguments for the same reasons explained by the bankruptcy judge. *Id.* at *3. And even if the Bankruptcy Court had erred by approving the settlement and dismissing the case, the District Court held in the alternative that the appeal was equitably moot because the settlement had been "substantially consummated as all the funds have been distributed." *Id.* at *4. The Drivers filed this timely appeal, with the United States Trustee supporting them as amicus curiae.

II

The Bankruptcy Court had jurisdiction under 28 U.S.C. § 157(b), and the District Court had jurisdiction under 28 U.S.C. §§ 158(a) and 1334. We have jurisdiction under 28 U.S.C. §§ 158(d) and 1291.

"Because the District Court sat below as an appellate court, this Court conducts the same review of the Bankruptcy Court's order as did the District Court." *In re Telegroup, Inc.*, 281 F.3d 133, 136 (3d Cir. 2002). We review questions of law de novo, findings of fact for clear error, and exercises of discretion for abuse thereof. *In re Goody's Family Clothing Inc.*, 610 F.3d 812, 816 (3d Cir. 2010).

III

To the extent that the Bankruptcy Court had discretion to approve the structured dismissal at issue, the Drivers tacitly concede that the Court did not abuse that discretion in approving a settlement of the Committee's action against CIT and Sun and dismissing Jevic's Chapter 11 case.

First, Federal Rule of Bankruptcy Procedure 9019 authorizes settlements as long as they are "fair and equitable." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson* (TMT Trailer Ferry), 390 U.S. 414, 424 (1968). In *Martin*, we gleaned from *TMT Trailer Ferry* four factors to guide bankruptcy courts in this regard: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." 91 F.3d at 393. None of the objectors contends that the Bankruptcy Court erred in concluding that the balance of these factors favors settlement, and we agree. Although the Committee's fraudulent conveyance suit survived a motion to dismiss, it was far from compelling, especially in view of CIT's and Sun's substantial resources and the Committee's lack thereof. App. 35 (Bankr. Op. 13); *see* App. 1273 (summarizing expert testimony CIT planned to offer that Jevic's failure was caused by systemic economic and industrial problems, not the leveraged buyout); *In re World Health Alts., Inc.*, 344 B.R. 291, 302 (Bankr. D. Del. 2006) ("[S]uccessful challenges to a pre-petition first lien creditor's position are unusual, if not rare."). The litigation promised to be complex and lengthy, whereas the settlement offered most of Jevic's creditors actual distributions.

Nor do the Drivers dispute that the Bankruptcy Court generally followed the law with respect to dismissal. A bankruptcy court may dismiss a Chapter 11 case "for cause," and one form of cause contemplated by the Bankruptcy Code is "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation[.]" 11 U.S.C. § 1112(b)(1), (b)(4)(A). By the time the settling parties requested dismissal, the estate was almost entirely depleted and there was no chance of a plan of reorganization being confirmed. But for $1.7 million in encumbered cash and the fraudulent conveyance action, Jevic had nothing.

Instead of challenging the Bankruptcy Court's discretionary judgments as to the propriety of a settlement and dismissal, the Drivers and the United States Trustee argue that the Bankruptcy Court did not have the discretion it purported to exercise. Specifically, they claim bankruptcy courts have no legal authority to approve structured dismissals, at least to the extent they deviate from the priority system of the Bankruptcy Code in distributing estate assets. We disagree and hold that bankruptcy courts may, in rare instances like this one, approve structured dismissals that do not strictly adhere to the Bankruptcy Code's priority scheme.

A

We begin by considering whether structured dismissals are ever permissible under the Bankruptcy Code. The Drivers submit that "Chapter 11 provides debtors only three exits from bankruptcy": confirmation of a plan of reorganization, conversion to Chapter 7 liquidation, or plain dismissal with no strings attached. Drivers' Br. 18. They argue that there is no statutory authority for structured dismissals and that "[t]he Bankruptcy Court admitted as much." *Id.* at 44. They cite a provision of the Code and accompanying legislative history indicating that Congress understood the ordinary effect of dismissal to be reversion to the status quo ante. *Id.* at 45 (citing 11 U.S.C. § 349(b)(3); H.R. Rep. No. 595, 95th Cong., 1st Sess. 338 (1977)).

The Drivers are correct that, as the Bankruptcy Court acknowledged, the Code does not expressly authorize structured dismissals. *See* App. 31 (Bankr. Op. 9). And as structured dismissals have occurred with increased frequency,[5] even commentators who seem to favor this trend have expressed uncertainty about whether the Code permits them.[6] As we understand them, however, structured dismissals are simply dismissals that are preceded by other orders of the bankruptcy court (*e.g.*, orders approving settlements, granting releases, and so forth) that remain in effect after dismissal. And though § 349 of the Code contemplates that dismissal will typically

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[5] *See* Norman L. Pernick & G. David Dean, *Structured Chapter 11 Dismissals: A Viable and Growing Alternative After Asset Sales*, Am. Bankr. Inst. J., June 2010, at 1; *see*, *e.g.*, *In re Kainos Partners Holding Co.*, 2012 WL 6028927 (D. Del. Nov. 30, 2012); W*orld Health Alts*., 344 B.R. at 293–95. *But cf. In re Biolitec, Inc.*, 2014 WL 7205395 (Bankr. D.N.J. Dec. 16, 2014) (rejecting a proposed structured dismissal as invalid under the Code).

[6] *See, e.g.*, Brent Weisenberg, *Expediting Chapter 11 Liquidating Debtor's Distribution to Creditors*, Am. Bankr. Inst. J., April 2012, at 36 ("[T]he time is ripe to make crystal clear that these procedures are in fact authorized by the Code."). *But cf.* Nan Roberts Eitel et al., *Structured Dismissals, or Cases Dismissed Outside of Code's Structure*?, Am. Bankr. Inst. J., March 2011, at 20 (article by United States Trustee staff arguing that structured dismissals are improper under the Code).

reinstate the pre-petition state of affairs by revesting property in the debtor and vacating orders and judgments of the bankruptcy court, it also explicitly authorizes the bankruptcy court to alter the effect of dismissal "for cause"—in other words, the Code does not strictly require dismissal of a Chapter 11 case to be a hard reset. 11 U.S.C. § 349(b); H.R. Rep. No. 595 at 338 ("The court is permitted to order a different result for cause."); *see also Matter of Sadler*, 935 F.2d 918, 921 (7th Cir. 1991) ("'Cause' under § 349(b) means an acceptable reason.").

Quoting Justice Scalia's oft-repeated quip "Congress … does not, one might say, hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), the Drivers forcefully argue that Congress would have spoken more clearly if it had intended to leave open an end run around the procedures that govern plan confirmation and conversion to Chapter 7, Drivers' Br. 22. According to the Drivers, the position of the District Court, the Bankruptcy Court, and Appellees overestimates the breadth of bankruptcy courts' settlement-approval power under Rule 9019, "render[ing] plan confirmation superfluous" and paving the way for illegitimate *sub rosa* plans engineered by creditors with overwhelming bargaining power. *Id.*; *see also id.* at 24-25. Neither "dire circumstances" nor the bankruptcy courts' general power to carry out the provisions of the Code under 11 U.S.C. § 105(a), the Drivers say, authorizes a court to evade the Code's requirements. *Id.* at 32-35, 40-41.

But even if we accept all that as true, the Drivers have proved only that the Code forbids structured dismissals when they are used to circumvent the plan confirmation process or conversion to Chapter 7. Here, the Drivers mount no real challenge to the Bankruptcy

Court's findings that there was no prospect of a confirmable plan in this case and that conversion to Chapter 7 was a bridge to nowhere. So this appeal does not require us to decide whether structured dismissals are permissible when a confirmable plan is in the offing or conversion to Chapter 7 might be worthwhile. For present purposes, it suffices to say that absent a showing that a structured dismissal has been contrived to evade the procedural protections and safeguards of the plan confirmation or conversion processes, a bankruptcy court has discretion to order such a disposition.

B

Having determined that bankruptcy courts have the power, in appropriate circumstances, to approve structured dismissals, we now consider whether settlements in that context may ever skip a class of objecting creditors in favor of more junior creditors. *See In re Buffet Partners, L.P.*, 2014 WL 3735804, at *4 (Bankr. N.D. Tex. July 28, 2014) (approving a structured dismissal while "emphasiz[ing] that not one party with an economic stake in the case has objected to the dismissal in this manner"). The Drivers' primary argument in this regard is that even if structured dismissals are permissible, they cannot be approved if they distribute estate assets in derogation of the priority scheme of § 507 of the Code. They contend that § 507 applies to all distributions of estate property under Chapter 11, meaning the Bankruptcy Court was powerless to approve a settlement that skipped priority employee creditors in favor of tax and general unsecured creditors. Drivers' Br. 21, 35–36; *see* 11 U.S.C. § 103(a) ("[C]hapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13[.]"); *Law v. Siegel*, 134 S. Ct. 1188, 1194 (2014) ("'[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code." (citation omitted)).

The Drivers' argument is not without force. Although we are skeptical that § 103(a) requires settlements in Chapter 11 cases to strictly comply with the § 507 priorities,[7] there is some tacit support in the caselaw for the Drivers' position. For example, in *TMT Trailer Ferry*, the Supreme Court held that the "requirement[] … that plans of reorganization be both 'fair and equitable,' appl[ies] to compromises just as to other aspects of reorganizations." 390 U.S. at 424. The Court also noted that "a bankruptcy court is not to approve or confirm a plan of reorganization unless it is found to be 'fair and equitable.' This standard incorporates the absolute priority doctrine under which creditors and stockholders may participate only in accordance with their respective priorities[.]" *Id.* at 441; *see also* 11 U.S.C. § 1129(b)(2)(B)(ii) (codifying the absolute priority rule by requiring that a plan of reorganization pay senior creditors before junior creditors in order to be "fair and equitable" and confirmable). This latter statement comports with a line of cases describing "fair and equitable" as "'words of art' which mean that senior interests are entitled to full priority over junior ones[.]" *SEC v. Am. Trailer*

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[7] There is nothing in the Code indicating that Congress legislated with settlements in mind—in fact, the bankruptcy courts' power to approve settlements comes from a Federal Rule of Bankruptcy Procedure promulgated by the Supreme Court, not Congress. *See* Rules Enabling Act, 28 U.S.C. § 2075. If § 103(a) meant that all distributions in Chapter 11 cases must comply with the priorities of § 507, there would have been no need for Congress to codify the absolute priority rule specifically in the plan confirmation context. *See* 11 U.S.C. § 1129(b)(2)(B)(ii).

Rentals Co., 379 U.S. 594, 611 (1965); *accord Otis & Co. v. SEC*, 323 U.S. 624, 634 (1945); *Case v. L.A. Lumber Prods. Co.*, 308 U.S. 106, 115–16 (1939).

Although these cases provide some support to the Drivers, they are not dispositive because each of them spoke in the context of plans of reorganization, not settlements. *See*, *e.g.*, *TMT Trailer Ferry*, 424 U.S. at 441; *Am. Trailer Rentals*, 379 U.S. at 611; *see also In re Armstrong World Indus.*, *Inc.*, 432 F.3d 507 (3d Cir. 2005) (applying the absolute priority rule to deny confirmation of a proposed plan). When Congress codified the absolute priority rule discussed in the line of Supreme Court decisions cited above, it did so in the specific context of plan confirmation, *see* § 1129(b)(2)(B)(ii), and neither Congress nor the Supreme Court has ever said that the rule applies to settlements in bankruptcy. Indeed, the Drivers themselves admit that the absolute priority rule "plainly does not apply here," even as they insist that the legal principle embodied by the rule dictates a result in their favor. Drivers' Br. 37.

Two of our sister courts have grappled with whether the priority scheme of § 507 must be followed when settlement proceeds are distributed in Chapter 11 cases. In *Matter of AWECO, Inc.*, the Court of Appeals for the Fifth Circuit rejected a settlement of a lawsuit against a Chapter 11 debtor that would have transferred $5.3 million in estate assets to an unsecured creditor despite the existence of outstanding senior claims. 725 F.2d 293, 295–96 (1984). The Court held that the "fair and equitable" standard applies to settlements, and "fair and equitable" means compliant with the priority system. *Id*. at 298.

Criticizing the Fifth Circuit's rule in *AWECO*, the Second Circuit adopted a more flexible approach in *In re Iridium Operating LLC*, 478 F.3d 452 (2007). There, the unsecured creditors' committee sought to settle a suit it had brought on the estate's behalf against a group of secured lenders; the proposed settlement split the estate's cash between the lenders and a litigation trust set up to fund a different debtor action against Motorola, a priority administrative creditor. *Id.* at 456, 459–60. Motorola objected to the settlement on the ground that the distribution violated the Code's priority system by skipping Motorola and distributing funds to lower-priority creditors. *Id.* at 456. Rejecting the approach taken by the Fifth Circuit in *AWECO* as "too rigid," the Second Circuit held that the absolute priority rule "is not necessarily implicated" when "a settlement is presented for court approval apart from a reorganization plan[.]" *Id.* at 463–64. The Court held that "whether a particular settlement's distribution scheme complies with the Code's priority scheme must be the most important factor for the bankruptcy court to consider when determining whether a settlement is 'fair and equitable' under Rule 9019," but a noncompliant settlement could be approved when "the remaining factors weigh heavily in favor of approving a settlement[.]" *Id.* at 464.

Applying its holding to the facts of the case, the Second Circuit noted that the settlement at issue deviated from the Code priorities in two respects: first, by skipping Motorola in distributing estate assets to the litigation fund created to finance the unsecured creditors committee's suit against Motorola; and second, by skipping Motorola again in providing that any money remaining in the fund after the litigation concluded would go straight to the unsecured creditors.

478 F.3d at 459, 465–66. The Court indicated that the first deviation was acceptable even though it skipped Motorola:

> It is clear from the record why the Settlement distributes money from the Estate to the [litigation vehicle]. The alternative to settling with the Lenders—pursuing the challenge to the Lenders' liens—presented too much risk for the Estate, including the administrative creditors. If the Estate lost against the Lenders (after years of litigation and paying legal fees), the Estate would be devastated, all its cash and remaining assets liquidated, and the Lenders would still possess a lien over the Motorola Estate Action. Similarly, administrative creditors would not be paid if the Estate was unsuccessful against the Lenders. Further, as noted at the Settlement hearing, having a well-funded litigation trust was preferable to attempting to procure contingent fee-based representation.

Id. at 465-66. But because the record did not adequately explain the second deviation, the Court remanded the case to allow the bankruptcy court to consider that issue. *Id.* at 466 ("[N]o reason has been offered to explain why any balance left in the litigation trust could not or should not be distributed pursuant to the rule of priorities.").

We agree with the Second Circuit's approach in *Iridium*—which, we note, the Drivers and the United States Trustee cite throughout their briefs and never quarrel with. *See* Drivers' Br. 27, 36; Reply Br. 11–13; Trustee Br. 21. As in other areas of the law, settlements are favored in bankruptcy. *In re*

Nutraquest, 434 F.3d 639, 644 (3d Cir. 2006). "Indeed, it is an unusual case in which there is not some litigation that is settled between the representative of the estate and an adverse party." *Martin*, 91 F.3d at 393. Given the "dynamic status of some pre-plan bankruptcy settlements," *Iridium*, 478 F.3d at 464, it would make sense for the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure to leave bankruptcy courts more flexibility in approving settlements than in confirming plans of reorganization. For instance, if a settlement is proposed during the early stages of a Chapter 11 bankruptcy, the "nature and extent of the [e]state and the claims against it" may be unresolved. *Id.* at 464. The inquiry outlined in *Iridium* better accounts for these concerns, we think, than does the per se rule of *AWECO*.

At the same time, we agree with the Second Circuit's statement that compliance with the Code priorities will usually be dispositive of whether a proposed settlement is fair and equitable. *Id.* at 455. Settlements that skip objecting creditors in distributing estate assets raise justifiable concerns about collusion among debtors, creditors, and their attorneys and other professionals. *See id.* at 464. Although Appellees have persuaded us to hold that the Code and the Rules do not extend the absolute priority rule to settlements in bankruptcy, we think that the policy underlying that rule—ensuring the evenhanded and predictable treatment of creditors—applies in the settlement context. As the Drivers note, nothing in the Code or the Rules obliges a creditor to cut a deal in order to receive a distribution of estate assets to which he is entitled. Drivers' Br. 42-43. If the "fair and equitable" standard is to have any teeth, it must mean that bankruptcy courts cannot approve settlements and structured dismissals devised by certain creditors in order to increase their shares of the estate at the expense of other creditors. We therefore hold that bankruptcy courts may approve settlements that deviate from the priority scheme of § 507 of the Bankruptcy Code only if they have "specific and credible grounds to justify [the] deviation." *Iridium*, 478 F.3d at 466.

C

We admit that it is a close call, but in view of the foregoing, we conclude that the Bankruptcy Court had sufficient reason to approve the settlement and structured dismissal of Jevic's Chapter 11 case. This disposition, unsatisfying as it was, remained the least bad alternative since there was "no prospect" of a plan being confirmed and conversion to Chapter 7 would have resulted in the secured creditors taking all that remained of the estate in "short order." App. 32 (Bankr. Op. 10).

Our dissenting colleague's contrary view rests on the counterfactual premise that the parties could have reached an agreeable settlement that conformed to the Code priorities. He would have us make a finding of fact to that effect and order the Bankruptcy Court to redesign the settlement to comply with § 507. We decline to do so because, even if it were appropriate for us to review findings of fact de novo and equitably reform settlements on appeal, there is no evidence calling into question the Bankruptcy Court's conclusion that there was "no realistic prospect" of a meaningful distribution to Jevic's unsecured creditors apart from the settlement under review. App. 32 (Bankr. Op. 10). If courts required settlements to be perfect, they would seldom be approved; though it's regrettable that the

Drivers were left out of this one, the question—as Judge Scirica recognizes—is whether the settlement serves the interests of the estate, not one particular group of creditors. There is no support in the record for the proposition that a viable alternative existed that would have better served the estate and the creditors as a whole.

The distribution of Jevic's remaining $1.7 million to all creditors but the Drivers was permissible for essentially the same reasons that the initial distribution of estate assets to the litigation fund was allowed by the Second Circuit in *Iridium*.[8] As in that case, here the Bankruptcy Court had to choose between approving a settlement that deviated from the priority scheme of § 507 or rejecting it so a lawsuit could proceed to deplete the estate. Although we are troubled by the fact that the exclusion of the Drivers certainly lends an element of unfairness to the first option, the second option would have served the interests of neither the creditors nor the estate. The Bankruptcy Court, in Solomonic fashion, reluctantly approved the only course that resulted in some payment to creditors other than CIT and Sun.

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[8] Judge Scirica reads *Iridium* as involving a settlement that deviated from the § 507 priority scheme in just one respect, and a minor one at that. As we have explained, however, the *Iridium* settlement involved two deviations: (1) the initial distribution of estate funds to the litigation fund created to sue Motorola; and (2) the contingent provision that money left in the fund after the litigation concluded would go directly to the unsecured creditors. *See supra* Section III-B. The Second Circuit held that, while the second deviation needed to be explained on remand, the first was acceptable despite the fact that it impaired Motorola because it clearly served the interests of the estate. *See Iridium*, 478 F.3d at 465-66.

* * *

Counsel for the United States Trustee told the Bankruptcy Court that it is immaterial whether there is a viable alternative to a structured dismissal that does not comply with the Bankruptcy Code's priority scheme. "[W]e have to accept the fact that we are sometimes going to get a really ugly result, an economically ugly result, but it's an economically ugly result that is dictated by the provisions of the code," he said. App. 1327. We doubt that our national bankruptcy policy is quite so nihilistic and distrustful of bankruptcy judges. Rather, we believe the Code permits a structured dismissal, even one that deviates from the § 507 priorities, when a bankruptcy judge makes sound findings of fact that the traditional routes out of Chapter 11 are unavailable and the settlement is the best feasible way of serving the interests of the estate and its creditors. Although this result is likely to be justified only rarely, in this case the Bankruptcy Court provided sufficient reasons to support its approval of the settlement under Rule 9019. For that reason, we will affirm the order of the District Court.

SCIRICA, *Circuit Judge*

I concur in parts of the Court's analysis in this difficult case, but I respectfully dissent from the decision to affirm. Rejection of the settlement was called for under the Bankruptcy Code and, by approving the settlement, the bankruptcy court's order undermined the Code's essential priority scheme. Accordingly, I would vacate the bankruptcy court's order and remand for further proceedings, described below.

At the outset, I should state that this is not a case where equitable mootness applies. We recently made clear in *In re Semcrude, L.P.*, 728 F.3d 314 (3d Cir. 2013), that this doctrine applies only where there is a confirmed plan of reorganization. I would also adopt the Second Circuit's standard from *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007), and hold that settlements presented outside of plan confirmations must, absent extraordinary circumstances, comply with the Code's priority scheme.

Where I depart from the majority opinion, however, is in holding this appeal presents an extraordinary case where departure from the general rule is warranted. The bankruptcy court believed that because no confirmable Chapter 11 plan was possible, and because the only alternative to the settlement was a Chapter 7 liquidation in which the WARN Plaintiffs would have received no recovery, compliance with the Code's priority scheme was not required. For two reasons, however, I respectfully dissent.

First, it is not clear to me that the only alternative to the settlement was a Chapter 7 liquidation. An alternative settlement might have been reached in Chapter 11, and might have included the WARN Plaintiffs. The reason that such a settlement was not reached was that one of the defendants being released (Sun) did not want to fund the WARN Plaintiffs in their ongoing litigation against it. As Sun's counsel explained at the settlement hearing, "if the money goes to the WARN plaintiffs, then you're funding someone who is suing you who otherwise doesn't have funds and is doing it on a contingent fee basis." Sun therefore insisted that, as a condition to participating in the fraudulent conveyance action settlement, the WARN Plaintiffs would have to drop their WARN claims.

Accordingly, to the extent that the only alternative to the settlement was a Chapter 7 liquidation, that reality was, at least in part, a product of appellees' own making.

More fundamentally, I find the settlement at odds with the goals of the Bankruptcy Code. One of the Code's core goals is to maximize the value of the bankruptcy estate, *see Toibb v. Radloff*, 501 U.S. 157, 163 (1991), and it is the duty of a bankruptcy trustee or debtor-in-possession to work toward that goal, including by prosecuting estate causes of action,[1] *see Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 573 (3d Cir. 2003). The reason creditors' committees may bring fraudulent conveyance actions on behalf of the estate is that such committees are likely to maximize estate value; "[t]he possibility of a derivative suit by a creditors' committee provides a critical safeguard against lax pursuit of avoidance actions [by a debtor-in-possession]." *Cybergenics*, 330 F.3d at 573. The settlement of estate causes of action can, and often does, play a crucial role in maximizing estate value, as settlements may save the estate the time, expense, and uncertainties associated with litigation. *See Protective Comm. for Ind. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) ("In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts.");

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[1] Of course, it was the creditors' committee, rather than a bankruptcy trustee or debtor-in-possession, who was responsible for prosecuting the fraudulent conveyance action here.

In re A&C Props., 784 F.2d 1377, 1380-81 (9th Cir. 1986) ("The purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims."). Thus, to the extent that a settlement's departure from the Code's priority scheme was necessary to maximize the estate's overall value, I would not object.

But here, it is difficult to see how the settlement is directed at estate-value maximization. Rather, the settlement deviates from the Code's priority scheme so as to maximize the recovery that certain creditors receive, some of whom (the unsecured creditors) would not have been entitled to recover anything in advance of the WARN Plaintiffs had the estate property been liquidated and distributed in Chapter 7 proceedings or under a Chapter 11 "cramdown." There is, of course, a substantial difference between the estate itself and specific estate constituents. The estate is a distinct legal entity, and, in general, its assets may not be distributed to creditors except in accordance with the strictures of the Bankruptcy Code.[2]

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[2] This point is reinforced with an analogy to trust law. Where there are two or more beneficiaries of a trust, the trustee is under a duty to deal with them impartially, and cannot take an action that rewards certain beneficiaries while harming others. Restatement (Second) of Trusts § 183 (1959); *see also Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996) ("The common law of trusts recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interests of all beneficiaries."). Yet that is what the Committee did here. This duty persists even where the trustee is a beneficiary of the trust himself, like the creditors' committee was here. *See* Restatement (Third) of Trusts § 32 (2003) ("A natural person, including a settlor or beneficiary, has capacity … to administer trust property and act as trustee … .")

In this sense, then, the settlement and structured dismissal raise the same concern as transactions invalidated under the *sub rosa* plan doctrine. In *In re Braniff Airways, Inc.*, 700 F.2d 935 (5th Cir. 1983), the Court of Appeals for the Fifth Circuit rejected an asset sale that "had the practical effect of dictating some of the terms of any future reorganization plan." *Id.* at 940. The sale was impermissible because the transaction "short circuit[ed] the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets." *Id.* "When a proposed transaction specifies terms for adopting a reorganization plan, 'the parties and the district court must scale the hurdles erected in Chapter 11.'" *In re Cont'l Air Lines, Inc.*, 780 F.2d 1223, 1226 (5th Cir. 1986) (quoting *Braniff*, 700 F.2d at 940). Although the combination of the settlement and structured dismissal here does not, strictly speaking, constitute a *sub rosa* plan—the hallmark of such a plan is that it dictates the terms of a reorganization plan, and the settlement here does not do so—the broader concerns underlying the *sub rosa* doctrine are at play. The settlement reallocated assets of the estate in a way that would not have been possible without the authority conferred upon the creditors' committee by Chapter 11 and effectively terminated the Chapter 11 case, but it failed to observe Chapter 11's "safeguards of disclosure, voting, acceptance, and confirmation." *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1982); *see also In re Biolitec Inc.*, No. 13-11157, 2014 WL 7205395, at *8 (Bankr. D.N.J. Dec. 17, 2014) (rejecting settlement and structured dismissal that assigned rights and interests but did not allow parties to vote on settlement's provisions in part because it "resemble[d] an impermissible *sub rosa* plan"). This settlement then appears to constitute an impermissible end-run around the carefully designed routes by which a debtor may emerge from Chapter 11 proceedings.

Critical to this analysis is the fact that the money paid by the secured creditors in the settlement was property of the estate. A cause of action held by the debtor is property of the estate, *see Bd. of Trs. of Teamsters Local 863 v. Foodtown, Inc.*, 296 F.3d 164, 169 (3d Cir. 2002), and "proceeds … of or from property of the estate" are considered estate property as well, 11 U.S.C. § 541(a)(6). Here, the administrative and unsecured creditors received the $3.7 million as consideration for the releases from the fraudulent conveyance action, so this payment qualifies as "proceeds" from the estate's cause of action.[3] *See* Black's Law Dictionary 1325 (9th ed. 2009) (defining proceeds as "[s]omething received upon selling, exchanging, collecting, or otherwise disposing of collateral"); *see also Strauss v. Morn*, Nos. 97-16481 & 97-16483, 1998 WL 546957, at *3 (9th Cir. 1998) ("§ 541(a)(6) mandates the broad interpretation of the term 'proceeds' to encompass all proceeds of property of the estate"); *In re Rossmiller*, No. 95-1249, 1996 WL 175369, at *2 (10th Cir. 1996) (similar). This case is thus distinguishable from the so-called "gifting" cases such

[3] On June 30, 2006, Sun acquired Jevic in a leveraged buyout, which included an $85 million revolving credit facility from a bank group led by CIT. The fraudulent conveyance action complaint sets forth that Jevic and Sun allegedly knew that Jevic would default on the CIT financing agreement by September 11 of that year. The fraudulent conveyance action sought over $100 million in damages, and the unsecured creditors' committee alleged that "[w]ith CIT's active assistance … Sun orchestrated a[n] … LBO whereby Debtors' assets were leveraged to enable a Sun affiliate to pay $77.4 million … with no money down."

as *In re World Health Alternatives*, 344 B.R. 291 (Bankr. D. Del. 2006), and *In re SPM Manufacturing Corp.*, 984 F.2d 1305 (1st Cir. 1993). In fact, those courts explicitly distinguished estate from non-estate property, and approved the class-skipping arrangements only because the proceeds being distributed were *not* estate property. *See World Health*, 344 B.R. at 299-300; *SPM*, 984 F.3d at 1313. The arrangement here is closer to a § 363 asset sale where the proceeds from the debtor's assets are distributed directly to certain creditors, rather than the bankruptcy estate. *Cf. In re Chrysler LLC*, 576 F.3d 108, 118 (2d Cir. 2009) (noting, in upholding a § 363 sale, that the bankruptcy court demonstrated "proper solicitude for the priority between creditors and deemed it essential that the [s]ale in no way upset that priority"), *vacated as moot*, 592 F.3d 370. It is doubtful that such an arrangement would be permissible.

The majority likens the deviation in this case to the first deviation in *Iridium*, in which the settlement would initially distribute funds to the litigation trust instead of the Motorola administrative creditors. For two reasons, however, I find this analogy unavailing. First, it is not clear to me that the Second Circuit saw the settlement's initial distribution of funds to the litigation trust as a deviation from the Code's priority scheme at all. As the Second Circuit explained, if the litigation was successful, the majority of the proceeds from that litigation would actually flow back to the estate, then to be distributed in accordance with the Code's priority scheme. 459 F.3d at 462.[4] Second, the critical (and, in my view, determinative) characteristic

[4] Here, by contrast, none of the settlement proceeds flowed to the estate.

of the settlement in this case is that it skips over an entire class of creditors. That is precisely what the second "deviation" in *Iridium* did, and the Second Circuit remanded to the bankruptcy court for further consideration of that aspect of the settlement.

In fact, the second "deviation" in *Iridium* deviated from the priority scheme in a more minor way than the settlement at issue here. In *Iridium*, the settlement would have deviated from the priority scheme only in the event that Motorola, an administrative creditor and a defendant in various litigation matters brought by the creditors' committee, had prevailed in the litigation or if its administrative claims had exceeded its liability in the litigation. *Iridium*, 478 F.3d at 465. The Second Circuit thus characterized this aspect of the settlement as a mere "possible deviation" in "one regard," but nevertheless remanded for the bankruptcy court to assess the "possible" deviation's justification. *Id.* at 466. Here, of course, it is clear that the settlement deviates from the priority scheme, as it provides no compensation for an entire class of priority creditors, while providing $1.7 million to the general unsecured creditors.

Finally, I do not question the factual findings made by the bankruptcy court. That court found that there was "no realistic prospect" of a meaningful distribution to Jevic's unsecured creditors apart from the settlement under review. But whether there was a realistic prospect of distribution to the unsecured creditors in the absence of this settlement is not relevant to my concerns. What matters is whether the settlement's deviation from the priority scheme was necessary to maximize the value of the *estate*. There is a difference between the estate and certain creditors of the estate, and there has been no suggestion that the deviation maximized the value of the estate itself.

The able bankruptcy court here was faced with an unpalatable set of alternatives. But I do not believe the situation it faced was entirely *sui generis*. It is not unusual for a debtor to enter bankruptcy with liens on all of its assets, nor is it unusual for a debtor to enter Chapter 11 proceedings—the flexibility of which enabled appellees to craft this settlement in the first place—with the goal of liquidating, rather than rehabilitating, the debtor.[5] It is also not difficult to imagine another secured creditor who wants to avoid providing funds to priority unsecured creditors, particularly where the secured creditor is also the debtor's ultimate parent and may have obligations to the debtor's employees. Accordingly, approval of the bankruptcy court's ruling in this case would appear to undermine the general prohibition on settlements that deviate from the Code's priority scheme.

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[5] *See* Ralph Brubaker, *The Post-*RadLAX *Ghosts of* Pacific Lumber *and* Philly News *(Part II): Limiting Credit Bidding*, Bankr. L. Letter, July 2014, at 4 (describing the "ascendancy of secured credit in Chapter 11 debtors' capital structures, such that it is now common that a dominant secured lender has blanket liens on substantially all of the debtor's assets securing debts vastly exceeding the value of the debtor's business and assets"); Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control & Conflict in Chapter 11*, 1 J.L. Analysis 511, 519 (2009) (finding that secured claims exceeded the value of the company in twenty-two percent of the bankruptcies surveyed); Stephen J. Lubben, *Business Liquidation*, 81 Am. Bankr. L.J. 65 (2007) (noting that although "chapter 7 is the prevailing method of business liquidation, … a sizable number of firms first attempt either a reorganization or liquidation under chapter 11"); 11 U.S.C. § 1123(b)(4) (providing that a chapter 11 plan may "provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests").

I recognize that if the settlement were unwound, this case would likely be converted to a Chapter 7 liquidation in which the secured creditors would be the only creditors to recover. Accordingly, I would not unwind the settlement entirely. Instead, I would permit the secured creditors to retain the releases for which they bargained and would not disturb any of the proceeds received by the administrative creditors either. But I would also require the bankruptcy court to determine the WARN Plaintiffs' damages under the New Jersey WARN Act, as well as the proportion of those damages that qualifies for the wage priority.[6] I would then have the court order any proceeds that were distributed to creditors with a priority lower than that of the WARN Plaintiffs disgorged, and apply those proceeds to the WARN Plaintiffs' wage priority claim. To the extent that funds are left over, I would have the court redistribute them to the remaining creditors in accordance with the Code's priority scheme.

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[6] At this point, the WARN litigation has largely concluded, with the WARN Plaintiffs having established liability on their New Jersey WARN claims against Jevic but having lost on all other claims. On May 10, 2013, the bankruptcy court dismissed the WARN Plaintiffs' claims against Sun (but not Jevic) on the grounds that Sun was not a "single employer" for purposes of the WARN Acts. The district court affirmed that decision on September 29, 2014. *In re Jevic Holding Corp.*, No. 13-1127-SLR, 2014 WL 4949474 (D. Del. Sept. 29, 2014). In a separate opinion on May 10, 2013, the bankruptcy court dismissed the federal WARN Act claims against Jevic, but granted summary judgment in favor of the WARN Plaintiffs against Jevic on their New Jersey WARN Act claims. No appeal was taken of that ruling; in fact, Jevic did not contest liability on the New Jersey WARN Act claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: JEVIC HOLDING CORP., *et al.*,
Debtors.

CASIMIR CZYZEWSKI, *et al.*,
Appellants,
v.

JEVIC HOLDING CORP., *et al.*,
Appellees.

Civ. Nos. 13-104-SLR and 13-105 SLR (consolidated)
Chapter 11
Bank. No. 08-11006 (BLS)
(Jointly Administered)
Filed January 24, 2014

ORDER

At Wilmington this 24th day of January, 2014, consistent with the memorandum issued this same date;

IT IS ORDERED that the appeal is dismissed and the order of the bankruptcy court dated November 28, 2012 is affirmed.

/s/ Sue L. Robinson
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: JEVIC HOLDING CORP., *et al.*,
Debtors.

CASIMIR CZYZEWSKI, *et al.*,
Appellants,
v.

JEVIC HOLDING CORP., *et al.*,
Appellees.

Civ. Nos. 13-104-SLR and 13-105 SLR (consolidated)
Chapter 11
Bank. No. 08-11006 (BLS)
(Jointly Administered)
Filed January 24, 2014

MEMORANDUM

At Wilmington this 24th day of January, 2014 having reviewed the appeal taken by Casimir Czyzewski, Melvin L. Myers, Jeffrey Oehlers, Arthur E. Perigard, and Daniel C. Richards, on behalf of themselves and all others similarly situated, ("appellants"), and the papers submitted in connection therewith; the court issues its decision based on the following analysis:

1. **Background.**[1] Jevic Holding Corp., Jevic Transportation, Inc. and Creek Road Properties, LLC's (collectively, "debtors") are a trucking company. In June 2006, Sun Capital Partners IV, LP, Sun Partners Management IV, LLC and Sun Capital Partners, Inc. (collectively, "Sun") bought debtors, and subsequently refinanced the acquisition through a $101 million loan from The CIT Group/Business Credit, Inc. ("CIT"), as agent for the lenders (the "Lender Group"). (D.I. 19 at 3-4)

2. On May 20, 2008 ("the petition date"),[2] debtors each filed a voluntary petition for relief under chapter 11 of title 11 of the United Stated Code (the "Bankruptcy Code") in the bankruptcy court. On June 4, 2008, the United States Trustee appointed the Official Committee of Unsecured Creditors of Jevic Holding Corp. et al. ("the committee") (collectively with debtors, Sun, and CIT, "appellees"). Shortly prior to the petition date, the debtors wound-down their business, ceasing substantially all of their operations and terminating approximately 90% of their employees. After the petition date, all of the debtors' tangible assets were liquidated and the proceeds used to partially repay the outstanding obligations owed to CIT.

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[1] The factual background is largely undisputed and is taken from the United States Bankruptcy Court for the District of Delaware's ("bankruptcy court") oral order dated November 28, 2012 and supplemented by the parties' briefing.

[2] As of the petition date, the debtors' primary secured creditors were Sun and CIT, with an aggregate of approximately $53 million on a first priority senior secured basis. (08-11006-BLS, D.I. 1519 at 5:1-4)

3. On May 21, 2008, appellants,[3] who are truck drivers[4] whose employment was terminated by debtors, filed a complaint asserting claims under the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et. seq., and the New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act, PL. 2007, c.212, C.34:21-2.[5] (D.I. 19 at 4)

4. Appellees reached a settlement agreement ("settlement"), dated June 22, 2012, which resolved all claims among the debtors and their estates, the committee, CIT, the Lender Group and Sun. Appellants minimally participated in the settlement negotiations, but did not agree to the settlement. (08-11006-BLS, D.I. 1519 at 11; D.I. 1514 at 31:13-21, 68:11-22) The settlement "provided for (a) the exchange of releases, (b) the payment of $2 million by CIT to the [d]ebtors, to be used to satisfy unpaid chapter 11 administrative claims, (c) the dismissal with prejudice of the Adversary Proceeding,[6] (d) the assignment by Sun of its lien on the estates' remaining assets to the Jevic Holding Corp. Liquidating Trust (the "[c]reditors['] [t]rust") for the benefit of the [d]ebtors' unsecured creditors and certain priority tax claimants, (e) the reconciliation of administrative and unsecured

[3] Referred to by the bankruptcy court as "the Warren [sic] plaintiffs."

[4] About 1 ,200 truck drivers who claim over $20 million and are debtors' largest group of unsecured creditors. (D.I. 19 at 1)

[5] Appellants allege that these claims are priority claims under 11 U.S.C. §§ 507(a)(4) and (a)(5); as such, they allege they should be paid in full before any funds may be paid to general or lower priority creditors. (D.I. 19 at 4)

[6] A proceeding brought by the committee against CIT and Sun, respectively the debtors' senior and junior secured lenders.

claims, and (f) the dismissal of the chapter 11 cases." (D.I. 15 at 5; ex. A at ¶ 3)

5. Appellants objected to the agreement on various grounds.[7] After briefing and an evidentiary hearing, the bankruptcy court concluded that the possibility of recovery for appellants was remote at best, as there were "several independent hurdles that the [c]ommittee would have to clear before it would actually see a material recovery out of the litigation," which would take years (08-11006-BLS, D.I. 1519 at 13:7-9) Further, the debtors possessed no funds that were not subject to the liens of CIT and Sun, to continue with litigation. The bankruptcy court entered the settlement on December 4, 2012. (08-11006-BLS, D.I. 1520)

6. On January 2, 2013, appellants filed a motion to stay with the bankruptcy court. (08-11006-BLS, D.I. 1545) After briefing and argument, the bankruptcy court denied the stay on January 18, 2013 but, as a courtesy to the district court, instructed the debtors to refrain from consummating the settlement for ten to fifteen days to give appellants an opportunity to challenge the ruling. (D.I. 16, ex. 6 at 29-30; 08-11006-BLS, D.I. 1567) Appellants did not challenge the denial and have not further sought a stay.

7. At a hearing on February 20, 2013, appellants sought clarification regarding whether the appellees could move forward with implementing the settlement. The bankruptcy court confirmed the lack of a stay. The committee advised that appellees were "actively considering closing. So if [appellants] want to stay … they should file a motion promptly." Although

[7] The United States Trustee also objected.

appellants indicated that they would be seeking a stay (D. 1.16, ex. 3 at 12-14), no such motion was filed in this court.

8. The appellees instigated a series of transactions to implement the settlement, beginning on August 28, 2013. All funds were distributed under the settlement, with the creditors' trust distributing 1,039 final disbursement checks to holders of allowed general unsecured claims and 29 final disbursement checks to holders of allowed unsecured priority tax claims.[8] (D.I. 15 at 9) The bankruptcy court dismissed the debtors' chapter 11 cases on October 11, 2013.

9. **Standard of Review**. 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)). The district court's appellate responsibilities are further informed by the directive of the United States Court of

[8] Of these, 39 checks were returned and "$90,422.58 in checks have not been negotiated by the payees … ." (D .1. 16 at 9)

Appeals for the Third Circuit, which effectively reviews on a de novo basis bankruptcy court opinions. *In re Hechinger*, 298 F.3d 219, 224 (3d Cir. 2002); *In re Telegroup*, 281 F.3d 133, 136 (3d Cir. 2002).

10. **Analysis**. Appellants largely do not contest the bankruptcy court's factual findings. Instead, appellants fault the bankruptcy court's approval of the settlement on various legal grounds. Contrary to appellants' contentions, the bankruptcy court properly evaluated the proposed settlement, considering the Martin test's four criteria[9] and determining that the settlement was "fair and equitable." *Myers v. Martin* (*In re Martin*), 91 F.3d 389, 393 (3d Cir. 1996); *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968). More specifically, the bankruptcy court considered appellants' primary objections to the settlement—that the proceeds did not flow to their claims and that the committee breached its fiduciary duty—in making its determination. (D.I. 1519 at 9:4-10); *see In re Nutraquest, Inc.*, 434 F.3d 639, 644-45 (3d Cir. 2006) (finding that "many cases have applied the *Drexel-TMT Trailer-Martin* factors to settlements involving claims against debtors" and the court should "carefully examine" the settlement and determine if it was fair to "the parties who did not settle") (citations omitted). As discussed below, these objections did not necessitate rejecting the settlement.

11. As to the pending WARN litigation, the bankruptcy court found that the litigation was in the early stages, would be lengthy and expensive, was not

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[9] "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors."

"a slam dunk," and the estate was without funds to support any litigation. (D.I. 1519 at 12-14) As to the "paramount interest of creditors" factor, the settlement involves "a substantial distribution to unsecured and certain administrative creditors." (D.I. 1519 at 14:4-17) Further, appellants' claim against the estate is "effectively worthless given that the estate lacks available unencumbered funds to satisfy it if it were allowed." (*Id.*)

12. As to the whether the settlement is "fair and equitable," the bankruptcy court found that all of the major economic stakeholders were involved in the negotiations (including appellants),[10] the committee lacked the resources to continue any litigation, and the settlement offered "the prospect of a meaningful distribution to unsecured creditors, and to some but admittedly not all administrative priority creditors." (D.I. 1519 at 9-10)

13. Appellants contend that the committee breached its fiduciary duty when it agreed to the settlement structure. The court concludes otherwise. The committee fulfilled its charge to investigate and prosecute potential causes of action. (D.I. 1519 at 11: 16-25) The committee fully participated in the negotiations and then sought approval of the settlement with the support of the debtor. (*Id.*) The court finds that the settlement was in the best interest of the estate and of resolving the pending Chapter 11 cases.

[10] The appellants initially participated in the negotiations, but chose not to settle as they wished to continue their pending litigation against debtors and Sun. (D.I. 1519 at 11-12) Appellants argue that the bankruptcy court erred in concluding that they "opted out" of the settlement, however, considering appellants were included in the negotiations, the court does not find this factual conclusion clearly erroneous.

14. As discussed by the bankruptcy court, the settlement does not follow the absolute priority rule. However, this is not a bar to the approval of the settlement as it is not a reorganization plan.[11] *Cf. In re Armstrong World Indus., Inc.*, 432 F.3d 507, 509 (3d Cir. 2005) (affirming the district court's denial of confirmation of a reorganization plan which violated the absolute priority rule). In *Armstrong*, the Third Circuit distinguished a line of cases approving settlement agreements allowing "creditors … to distribute their proceeds from the bankruptcy estate to other claimants without offending section 1129(b)." *Id.* at 514 (discussing *In re SPM Mfg. Corp.*, 984 F.2d 1305 (1st Cir. 1993); *In re Mcorp Fin., Inc.*, 160 B.R. 941 (S.D. Tex. 1993), and *In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001)); *see also In re World Health Alts., Inc.*, 344 B.R. 291, 297-98 (Bankr. D. Del. 2006); *In re Kainos Partners Holding Company, LLC*, 2012 WL 6028927 at *12 (D. Del. Nov. 30, 2012) (finding that the settlement did "not violate the Bankruptcy Code's statutory priority scheme but, instead, satisfie[d] the criteria for approval under Bankruptcy Rule 9019 and the standards set forth under *In re Martin*). In the case at bar, "the funds are indisputably the collateral of the secured creditors, [and] admittedly subject to litigat[ion] challenge." Therefore, the court concludes that the bankruptcy court did not err in confirming the settlement and dismissing the Chapter 11 cases. (D.I. 1519 at 10-11)

[11] The bankruptcy court found that there was no prospect of a confirmable plan. (D.I. 1519 at 8:6-8) This court has no reason to question this conclusion on the record at bar, nor have the appellants presented any evidence to the contrary.

15. Alternatively, appellees have moved to dismiss this appeal as equitably moot. (D.I. 14) In determining whether the doctrine applies, courts should consider the following "two analytical steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation." *In re Semcrude, L.P., et al.*, 728 F.3d 314, 321 (3d Cir. Aug. 27, 2013).

16. The court finds that the settlement has been substantially consummated as all the funds have been distributed. Should the court grant the appeal, the settlement will be irreversibly "scrambled," as it did not provide for funds for appellants' speculative recovery and appellants chose not to substantively participate in the negotiation and subsequent settlement. The parties to the settlement reached their negotiated resolution following years of litigation and will be harmed if the settlement is now unwound. The court concludes that the appeal is equitably moot in view of the settlement.

17. For the reasons discussed above, the court dismisses the appeal and affirms the order of the bankruptcy court. An order shall issue.

/s/ Sue L. Robinson
United States District Judge

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: JEVIC HOLDING CORP., *et al.*,
Debtors.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS,
on behalf of the bankruptcy estates
of Jevic Holding Corp., *et al.*,
Plaintiff.

-against-

THE CIT GROUP/BUSINESS CREDIT INC., in its capacity
as Agent, and SUN CAPITAL PARTNERS IV, LP,
SUN CAPITAL PARTNERS MANAGEMENT IV, LLC,
and SUN CAPITAL PARTNERS, INC.,
Defendants.

Chapter 11
Case No. 08-11006 (BLS)
(Jointly Administered)
Adv. Pro. No. 08-51903 (BLS)
Related to D.I. 1346 and 1465 in Case No. 08-11006 and
D.I. 67 and 69 in Adv. Pro. No. 08-51903
Filed December 4, 2012

ORDER GRANTING JOINT MOTION OF THE DEBTORS, CIT, SUN CAPITAL AND THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS PURSUANT TO 11 U.S.C. §§ 105(a), 349, AND 1112(b) AND FED. R. BANKR. P. 9019 FOR ENTRY OF AN ORDER: (I) APPROVING SETTLEMENT AGREEMENT AND RELEASING CLAIMS; (II) DISMISSING THE DEBTORS' CASES UPON IMPLEMENTATION OF SETTLEMENT; AND (III) GRANTING RELATED RELIEF

Upon consideration of the *Joint Motion of the Debtors*[1], *CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement; and (III) Granting Related Relief* [Bankruptcy Case Docket No. 1346; Adv. Pro. Docket No. 67] (the "Joint Motion") and the *Supplement to the Joint Motion of the Debtors, CIT, Sun Capital and the Official Committee of Unsecured Creditors Pursuant to 11 U.S.C. §§ 105(a), 349 and 1112(b) and Fed. R. Bankr. P. 9019 for Entry of an Order: (I) Approving Settlement Agreement and Releasing Claims; (II) Dismissing the Debtors' Cases Upon Implementation of Settlement, and (III) Granting Related Relief* [Bankruptcy Case Docket No. 1465; Adv. Pro. Docket No. 69] (the "*Supplement*"); the Court having reviewed the Joint Motion, the Supplement, the Settlement Agreement, the exhibits thereto, and any responses or objections thereto; the Court having considered the evidence presented at the hearing on the Joint Motion, the Court having jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334; and the Court having determined that consideration of the Joint Motion and Supplement is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and the Court having determined that the legal and factual bases set forth in the Joint Motion and Supplement establish just cause for the relief requested in the Joint Motion and Supplement, and that such relief is in the best interests of the Debtors, their

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[1] Defined terms used herein and not otherwise defined herein shall have the meaning ascribed to them in the Joint Motion and Supplement as applicable.

estates, their creditors and the parties in interest; and for the reasons set forth on the record at the telephonic hearing held on November 28, 2012, and the Court finding that notice of the Joint Motion and Supplement was sufficient and that no other notice need be provided; and good and sufficient cause appearing therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The relief requested in the Joint Motion and Supplement is GRANTED.

Settlement Agreement

2. The Debtors are authorized to enter into the Settlement Agreement, a copy of which is attached as *Exhibit A* to the Joint Motion, and the Settlement Agreement is approved in its entirety.

3. The Debtors are authorized and instructed to take any and all actions necessary or appropriate to perform their obligations arising under the Settlement Agreement.

4. Within ten (10) business days after the Effective Date, as defined in paragraph 18 of the Settlement Agreement (the "*Effective Date*"), the following shall occur simultaneously:

(a) CIT shall pay to the Debtors $2,000,000 (the "*Administrative Claim Fund*");

(b) The Committee, CIT and Sun shall file with the Court a fully executed stipulation of dismissal with prejudice, substantially in the form of Exhibit 2 to the Settlement Agreement;

(c) The releases set forth in paragraph 2(c) of the Settlement Agreement shall become effective upon payment of the Administrative Claim Fund to the Debtors; and

(d) The Estate Releasing Parties, as such term is defined in the Settlement Agreement, shall execute and deliver to CIT releases in favor of the other members of the Lender Group, as such term is defined in the Settlement Agreement, in the form attached as Exhibit 3 to the Settlement Agreement and such releases shall be effective upon payment of the Administrative Claim Fund to the Debtors.

5. Sun has an allowed secured claim secured by a superpriority lien and security interest in the cash and other assets of the Debtors' estates in an amount equal to $2,000,000, plus at least $200,000.00 of accrued and unpaid interest as of May 31, 2012 and at least $250,000 in fees and costs incurred as of May 31, 2012.

6. The failure specifically to describe or include any particular provision of the Settlement Agreement in this Order shall not diminish or impair the effectiveness of such a provision, it being the intent of this Court that the Settlement Agreement be approved in its entirety; provided that to the extent of any conflict between the provisions of this Order and the Settlement Agreement, this Order shall govern.

7. The Clerk of the Court is authorized to take all necessary and appropriate actions to give effect to the Settlement Agreement.

Dismissal Of Debtors' Chapter 11 Cases

8. Upon payment of the Administrative Claim Fund to the Debtors, the Debtors shall pay the aggregate sum of $200,000 from the Administrative Claim Fund to the professionals retained by the Committee on account of previously approved and unpaid fees and expenses.

9. Unless a later date is agreed to by the Debtors, Sun, and the Committee, within sixty (60) days following the Effective Date, the Debtors shall determine (a) in consultation with the Committee and Sun, the identity of the holders and the amount of the Administrative Claims, as such term is defined in the Settlement Agreement (the "*Administrative Claims*"), and (b) in consultation with the Committee, the identity of the holders and the amount of the Allowed GUC Claims.

10. Upon reconciliation of the Administrative Claims, the Debtors shall pay in full the Administrative Claims. Upon payment in full of the Administrative Claims as provided in the Settlement Agreement, Sun shall indefeasibly transfer to the Trust, as such term is defined in the Settlement Agreement, as a collateral carve-out from its allowed secured claim and superpriority liens on the assets in the Debtors' estates including the balance of the Administrative Claim Fund after payment in full of the Administrative Claims, a sum equal to all of the remaining funds in the estates (the "*Carve-out*"). The Trust shall pay from the Carve-Out (i) first, the Allowed Resolved Priority Claims and (ii) thereafter, with the remaining balance of the Carve-Out funds, the holders of the Allowed GUC Claims on a pro rata basis.

11. Upon payment in full of the allowed Administrative Claims, and after the completion of the transfer of the Carve-out to the Trust, the Debtors and the Committee, by counsel, shall file with this Court a certification substantially in the form of *Exhibit 4* attached to the Settlement Agreement that all allowed Administrative Claims have been paid in full and the Carve-out has been transferred to the Trust, and thereupon, the Clerk, without further order of the Court, shall mark the Chapter 11 cases dismissed on the docket as of the date the certification is entered on the docket.

12. Each Party shall bear its own costs and expenses in connection with the Adversary Proceeding and the Settlement Agreement.

Berrios Objection Resolution

13. The withdrawal of the objection by Naysha Berrios, Individually and as Administratrix of the Estate of Cassandra Berrios (collectively, "*Berrios*") and the treatment of the claims filed by Berrios (the "*Berrios Claims*") in these bankruptcy cases pursuant to the Settlement Agreement shall not impact or prejudice in any way those proceedings presently pending in Providence County Superior Court, entitled Naysha Berrios, Individually and as Administratrix of the Estate of Cassandra Berrios v. Jevic Transportation, Inc.,. Craig G. Benfield; First Student, Inc.; Ilba Berrios, Alias; Saia, Inc.; Saia Motor Freight Line , LLC, Alias; and National Union Fire Insurance Company Of Pittsburgh, Superior Court, C.A. No. PO4-2390 (the "*Superior Court Action*").

14. The treatment of the Berrios Claims in this bankruptcy proceeding shall not serve as a bar to the Superior Court Action and shall not be relied on or

raised as a defense by any party in the Superior Court Action, including, but not limited to, res judicata, estoppell, accord & satisfaction, waiver of claims, laches, or any other defenses that may be raised by Jevic or any other party in the Superior Court Action. The treatment of the Bankruptcy Claims shall not serve to preclude recovery by or on behalf of Berrios as against Jevic, Saia, Inc, or Saia Motor Freight Line, LLC or any other party in accordance with the terms and conditions of the settlement agreement entered into by and between Saia, Inc., Saia Motor Freight Line LLC, Jevic Holding Corp. and other parties (the "*Saia Agreement*") approved by the Bankruptcy Court by Order dated September 19, 2008 (D.I. 267) (the "*Saia Order*") and as against any insurance coverage which was in full force and effect on the date of this eventuality.

15. Nothing in this order or resulting from the treatment of the Berrios claims in this bankruptcy proceeding shall impair Berrios from pursuing any judgment obtained in the Superior Court Action in accordance with (i) the Saia Agreement and the Saia Order or (ii) the documents contained in the Exhibit of Documents Relating to Superior Court Action [Docket No. 1489] filed by Berrios on November 12, 2012, including (a) the insurance coverage afforded for this eventuality described in the affidavit of Gary Swanson dated July 31, 2012 and (b) the Indemnity Agreement dated March 2, 2000 between non-debtor parties USF&G Co., ABC Trucking, Inc., and Regional Holding Corporation.

Additional Relief

16. Notwithstanding entry of this Order, all stipulations, settlements, rulings, orders and

judgments of this Court made during the course of the Chapter 11 Cases shall remain in full force and effect, shall be unaffected by the dismissal of the Chapter 11 Cases, and are specifically preserved for purposes of finality of judgment and *res judicata*.

17. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: December 4, 2012
Wilmington, Delaware

/s/ Brendan L. Shannon
The Honorable Brendan L. Shannon
United States Bankruptcy Judge

APPENDIX E

ORAL MEMORANDUM

THE COURT: Good morning, counsel, this is Judge Shannon. I understand from the operator that all necessary parties are on the call this morning.

This hearing is a follow up to an evidentiary hearing that we had in this Court on the 13th of November. The matter that is before the Court is the motion for approval of a settlement between and among the Debtor, the Committee, Sun Capital and CIT. Settlement motion is opposed by the U.S. Trustee and certain claimants that I will refer to as the Warren claimants. At the hearing Mr. Dooley [*phonetic*] and Mr. Gavin [*phonetic*] testified in support of the settlement. Each was subject to cross examination, and the Court heard substantial argument from counsel.

I also would note, specifically, that I am giving my ruling orally because of the party's desire for a prompt ruling, and because there are other matters that have been pressing on my docket that preclude me from writing a formal opinion on this dispute. Nevertheless, for the reasons that I will give you this morning I will grant the motion, and I will overrule the objections.

I touched, very briefly, on the background. The parties are certainly familiar with the history of this case. Jevic was in the trucking business, and filed for bankruptcy on May 20th, 2008. The Debtors shut down all of its operations either right before or immediately after commencing the bankruptcy. At the time of the filing the Debtors' primary secured creditors were Sun Capital and CIT. Now with an aggregate of, approximately, $53 million dollars on a first priority senior secured basis. The lenders provided the DIP financing facility which was approved by final order of the Court. And among other provisions the final DIP order had a roll up of prepetition debt into the post petition facility, granted the lenders a Section 507(b) super priority, and set a deadline within which challenges to their liens and claims would have to be made.

Again, in 2008 the Committee was granted standing to prosecute estate causes of actions against Sun Capital and CIT. And the Committee's complaint that subsequently amended this filing seeking among other things was filed, seeking among other things to avoid the liens of CIT and Sun Capital to disallow their claims and for damages.

That litigation has been actively defended by CIT and Sun Capital. In the nearly four years since these cases were commenced, since the Chapter 11 cases were commenced, the record reflects that nearly all of the work to administer these estates has been completed. The undisputed testimony is that all necessary claim objections have been filed and ruled upon, all assets of the Debtor have been sold or otherwise disposed of, all routine preference and avoidance actions have been commenced and settled or otherwise disposed of, and all necessary filings such as schedules of assets and liabilities, statements of financial affairs, and the monthly operating reports have long since been filed or are current, what does remain are several lawsuits.

First is the Committee's lawsuit against CIT and Sun Capital, mentioned earlier. Also pending is litigation commenced on behalf of certain former employees against the Debtor, as well as against CIT and Sun Capital for damages and claims arising under various Warren statutes, state and federal.

The testimony adduced at last week's hearing reflects that all of the major economic stakeholders in the case including, the Committee, the Warren claimants, CIT and Sun Capital came together at the Debtors' suggestion earlier this year to attempt to negotiate a settlement of the litigation commenced by the Committee.

As noted earlier that Committee lawsuit has been pending for well over three years. After what the witnesses testified to as extensive arms length negotiation, certain of the parties reached a global resolution. And the general terms of that settlement are identified in the motion, and are as follows: the payment of $2 million dollars by CIT to the Debtors to be used to satisfy unpaid Chapter 11 allowed administrative claims, the dismissal with prejudice of the Committee's adversary proceeding, the assignment by Sun of its lien on the estate's remaining assets to a liquidating trust for the exclusive benefit of general unsecured creditors, the exchange of releases, the reconciliation of administrative and general unsecured claims during a sixty day period following the effective date of the settlement agreement, and thereafter the dismissal of these Chapter 11 cases.

The record reflects that the terms of the settlement were embodied in a motion, jointly, tendered by the Debtor, the Committee, CIT and Sun Capital for approval under Bankruptcy Rule 9019. Notice of that motion was provided to all creditors in these cases. Numerous objections to the settlement motion were filed, all but two of which were resolved prior to the November 13, 2012 hearing. I will address the substance to the remaining objections in a moment, but I turn first to the motion and the standard for approval of a settlement agreement under rule 9019.

That standard is well settled. The movants must demonstrate that the proposed settlement represents the exercise of the Debtors' reasonable business judgment in light of one, that the probability of success in the litigation; two, the complexity of the litigation and three, the prospect of collection difficulties. The final and most important consideration Court's have identified for consideration under of settlements under Bankruptcy Rule 9019 is the paramount interest of creditors. Court's have stated that the standard for approval of a settlement is not a heavy burden on a movant, and that the movant need to, need only demonstrate that the proposed settlement rises above the lowest point on the range of reasonableness.

I consider the motion in light of the following facts: this case has been pending for years, presently, with no reasonable prospect of a confirmable plan. All material tasks needed to administer the estates have already been completed other than the litigations that I have mentioned. The Debtor possesses no assets or funds that are not subject to the liens of CIT and Sun Capital. The Debtor, therefore, lacks the resources to creditably prosecute the Committee's lawsuit, and the Committee lacks, therefore, the resources as well.

And they lack the resources to, otherwise, wrap up these bankruptcy proceedings. In the absence of a settlement of the settlement that is before the Court it is a virtual certainty that there will be no distribution to unsecured creditors here, and a substantial shortfall for distributions to administrative creditors.

The U.S. Trustee objects to the settlement mainly on the ground that the Bankruptcy Code neither contemplates nor permits the relief sought outside of a confirmed plan or a Chapter 7 liquidation and distribution. Additionally, the U.S. Trustee contends that the proposed distributions violate the absolute priority rule, and the code statutory distribution scheme.

The Warren claimant's primary objection is that the proceeds of the settlement do not flow to their priority claims, but instead go to junior creditors in derogation of the codes priority structure. The Warren claimants and the U.S. Trustee also contend that the Committee is breaching its fiduciary duty in agreeing to a settlement that, effectively, freezes out the Warren creditors.

The theory is that because the Committee has been granted standing to prosecute claims on behalf of the estate it stands as a fiduciary to the estate, generally, and not just to its typical constituency of unsecured creditors. I acknowledge the weight and significance of the U.S. Trustees' argument.

There is no expressed provision in the code for distribution and dismissal contemplated by the settlement motion. However, I do observe that while the practice is certainly neither favored nor commonplace the record does reflect that this, sort of, relief has been granted by this and other Court's in appropriate occasions in the past. And I find that the dire circumstances that are present in this case warrant the relief requested here by the Debtor, the Committee and the secured lenders.

As previously noted through the settlement there is the prospect of a meaningful distribution to unsecured creditors, and to some but admittedly not all administrative priority creditors. In the absence of this settlement there is no realistic prospect for such a distribution. All of the funds contemplated here are subject to the liens of Sun Capital and CIT. The lenders have stated unequivocally and credibly that they would not do this deal in a Chapter 7.

The record reflects that there are no unencumbered assets or assets awaiting administration. So in the event of a conversion it does not appear that a Chapter 7 Trustee would have any money to operate, investigate or litigate. I certainly see nothing upon which I could base a finding of adequate protection if a Chapter 7 Trustee sought to use the liened up funds that are currently held by the estate. To the extent that I am being asked to predict the future, I would say with a measure of confidence that the settlement proceeds would be taken by the secured creditors in relatively short order following a conversion of Chapter 7 with nothing leftover for stakeholders.

I further acknowledge that the proposed distributions are not in accordance with the absolute priority rule. But because this is not a plan, and there is no prospect here of a confirmable plan being filed, the absolute priority rule is not a bar to approval of this settlement. I believe that this is consistent with Judge Walsh's opinion in World Health, and case law in this other jurisdictions as consistently recognized and accepted the right of a secured creditor to dispose of its collateral as it wishes. Neither Armstrong nor DBSD affect this proposition outside of a Chapter 11 plan.

Here the funds are indisputably the collateral of the secured creditors, admittedly subject to litigate challenge. The settlement disposes of litigation, and provides for the handover of their collateral, predictably, with the execution of certain releases to unsecured and administrative creditors. This is a format that the Court has previously approved, and the pendency of objections by the U.S. Trustee and by an economics stakeholder do not change the nature of this case from other cases where this has been permitted.

Similarly, I am not satisfied that the proposed settlement represents a breach of the Committee's fiduciary duties as an estate representative. The Committee's charge was to investigate and prosecute potential causes of action against CIT and Sun Capital. This the Committee has done, and it now seeks approval of a settlement with the support of the Debtor. It is clear that the Warren claimants were invited to and took part in that settlement process, but they have chosen not to be part of this settlement. The fact that the Committee stands in the shoes of the Debtor here does not give every creditor here a veto over the chosen course of action.

As I see it fiduciary duties do not really enter into the analysis that is presently before me. The litigation has been commenced, and is now sought to be settled. If the movants carry their burden it will be approved. If they do not the settlement would be denied. The Warren claimants, presumably, wish to continue their separate pending litigation against the Debtor, CIT and Sun Capital. And thus chose not to settle for the limited distribution that is available here, and that is their right. And this settlement does effect or impair the Warren claimant's right to prosecute their own litigation.

But the decision of the Warren claimants not to participate in this settlement does not give rise to a breach of the Committee's fiduciary duties, particularly, in light of a settlement that has been noticed to all creditors, and presented to the Court for approval on a full evidentiary record.

Turning to the applicable standards under Rule 9019 I will address the first two prongs together. They are the probability of success in the litigation, and the cost, complexity and likely duration of such litigation. The Committee's prospect for success in its lawsuit, are uncertain at best. The litigation remains in its earliest stages. It raises challenges to perfected prepetition liens, and liens that have been approved post petition. This lawsuit will require expert witnesses and substantial discovery. Mr. Gavin and Mr. Dooley, both, testified to these to the prospect for the litigation.

Without getting too far into the specifics of the lawsuit I note that the record developed at the trial indicates that there are several independent hurdles that the Committee would have to clear before it would actually see a material recovery out of the litigation. For example, even if the Committee succeeds in unwinding the liens or avoiding certain transfers it also has to deal with the consequences of Bankruptcy Code Section 502(h). It is an understatement to say that this litigation is not a slam dunk.

Further to that point this litigation would be expensive to prosecute and would, presumably, take years to lend its way through the trial and appellate processes. The Court presumes from its prior experience that CIT and Sun Capital are well healed, and will vigorously defend. The estate, by contrast, as I have noted has no available funds.

I do note that both objectors suggest the contingency counsel or a Chapter 7 Trustee might be found to front the substantial expenses, and wait for a return either in Chapter 11 or if engaged by a Chapter 7 Trustee. I acknowledge that that is a possibility, but on these facts I think any lawyer or firm that signed up for that role should have his head examined. The third prong relating to collection difficulties does not really enter this analysis.

The final and most important consideration according to the case law is the paramount interest of creditors, and here that prong has certainly been satisfied. The record reflects a substantial distribution to unsecured and certain administrative creditors under the settlement. It is a virtual certainty that that distribution would not be available in Chapter 11 absent the settlement. And that this deal is not likely to be available in Chapter 7. The one objecting creditor is not unfairly prejudice. Its claim against the estate is presently, effectively worthless given that the estate lacks available unencumbered funds to satisfy it if it were allowed. The Warren claimant's rights against CIT and Sun Capital are unaffected. They may continue their litigation.

So I am presented with two options, a meaningful return or zero. The paramount interest of the creditors mandates approval of the settlement, and I do not find that the Bankruptcy Code precludes this result given substantial precedent in this and other jurisdictions. I would ask that an order approving the settlement be submitted under certification of counsel. Are there any questions?

UNKNOWN: None from the Debtor, Your Honor.

UNKNOWN: No, Your Honor, thank you very much.

MR. ACKERLY: Judge Shannon, this is Ben Ackerly for CIT.

THE COURT: Yes, Mr. Ackerly.

MR. ACKERLY: I have one small, factual correction. CIT is not a defendant in the Warren Act litigation.

THE COURT: Thank you for the correction I appreciate that, and I actually was aware of that that was an overstatement by me. I appreciate the clarification.

MR. ACKERLY: Thank you, sir.

THE COURT: Right, any questions?

MR. RAISNER: Judge Shannon, this is Jack Raisner.

THE COURT: Yes, sir.

MR. RAISNER: In our opposition to this motion we discussed the, what would be the jurisdictional status of the Warren litigation in the event that Your Honor approved the 9019 settlement.

THE COURT: I appreciate, I appreciate you raising that because that is a point that I believe is an issue that is, that we do need to deal with. I guess what I would say is that as I understand the timeline there are steps under the settlement agreement that are to play out prior to dismissal. I think in your papers I thought that you raised a legitimate question with respect to the Court's continuing jurisdiction over the pending litigations, and so what I think what I would invite you to do is I am not sure what the easiest or most appropriate path would be with respect to motion practice about where the litigation itself should continue, or does it continue in this Court. But I am not prepared to address that right now, but I would certainly invite you and give you the opportunity to, I guess, raise the question, and we can deal with it on a full record prior to dismissal of the cases.

MR. GILLESPIE: Your Honor, this is Jim Gillespie on behalf of the Sun Capital defendants in the Warren action. As the Court, likely, recalls there has been summary judgment filed in the Warren litigation. Briefing has been completed on Sun Capital's motion for summary judgment in the Warren action, so I just draw that Court's attention to that because that is something that is pending while the underlying settlement is being finalized that that is all ready for the Court to rule on.

MR. RAISNER: Your Honor, Jack Raisner we have not completed briefing in that matter.

THE COURT: Is briefing not complete in that?

MR. RAISNER: Your Honor, briefing is completed on the Sun motion for summary judgment. There is motions for summary judgment filed by the Warren plaintiffs where briefing will be completed on December 3rd.

THE COURT: Okay, here is what I want to do. I am going to leave it right now to you guys. Mr. Raisner raised a good point. He raised it in his papers. I did not feel it is something that I could, obviously, address in the context of the motion that was before me, but it is clearly an issue that I do need to address. I want the opportunity to I have the Sun motion for summary judgment, and I am aware that that is *sub judice*. The way that our paper flow works within the Court I, generally, do not see motion practice until all of the briefing is complete, and it arrives in Chambers with a notice of completion of briefing. Here is what I want. I am not sure do we have a, Mr. Facitti; do we have a hearing coming up in Jevic at anytime soon?

UNKNOWN: No we do not have a omni's scheduled yet, Your Honor.

THE COURT: All right, here is what I think would make sense. I am going to ask that the parties confer, and it may make sense to have even just a telephonic status conference about what the best path forward is. It may be that, again, without having studied the submissions, and the competing submissions I want to, I think I would like the benefit of the party's guidance after they have considered my ruling, and sort of figuring out how the process will play out to get on the phone with me on a status conference sometime in the next couple of weeks.

And it may be that in order to get the matter, sort of, up and front and center it may be that scheduling the summary judgment motions for argument might make sense. But, again, if there are alternatives to dealing with the pending Warren litigation, and the issues that would be raised by dismissal of the main case, I think I would like the benefit of the lawyer's thoughts and guidance on that.

So I would make myself available at the party's convenience, telephonically or live within the next couple of weeks, and we can come up with a game plan going forward.

UNKNOWN: Thank you.

MR. FEINSTEIN: Judge, Robert Feinstein, Judge, one final thing Your Honor asked for a submission of an order which we will do, and I just want to confirm in light of this this colloquy that we will submit an order under certification that tracks the former order that was submitted with the motion and the amendment to the motion. And we will be silent on the subject of jurisdiction over the Warren Act claim so as not to hang up that order we, you know, we would like to get that order entered as soon as possible.

THE COURT: I think—

MR. FEINSTEIN: The issue regarding jurisdiction will be dealt with separately.

THE COURT: —I think that that is appropriate. And I have said before that I think it was appropriate that the question be raised by the Warren claimants. I saw it in their briefing. I have not touched on it here, but it is definitely something that we need to deal with it now that we have ruled on the settlement motion itself.

So, again, I am happy to deal with that issue, and to make sure that we are promptly and responsibly administering the case. And with respect to the status conference, again, my hope would be that that would give me the benefit of input from the lawyers about, you know, alternatives and the best way to proceed.

So I am really at your pleasure, but I would I think a teleconference in the space of the next couple of weeks would give everybody an opportunity to think about it, and if there is an agreed game plan forward than you can expect I will be all ears, and probably on board. So, and if you can touch base with Ms. Bellow once you look at your own schedules and, again, I am happy to make myself available for a status conference, okay?

MR. FEINSTEIN: Thank you very much, Your Honor.

THE COURT: Thank you very much, counsel, have a good day.

(Court Adjourned)

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-1465

IN RE: JEVIC HOLDING CORP., *et al.*,
Debtors

OFFICIAL COMMITTEE OF UNSECURED CREDITORS
on behalf of the bankruptcy estates
of Jevic Holding Corp., *et al.*

v.

CIT GROUP/BUSINESS CREDIT INC.,
in its capacity as Agent;
SUN CAPITAL PARTNERS, INC.;
SUN CAPITAL PARTNERS IV, LP;
SUN CAPITAL PARTNERS MANAGEMENT IV, LLC

CASIMIR CZYZEWSKI; MELVIN L. MYERS;
JEFFREY OEHLERS; ARTHUR E. PERIGARD
and DANIEL C. RICHARDS, on behalf of themselves
and all others similarly situated,
Appellants

(D.C. Nos. 13-cv-00104 & 1-13-cv-00105)
Filed August 18, 2015

SUR PETITION FOR REHEARING

Present: McKEE, *Chief Judge*, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, SCIRICA and BARRY[1], *Circuit Judges*

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Thomas M. Hardiman
Circuit Judge

Dated: August 18, 2015
DWB/cc:
Tyler P. Brown, Esq.
Shannon E. Daily, Esq.
James P. Gillespie, Esq.
Christopher Landau, Esq.
Christopher D. Loizides, Esq.
Curtis S. Miller, Esq.
Richard P. Norton, Esq.
James E. O'Neill III, Esq.
Jason R. Parish, Esq.
Jack A. Raisner, Esq.
Linda Richenderfer, Esq.
Rene S. Roupinian, Esq.
Craig Goldblatt, Esq.
Robert J. Feinstein, Esq.
Wendy Cox, Esq.
P. Matthew Sutko, Esq

[1] Judge Scirica and Judge Barry's votes are limited to panel rehearing.

APPENDIX G

STATUTORY AND RULE PROVISIONS

11 U.S.C. § 103. Applicability of Chapters

(a) Except as provided in section 1161 of this title, chapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13 of this title, and this chapter, sections 307, 362(o), 555 through 557, and 559 through 562 apply in a case under chapter 15.

(b) Subchapters I and II of chapter 7 of this title apply only in a case under such chapter.

(c) Subchapter III of chapter 7 of this title applies only in a case under such chapter concerning a stockbroker.

(d) Subchapter IV of chapter 7 of this title applies only in a case under such chapter concerning a commodity broker.

(e) Scope of Application.—Subchapter V of chapter 7 of this title shall apply only in a case under such chapter concerning the liquidation of an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

(f) Except as provided in section 901 of this title, only chapters 1 and 9 of this title apply in a case under such chapter 9.

(g) Except as provided in section 901 of this title, subchapters I, II, and III of chapter 11 of this title apply only in a case under such chapter.

(h) Subchapter IV of chapter 11 of this title applies only in a case under such chapter concerning a railroad.

(i) Chapter 13 of this title applies only in a case under such chapter.

(j) Chapter 12 of this title applies only in a case under such chapter.

(k) Chapter 15 applies only in a case under such chapter, except that—

(1) sections 1505, 1513, and 1514 apply in all cases under this title; and

(2) section 1509 applies whether or not a case under this title is pending.

11 U.S.C. § 507. Priorities

(a) The following expenses and claims have priority in the following order:

(1) First:

(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, without regard to whether the claim is filed by such person or is filed by a governmental unit on behalf of such person, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition shall be applied and distributed in accordance with applicable nonbankruptcy law.

(B) Subject to claims under subparagraph (A), allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition, are assigned by a spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative to a governmental unit (unless such obligation is assigned voluntarily by the spouse, former spouse, child, parent, legal guardian, or responsible relative of the child for the purpose of collecting the debt) or are owed directly to or recoverable by a governmental unit under applicable nonbankruptcy law, on the condition that funds received under this paragraph by a governmental unit under this title after the date of the filing of the petition be applied and distributed in accordance with applicable nonbankruptcy law.

(C) If a trustee is appointed or elected under section 701, 702, 703, 1104, 1202, or 1302, the administrative expenses of the trustee allowed under paragraphs (1)(A), (2), and (6) of section 503(b) shall be paid before payment of claims under subparagraphs (A) and (B), to the extent that the trustee administers assets that are otherwise available for the payment of such claims.

(2) Second, administrative expenses allowed under section 503(b) of this title, unsecured claims of any Federal reserve bank related to loans made through programs or facilities authorized under section 13(3) of the Federal Reserve Act (12 U.S.C. 343), and any fees and charges assessed against the estate under chapter 123 of title 28.

(3) Third, unsecured claims allowed under section 502(f) of this title.

(4) Fourth, allowed unsecured claims, but only to the extent of $10,000 for each individual or corporation, as the case may be, earned within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first, for—

(A) wages, salaries, or commissions, including vacation, severance, and sick leave pay earned by an individual; or

(B) sales commissions earned by an individual or by a corporation with only 1 employee, acting as an independent contractor in the sale of goods or services for the debtor in the ordinary course of the debtor's business if, and only if, during the 12 months preceding that date, at least 75 percent of the amount that the individual or corporation earned by acting as an independent contractor in the sale of goods or services was earned from the debtor.

(5) Fifth, allowed unsecured claims for contributions to an employee benefit plan—

(A) arising from services rendered within 180 days before the date of the filing of the petition or the date of the cessation of the debtor's business, whichever occurs first; but only

(B) for each such plan, to the extent of—

(i) the number of employees covered by each such plan multiplied by $10,000; less

(ii) the aggregate amount paid to such employees under paragraph (4) of this subsection, plus the aggregate amount paid by the estate on behalf of such employees to any other employee benefit plan.

(6) Sixth, allowed unsecured claims of persons—

(A) engaged in the production or raising of grain, as defined in section 557(b) of this title, against a debtor who owns or operates a grain storage facility, as defined in section 557(b) of this title, for grain or the proceeds of grain, or

(B) engaged as a United States fisherman against a debtor who has acquired fish or fish produce from a fisherman through a sale or conversion, and who is engaged in operating a fish produce storage or processing facility—

but only to the extent of $4,000 for each such individual.

(7) Seventh, allowed unsecured claims of individuals, to the extent of $1,800 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition—

(i) for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days before the date of the filing of the petition, exclusive of—

(I) any time during which an offer in compromise with respect to that tax was pending or in effect during that 240-day period, plus 30 days; and

(II) any time during which a stay of proceedings against collections was in effect in a prior case under this title during that 240-day period, plus 90 days; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case;

(B) a property tax incurred before the commencement of the case and last payable without penalty after one year before the date of the filing of the petition;

(C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity;

(D) an employment tax on a wage, salary, or commission of a kind specified in paragraph (4) of this subsection earned from the debtor before the date of the filing of the petition, whether or not actually paid before such date, for which a return is last due, under applicable law or under any extension, after three years before the date of the filing of the petition;

(E) an excise tax on—

(i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition; or

(ii) if a return is not required, a transaction occurring during the three years immediately preceding the date of the filing of the petition;

(F) a customs duty arising out of the importation of merchandise—

(i) entered for consumption within one year before the date of the filing of the petition;

(ii) covered by an entry liquidated or reliquidated within one year before the date of the filing of the petition; or

(iii) entered for consumption within four years before the date of the filing of the petition but unliquidated on such date, if the Secretary of the Treasury certifies that failure to liquidate such entry was due to an investigation pending on such date into assessment of antidumping or countervailing duties or fraud, or if information needed for the proper appraisement or classification of such merchandise was not available to the appropriate customs officer before such date; or

(G) a penalty related to a claim of a kind specified in this paragraph and in compensation for actual pecuniary loss.

An otherwise applicable time period specified in this paragraph shall be suspended for any period during which a governmental unit is prohibited under applicable nonbankruptcy law from collecting a tax as a result of a request by the debtor for a hearing and an appeal of any collection action taken or proposed against the debtor, plus 90 days; plus any time during which the stay of proceedings was in effect in a prior case under this title or during which collection was precluded by the existence of 1 or more confirmed plans under this title, plus 90 days.

(9) Ninth, allowed unsecured claims based upon any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution.

(10) Tenth, allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

(c) For the purpose of subsection (a) of this section, a claim of a governmental unit arising from an erroneous refund or credit of a tax has the same priority as a claim for the tax to which such refund or credit relates.

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(1), (a)(4), (a)(5), (a)(6), (a)(7), (a)(8), or (a)(9) of this section is not subrogated to the right of the holder of such claim to priority under such subsection.

11 U.S.C. § 726. Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed on or before the earlier of—

(A) the date that is 10 days after the mailing to creditors of the summary of the trustee's final report; or

(B) the date on which the trustee commences final distribution under this section;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if—

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6), (7), (8), (9), or (10) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:

(A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.

(B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.

(D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

11 U.S.C. § 1129. Confirmation of plan

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to

subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

Federal Rule of Bankruptcy Procedure
Rule 9019. Compromise and Arbitration

(a) Compromise.

On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

(b) Authority To Compromise or Settle Controversies Within Classes.

After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.

(c) Arbitration.

On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.