No. 15-649

IN THE

Supreme Court of the United States

CASIMIR CZYZEWSKI, *et al.*,

Petitioners,

v.

JEVIC HOLDING CORP., *et al.*,

Respondents.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether a Chapter 11 case may be terminated by a "structured dismissal" that distributes estate property in violation of the Bankruptcy Code's 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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BRIEF FOR PETITIONERS

OPINIONS BELOW

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

JURISDICTION

The court of appeals entered judgment on May 21, 2015, and denied a timely petition for rehearing en banc on August 18, 2015. Pet. App. 1a, 67a-68a. Petitioners filed a timely petition for certiorari on November 16, 2015, which this Court granted on June 28, 2016. The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The appendix reproduces §§103, 105, 349, 363, 507, 726, 1112, and 1129 of the Bankruptcy Code (11 U.S.C.) and Federal Rule of Bankruptcy Procedure 9019.

INTRODUCTION

Petitioners represent a certified class of nearly 1,800 truck drivers who were fired without warning when their employer, Jevic Transportation, filed for Chapter 11 bankruptcy. As a result of their sudden termination, the drivers had claims against Jevic's bankruptcy estate that were entitled to priority under the Bankruptcy Code. Yet the drivers received nothing for those claims, even though lower-priority general unsecured creditors were paid by the estate. That outcome would have been impermissible in a Chapter 11 plan or a Chapter 7 liquidation. The bankruptcy court allowed it here as part of a so-called "structured dismissal" that approved a settlement of the estate's pending claims against its two largest creditors; distributed the settlement proceeds in violation of the Code's priority scheme, deliberately skipping over petitioners; and dismissed the Chapter 11 case. The Bankruptcy Code does not permit that result.

The Bankruptcy Code establishes a comprehensive process for distributing the value of a business when its assets may be insufficient to pay all creditors in full. Under either Chapter 7 or Chapter 11, that value is distributed according to a strict and detailed scheme of priority. Secured creditors are paid first, up to the value of their collateral and in accordance with the priority of their liens; unsecured creditors are paid next; and equity-holders receive value only after creditors are paid in full. As among unsecured creditors, the Bankruptcy Code grants priority to specific categories of claims, including the employee claims at issue here, which must be paid in full before unsecured creditors without priority—general unsecured creditors—are paid anything. In a Chapter 7 liquidation, this order of priority cannot be varied. In a Chapter 11 plan, it can be varied only with the affected creditors' consent. As the Court has repeatedly recognized, this priority structure is the backbone of Chapter 11 and the ultimate safeguard of bankruptcy's core purpose to distribute a debtor's value fairly among its stakeholders.

A debtor can be reorganized under Chapter 11 only through a plan, which must satisfy detailed substantive and procedural requirements—including compliance with priority. Not uncommonly, as here, businesses seek protection under Chapter 11 and then prove unable to confirm a plan. When that happens, the Bankruptcy Code provides two options: The court may either convert the case to Chapter 7, where the debtor's assets are liquidated and distributed according to priority, or dismiss the case, in which event the parties revert to their prebankruptcy positions and creditors can pursue the debtor outside bankruptcy to collect on their claims. Nothing in the Bankruptcy Code contemplates or suggests that a failed Chapter 11 case can be resolved through a "structured dismissal" that distributes the debtor's assets, yet ignores the Bankruptcy Code's requirements for doing so. Basic principles of statutory construction compel the conclusion that Congress did not spell out a mandatory priority scheme in granular detail while at the same time silently conferring the power to disregard that scheme when it proves inconvenient.

The courts below approved the structured dismissal, calling this a "rare" case, because the senior creditors claimed they would not settle if petitioners received any of the settlement proceeds. Of course, there is no way to know whether the parties would have settled had they been required to respect priority. But setting that aside, some parties to a Chapter 11 case may stand to benefit from violating priority and may be able to reach a deal more easily if they are permitted to do so. That is precisely why the Bankruptcy Code requires strict adherence to priority—so that senior creditors will not collaborate with junior creditors or equity-holders to squeeze out disfavored intermediate creditors, as happened here. If a bankruptcy court can approve a structured dismissal violating the priority rights of an objecting creditor because other parties assert that they cannot reach a deal if that creditor's priority is respected, bargaining in every Chapter 11 case will be compromised because it will no longer take place against the backdrop of a clear legal rule. The priority-violating structured dismissal the courts approved here thus undermines the very core of Chapter 11 as Congress envisioned it.

STATEMENT

I. STATUTORY BACKGROUND

A. The Structure And Purpose Of Bankruptcy

The basic function of business bankruptcy law is the creation of an orderly process for distributing an insolvent corporation's value among its creditors. Outside bankruptcy, when a corporation's assets are insufficient to pay all the claims against it in full, there is a danger that creditors will not be treated fairly. For instance, a debtor might seek to pay off favored creditors, or the prospect of insolvency could precipitate a race to the courthouse, in which creditors who win the race are paid and those who lose the race are not. That in turn can result in the piecemeal dismemberment of the debtor's business and the loss of any going-concern value the business may have, which can reduce the total recoveries for creditors as a group. *See, e.g.*, Jackson, *The Logic and Limits of Bankruptcy Law* 7-19 (1986).

The Bankruptcy Code's response to this problem is to establish a distribution scheme that is "designed to enforce a distribution of the debtor's assets in an orderly manner in which the claims of all creditors are considered fairly, in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor." H.R. Rep. No. 103-835, at 33 (1994); *see also, e.g.*, Baird, *Elements of Bankruptcy* 59 (6th ed. 2014).

The Code accomplishes this end through several interlocking devices. When a debtor files a petition for bankruptcy, an estate is created comprising all the debtor's prepetition property, tangible and intangible, and any proceeds of that property. §541(a).[1] The bankruptcy trustee or (in most Chapter 11 cases) the debtor-in-possession is required to manage that property for the benefit of the creditor group as a whole, §§704, 1106, 1107(a), and can recover certain payments the debtor made or assets it transferred before bankruptcy that unfairly preferred particular creditors (preferences), §547, or for which the debtor did not receive fair value in return (fraudulent transfers), §§544, 548.

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[1] All statutory citations are to the Bankruptcy Code (11 U.S.C.), unless otherwise noted.

The bankruptcy filing also gives rise to an "automatic stay" of any actions by creditors to seize estate assets or to collect on claims against the debtor that arose before the filing. §362(a), (c). By halting collection activities during the bankruptcy, the automatic stay ensures that the estate's value can be maximized and distributed fairly among creditors in accordance with the Code's priority scheme. Creditors can file claims against the estate, which are typically allowed or disallowed—that is, held valid or invalid—according to nonbankruptcy law. §§501, 502.

There are two types of business bankruptcies: liquidation under Chapter 7 and reorganization under Chapter 11. Chapter 7 is designed for circumstances in which the debtor's business cannot be rehabilitated. A Chapter 7 trustee will liquidate the assets of the estate and distribute them to creditors according to specific and unvarying rules of priority, set out in part in §507 of the Bankruptcy Code and described further below. §§704(a), 724, 726.

Chapter 11 is more complex and is typically used when there is a prospect of reorganizing the debtor's business and continuing it as a going concern after the bankruptcy (although Chapter 11 may also be used to liquidate a debtor's business). Chapter 11 recognizes that some debtors may have a business that is suffering from temporary financial distress but can be saved if that distress is resolved. Preserving a debtor's business, in turn, can benefit creditors because a business is typically worth more as a going concern than as a piecemeal collection of assets, and that "going-concern surplus" can be distributed to creditors in satisfaction of their claims. *See, e.g.*, Jackson 14. Unlike in Chapter 7, in Chapter 11 the debtor's management usually remains in place and operates the business during the bankruptcy case, taking on the obligations of a bankruptcy trustee. §1107(a). And, unlike in Chapter 7, the debtor-in-possession and the various stakeholders can negotiate with one another over how best to maximize the value of the debtor's business (whether in a traditional reorganization or through a sale and liquidating plan), and creditors can consent to different treatment than the Bankruptcy Code would otherwise require if they determine it is in their interest to do so.

The culmination of the Chapter 11 process is the plan, which governs the distribution of the value of the estate to stakeholders. The plan process gives creditors numerous substantive and procedural protections. Most significantly, absent creditors' consent to different treatment, a plan must comply with the Bankruptcy Code's priority scheme, as described below. §1129.

The goal of a Chapter 11 case is usually confirmation of a plan of reorganization, following which the reorganized debtor emerges from bankruptcy protection unencumbered by its prebankruptcy obligations, except as provided in the plan. §1141(d). However, Chapter 11 debtors who are unable or do not want to reorganize may liquidate and distribute the resulting value through a liquidating Chapter 11 plan. §1123(b)(4). In such cases, the debtor does not receive a discharge of any debt, §1141(d)(3), but the requirements of §1129, including compliance with priority, must still be met.

Sometimes Chapter 11 debtors are unable to confirm any plan. For instance, a debtor may be unable to comply with the Bankruptcy Code's requirement that administrative and priority claims be paid in full on the effective date of the plan, §1129(a)(9)—a circumstance known as "administrative insolvency." In such circumstances, the Code provides that the Chapter 11 case is either converted to Chapter 7—where the estate will be liquidated and distributed as described above—or dismissed. §1112(b). If the case is dismissed, unless the court orders otherwise "for cause," estate property is returned to the debtor, and creditors can once again pursue the debtor and its assets for payment on their claims outside bankruptcy. §349(b).[2]

B. The Priority Scheme

The Bankruptcy Code's priority scheme is central to both Chapter 7 and Chapter 11. Higher-priority claims are entitled to be paid in full before lower-priority claims are paid anything—a system often likened to a waterfall, in which payments cascade down to lower levels only after higher-priority claims are fully satisfied. *See, e.g.*, 4 *Collier on Bankruptcy* ¶507.02[1] (16th ed. 2016); 3 *Norton Bankruptcy Law and Practice* §49:1 (3d ed. 2016).

The overall priority scheme in bankruptcy is a function of both bankruptcy and nonbankruptcy law. In

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[2] In recent years, it has become increasingly common for failed Chapter 11 cases to be resolved by "structured dismissals," in which the order dismissing the case is accompanied by other ancillary relief. *See* American Bankruptcy Institute Commission To Study the Reform of Chapter 11, *2012-2014 Final Report and Recommendations* 269-271 (2014) (enumerating common features of structured dismissals). While structured dismissals have occasioned some controversy, this case does not present the question whether structured dismissals are ever permissible. To the extent that structured dismissals are consensual and consistent with the Bankruptcy Code, they might be an appropriate exercise of the court's equitable authority. The narrow question here is only whether a nonconsensual structured dismissal can distribute the value of the bankruptcy estate in a way that violates the Code's priority scheme.

Chapter 7, that priority scheme cannot be altered. As they would be outside bankruptcy, secured creditors are entitled to be paid first from the proceeds of their collateral, according to the priority of their liens. §§103(a), 361, 362(d), 363(e), 725. Unsecured creditors are then paid according to a carefully delineated statutory scheme of priority, set out in §507 of the Bankruptcy Code. §726(a)(1). Unsecured creditors without priority—"general unsecured creditors"—are paid only after priority unsecured creditors. §726(a)(2). Equity-holders receive nothing unless all creditors are paid in full. §726(a)(6).

As noted above, Chapter 11 plans permit creditors to consent to deviations from priority. Absent consent, however, Chapter 11 plans are governed by the principle of "absolute priority," under which junior classes of claims cannot receive anything until senior classes of claims are paid in full, and equity-holders cannot retain any value unless all creditors are paid in full. *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 202 (1988). That principle is codified in §1129(b) of the Bankruptcy Code through the requirement that plans must be "fair and equitable" to nonconsenting classes of claims. §1129(b)(2)(A) (defining "fair and equitable" for classes of secured claims); §1129(b)(2)(B) (defining "fair and equitable" for classes of unsecured claims).

Chapter 11 plans must also abide by the statutory priorities for unsecured creditors set out in §507. Absent consent, priority unsecured creditors must be paid in cash in full, in most cases on the effective date of the plan. §1129(a)(9). Section 507 currently contains ten categories of unsecured claims accorded priority because of their "special social importance," S. Rep. No. 95-1106, at 4 (1978), or their critical role in facilitating the resolution of a bankruptcy case. Priority is afforded to, for example, expenses incurred in administering the bankruptcy estate, §507(a)(2), and many federal, state, and local taxes, §507(a)(8).

Petitioners in this case have claims against Jevic for severance pay for firing them without warning immediately before the bankruptcy. Those claims are entitled to priority under the Bankruptcy Code, which grants priority to certain unpaid employee wages and benefits, including severance pay. §507(a)(4), (5). Congress established those 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, "[e]mployees 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 imperil the chances of rehabilitation and worsen the prospects of repayment for all other creditors. H.R. Rep. No. 95-595, at 187 (1977). Accordingly, either in Chapter 7 or (absent consent) under a Chapter 11 plan, priority claims for unpaid wages and employee benefits must be paid in full before general unsecured claims are paid anything.

II. THE JEVIC BANKRUPTCY

A. Jevic's Bankruptcy Filing And The Fraudulent Transfer Suit

1. The debtor in this Chapter 11 case, Jevic Transportation, was a New Jersey-based trucking company. Pet. App. 2a. In 2006, Sun Capital Partners, a private equity firm, acquired Jevic in a leveraged

buyout. *Id.* In substance, Sun financed the acquisition of Jevic by borrowing against Jevic's own assets. Shortly after the buyout, Jevic refinanced the acquisition debt with an $85 million loan from a consortium of lenders led by the CIT Group, secured by a lien on all of Jevic's assets. JA22.

Jevic soon defaulted on the loan. JA22. By the end of 2007, CIT had obtained a guarantee from Sun for $2 million of Jevic's debt and had entered into a forbearance agreement with Jevic. Pet. App. 2a. But Jevic remained in default when the forbearance agreement expired in May 2008. *Id.*; JA23. On May 19, 2008, Jevic terminated petitioners and similarly situated employees without notice. It filed a Chapter 11 petition the next day. Pet. App. 2a-3a.

2. Petitioners are representatives of a certified class of nearly 1,800 truck drivers and other employees whom Jevic fired without warning immediately before entering bankruptcy. Petitioners sued Jevic and Sun for violations of the Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§2101-2109, and an analogous New Jersey law, N.J. Stat. Ann. §§34:21-1 to -7, which require employers to provide advance notice of such a termination. CAJA1087-1099 (complaint), 1137-1138 (class certification).

Petitioners prevailed on their state-law claims against Jevic but not on their claims against Sun. *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), *aff'd*, 2016 WL 4011149 (3d Cir. July 27, 2016). 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" §507(a)(4). Pet. App. 6a.

3. Failed leveraged buyouts such as the one here are commonly challenged in bankruptcy court as fraudulent transfers. Generally, such suits allege that assets that otherwise would have been available to satisfy unsecured creditors' claims were fully encumbered by liens granted to finance the buyout of the debtor's old equity-holders and that the debtor did not receive reasonably equivalent value in return. *See* §§544(b), 548(a). Fraudulent transfer suits are assets of the bankruptcy estate, as are any funds recovered through such a suit; they are typically prosecuted by a trustee or debtor-in-possession. A debtor-in-possession, however, may not want to bring a fraudulent transfer suit arising from a transaction in which the debtor's management participated. When a debtor-in-possession declines to bring an estate cause of action, an official creditors' committee may seek leave to bring the suit on the estate's behalf. *See generally Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp.* v. *Chinery*, 330 F.3d 548 (3d Cir. 2003) (en banc).

In this case, an official committee of Jevic's unsecured creditors was authorized to litigate fraudulent transfer claims on behalf of Jevic's bankruptcy estate. JA56-57; CAJA342. The committee sued CIT and Sun, asserting that the leveraged buyout fraudulently transferred Jevic's value to them and left Jevic unable to pay its other creditors. The committee alleged that Sun, with CIT's active assistance, "acquired Jevic with virtually none of its own money" and "leverag[ed] all of [Jevic's] assets to the maximum extent possible," based on "ever more optimistic and aggressive" financial projections. JA54, 58, 66; *see also* JA70-73. Sun itself "contribut[ed] only $1 million in equity, most of which it got back in 'fees.'" JA54-55. As a result, the suit alleged, Jevic's ultimate failure "was the foreseeable end of a reckless course of action in which Sun and CIT bore no risk but all other constituents did." JA80.

Based on those allegations, the committee asserted fraudulent transfer claims under both §548 and §544(b) of the Bankruptcy Code, seeking to avoid the liens that Sun and CIT asserted on Jevic's assets and to recover other assets transferred in connection with the leveraged buyout. JA82-98, 102-131. Under §548, a debtor-in-possession can unwind certain transfers of property that did not give the debtor reasonably equivalent value in return or that were undertaken to hinder, delay, or defraud creditors. Under §544(b), the debtor-in-possession can avoid any fraudulent transfer that would be avoidable by an unsecured creditor under state law—which gives individual creditors the ability to unwind fraudulent transfers in similar circumstances outside bankruptcy.

In September 2011, the bankruptcy court denied a motion to dismiss, holding that the committee had stated claims for fraudulent transfer, as well as other causes of action. JA36-47. The court dismissed certain other claims without prejudice (JA51-52), and the committee responded in October 2011 by filing an amended complaint (JA13). Had the committee prevailed, it would have been able to avoid all of CIT's and Sun's liens on Jevic's assets and could have recovered for the estate the value of the property Jevic transferred to CIT and Sun to finance the buyout—potentially more than $100 million. JA54-56.

B. The Settlement And Structured Dismissal

In June 2012, Jevic, Sun, CIT, and the committee of unsecured creditors filed a joint motion "pursuant to sections 105(a), 349 and 1112(b)" of the Code and "Rule 9019(a) of the Federal Rules of Bankruptcy," seeking approval of a settlement and structured dismissal that would settle the estate's claims against Sun and CIT, distribute the settlement proceeds, and dismiss the bankruptcy case. JA159.

Under the terms of the proposed order, the estate would dismiss its lawsuit and release all fraudulent transfer claims against Sun and CIT, including the state-law fraudulent transfer claims that Jevic's creditors could otherwise bring outside bankruptcy. JA162-163. In exchange, CIT would pay $2 million to Jevic to satisfy various administrative priority claims, including the committee's attorneys' fees. JA163-165, 185-186. 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 priority claims, including tax claims, and then to pay general unsecured claims on a pro rata basis. JA163, 166-167, 192. The Chapter 11 case would then be dismissed. JA167-168.

The proposed structured dismissal deliberately skipped over petitioners in the distribution of estate assets. It is undisputed that petitioners had priority wage claims against the estate. *Supra* pp.11-12. Yet petitioners were to receive nothing on account of those claims, even though lower-priority general unsecured creditors would be paid. Sun apparently insisted on that arrangement because petitioners were still suing Sun for violating the WARN Act, and Sun refused to provide petitioners any payments that could be used to fund that litigation. Pet. App. 6a n.4.[3]

Both petitioners and the U.S. Trustee objected to the settlement and structured dismissal on the ground that it violated the §507 priority scheme. Pet. App. 7a. As the U.S. Trustee explained, the fraudulent transfer action had been brought by the committee *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. CAJA530; *see* §541(a)(3), (6) (interests recovered through avoided transfers and proceeds of estate property are themselves estate property).

The bankruptcy court nevertheless approved the settlement and structured dismissal. Pet. App. 45a-52a. The court "acknowledge[d] that the proposed distributions are not in accordance with the absolute priority rule." *Id.* 58a. But in the court's view, the Code's priority rules 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. *Id.* 57a. Jevic's only remaining cash was subject to the disputed liens held by CIT and Sun—leaving, in the court's opinion, insufficient resources to prosecute the fraudulent

[3] Notably, the original proposed distribution also would have skipped over claims held by prepetition tax creditors—entitled to priority under §507(a)(8)—on the basis that there were "no available assets" to pay those claims. JA164. After those creditors objected, the settlement was revised to include partial payment of various prepetition tax claims among the distributions to be made from the settlement trust. JA197-204.

transfer action against Sun and CIT "creditably" or to confirm a Chapter 11 plan. *Id.* 56a.[4]

The bankruptcy court considered but rejected several alternatives to the structured dismissal. It 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 [settlement] in a Chapter 7" case, and that the estate would have no unencumbered assets for a Chapter 7 trustee to use to pursue litigation. Pet. 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 "any lawyer" who took the case on contingency "should have his head examined"—notwithstanding the fact that the suit survived a motion to dismiss and Sun and CIT paid $3.7 million to settle it. *Id.* 60a-61a. The court therefore concluded that it could approve the structured dismissal's settlement and priority-skipping distribution pursuant to its authority under Federal Rule of Bankruptcy Procedure 9019 to "approve a compromise or settlement." *See id.* 56a, 61a.

[4] The bankruptcy court also reasoned that because the priority-skipping distribution would be made from the estate's $1.7 million in remaining cash on which Sun supposedly held a lien, Sun could "dispose of its collateral as it wishes." Pet. App. 58a; *see also* JA192. That rationale is mistaken, and respondents did not defend it in the court of appeals or in their brief in opposition. Even if Sun held a lien on the cash, it relinquished that lien to settle *the estate's* avoidance action against it, and the proceeds of a settlement of an estate cause of action are estate property, §541(a)(6). Thus, earmarking those proceeds for general unsecured creditors was a disposition of estate assets, not of Sun's property. As discussed below (at 18), the Third Circuit resolved the case on that premise.

If the court had enforced the Code's priority scheme, no general unsecured creditors could have received any distributions until petitioners' higher-priority wage claims were paid in full (absent petitioners' consent to different treatment). Alternatively, if the court had simply dismissed the case, without approving the estate's release of the state-law fraudulent transfer claims belonging to Jevic's creditors, petitioners—as creditors of Jevic—would have been free to pursue such actions against Sun and CIT.[5] Instead, they were left with no recovery, and no means of recovering anything, on their New Jersey WARN Act claims.

C. 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." Pet. App. 42a.

A divided panel of the Third Circuit also affirmed. The majority began by acknowledging that "the Code does not expressly authorize structured dismissals,"

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[5] Most States, including New Jersey, recognize such a cause of action for creditors outside bankruptcy. N.J. Stat. Ann. §§25:2-20 to-34. In bankruptcy, however, as noted above (at 12), the estate has the right to bring such claims, and the estate's settlement and release of such claims precludes creditors from bringing them after bankruptcy. *See, e.g.*, *In re PWS Holding Corp.*, 303 F.3d 308, 314-315 (3d Cir. 2002). Thus, when the committee, acting for the estate, settled and released the state-law fraudulent transfer claims, it extinguished rights petitioners otherwise could have invoked after dismissal to look to Sun and CIT for satisfaction of Jevic's debts to petitioners. *See* JA186-191 (releases).

and that dismissal ordinarily results in a "hard reset" to the prepetition status quo. Pet. App. 13a, 14a. But, noting that the Code "authorizes the bankruptcy court to alter the effect of dismissal 'for cause,'" it reasoned that a structured dismissal is permissible if it is not "used to circumvent" the Code's procedures "govern[ing] plan confirmation and conversion to Chapter 7." *Id.* 14a (quoting §349(b)).

The majority was "troubled" by the structured dismissal's departure from priority, noting 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." Pet. App. 20a, 22a. But it reasoned that the absolute priority rule codified in §1129(b)(2) applies by its terms to plans, and that no Code provision explicitly prohibits priority-skipping distributions of settlement proceeds made outside a plan. *Id.* 17a. As to that question, the majority recognized that two other courts of appeals had reached divergent results, and opted to follow what it perceived to be the more "flexible" approach of the Second Circuit. *Id.* 17a-19a (discussing *In re AWECO, Inc.*, 725 F.2d 293 (5th Cir. 1984), and *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007)). Thus, it held that settlements that "distribut[e] estate assets" but "deviate from the priority scheme" may be approved under Rule 9019 in "rare instances," if the bankruptcy court has "'specific and credible grounds to justify [the] deviation.'" *Id.* 12a, 21a (alteration in original). And the majority found such grounds here, endorsing the bankruptcy court's view that the settlement and structured dismissal were the "least bad alternative." *Id.* 21a-22a.

Judge Scirica dissented. In his view, "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. Pet. 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 and structured dismissal here were designed as "an impermissible end-run around the carefully designed routes by which a debtor may emerge from Chapter 11 proceedings." *Id.* 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." *Id.* 31a.

SUMMARY OF ARGUMENT

I. The Bankruptcy Code does not permit a bankruptcy court to approve a "structured dismissal" of a Chapter 11 case that distributes the estate to creditors in violation of the Code's priority scheme. The Code provides three, and only three, ways to resolve a Chapter 11 case: through a confirmed Chapter 11 plan, which must comply with priority, absent consent; through conversion to Chapter 7, which must also comply with priority; or through dismissal, which returns the estate's assets to their prebankruptcy owners and restores creditors' rights to pursue the debtor and its assets to recover on their claims. Nothing in the Code authorizes the court to distribute the estate to creditors through a "structured dismissal" that violates the Code's basic priority scheme.

In approving the settlement and structured dismissal, the bankruptcy court relied on Federal Rule of Bankruptcy Procedure 9019, which gives courts the power to "approve a compromise or settlement" of estate claims. But both Rule 9019 and the underlying statutory authority for settlement, the power to approve the use or sale of estate property under §363(b), govern the *liquidation* of estate assets. They do not govern distribution of the proceeds—let alone provide authority to distribute them in violation of the priority scheme. Likewise, the authority under §349(b) to order limited departures for "cause" from the rule that dismissal returns estate property to its prebankruptcy owner does not permit the court to distribute the estate in violation of Chapter 11's priority scheme. Nor does §105(a), which codifies bankruptcy courts' residual equitable powers and provides that they may enter orders "necessary or appropriate to carry out the provisions" of the Code, confer such authority. This Court has squarely rejected the proposition that the Code permits bankruptcy courts to depart from the priority scheme to achieve what they consider more "equitable" or more practical outcomes.

Basic principles of statutory construction—that statutes must be read as a whole, and that specific provisions control over general provisions—compel this conclusion. The Code provides specific, limited authorization to distribute estate assets in accordance with priority—the central organizing principle of bankruptcy—or to dismiss a case without distributing assets. It does not, through general provisions or interstitial "equitable" authority, grant the power to dismiss a case while distributing assets in violation of priority.

II. Upholding the court of appeals' contrary rule would threaten the judgments that Congress made in §507 to protect employees from the disproportionate harm they suffer when their employer files for bankruptcy and to encourage employees not to flee when a business is failing—an inducement that is severely undercut if its application is uncertain. It would also invite the same dangers of collusion among senior and junior stakeholders to squeeze out disfavored intermediate creditors that first motivated this Court to develop the absolute priority rule, and later motivated Congress to codify that rule in the current Bankruptcy Code. The court of appeals was mistaken in suggesting that giving bankruptcy courts the "flexibility" to depart from that rule would facilitate settlement; rather, it would simply redistribute settlement proceeds away from the priority creditors whom Congress intended to protect. And the effects of such departures would not be limited to the "rare" case in which there was no better alternative—a circumstance that the debtor and favored creditors would have substantial incentive and ability to concoct. The threat of a priority-skipping distribution in a structured dismissal would profoundly undermine the bargaining position of all priority creditors in all Chapter 11 cases, as they would never be certain that their priority status is, in fact, absolute.

ARGUMENT

I. STRUCTURED DISMISSALS MUST RESPECT THE CODE'S PRIORITY SCHEME

The Code does not permit a bankruptcy court to approve a structured dismissal that distributes estate assets to creditors in violation of the priorities that would govern an analogous distribution under a confirmed Chapter 11 plan or upon conversion to Chapter 7 for liquidation. Chapter 11 specifies in "meticulous" and "detailed" fashion, *Law* v. *Siegel*, 134 S. Ct. 1188, 1196 (2014), the procedures and requirements for confirmation of a plan, including compliance with the priority scheme. If a plan cannot be confirmed, the Chapter 11 case can be converted to Chapter 7, where again the

Code makes clear that Congress's priority scheme must be respected. The same must be true when a Chapter 11 case is dismissed. Nothing in the Code allows select creditors to agree with the debtor to "structure" the dismissal to secure for themselves a distribution the Code forbids in a confirmed plan or liquidation.

Respondents argue that nothing in the Code in so many words requires compliance with the priority scheme when a bankruptcy court approves a settlement of estate litigation, or when the court dismisses a Chapter 11 case. Opp. 1, 16-23. That is irrelevant. The Code does not expressly require compliance with the priority scheme in its provisions authorizing dismissal or settlement because those provisions were never intended to authorize a plan-like distribution of estate assets to creditors, like the one approved here. By providing a detailed and comprehensive structure for the distribution of estate assets at the end of a bankruptcy case—one that requires, as an indispensable component, compliance with the priority scheme—Congress unmistakably forbade deviations from that structure under the guise of dismissals, settlements, or any other device respondents might invoke.

"Statutory construction," the Court has explained, "is a holistic endeavor," in which individual provisions must be understood in the context in which Congress placed them. *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). An interpretation of a given provision is permissible only if it "produces a substantive effect that is compatible with the rest of the law." *Id.*; *see also, e.g.*, *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) (rejecting "hypertechnical reading" that was "not inconsistent with the language of [the] provision examined in isolation," but that was contradicted by "context" and "the overall statutory scheme"); *Kelly* v. *Robinson*, 479 U.S. 36, 43 (1986) ("[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its objects and policy." (internal quotation marks omitted)); *infra* pp.38-41. Reading into the Code's provisions for dismissal or settlement a power to achieve what would be unlawful in a plan or liquidation fails to honor that basic precept.

A. A Distribution Of The Debtor's Estate Under A Plan Or In Chapter 7 Must Comply With §507, And A Dismissal Must Reinstate Creditors' Prebankruptcy Property Rights

Chapter 11 provides only three ways for a debtor to exit bankruptcy: confirmation of a Chapter 11 plan of reorganization or liquidation; conversion to Chapter 7; or dismissal. Under either a Chapter 11 plan, absent consent, or Chapter 7, estate assets must be distributed in accordance with priority; under a dismissal, estate assets are not distributed to creditors at all, and the parties regain their prebankruptcy rights insofar as that is possible. Those carefully specified options for exiting bankruptcy, and the strict and reticulated priority scheme that accompanies them, foreclose a debtor from creating its own, different priority scheme and implementing it through a "structured dismissal."

1. The Chapter 11 plan

a. Chapter 11 contains an intricate set of rules governing the formulation and confirmation of a plan for distributing the estate's value to creditors. The Code sets out detailed provisions governing who may file a plan, including when the debtor has the exclusive right to do so, §1121; the contents of the plan itself, §§1122-1123; the disclosures required to ensure creditors can make an informed judgment about the plan, §1125; procedures for creditors to vote on the plan, §1126; and the substantive requirements for confirmation of the plan, including the priority scheme, §1129. These provisions create a framework through which the debtor and its stakeholders may seek to negotiate a consensual plan for distribution of the debtor's value. And they clearly set out creditors' default entitlements, which form the substantive backdrop of those negotiations.

Chapter 11 is intended to "preserv[e] going concerns" that are worth more if reorganized or sold as operating businesses than if liquidated piecemeal and to "maximiz[e] [the] property available to satisfy creditors." *Bank of Am. Trust & Sav. Ass'n* v. *203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999). Accordingly, the Bankruptcy Code provides the debtor and its stakeholders substantial flexibility in designing the terms of a Chapter 11 plan. The plan may vest the estate in the debtor and give creditors new securities in the reorganized enterprise in satisfaction of their old interests. §1123(a)(5)(A), (J). It may provide for the sale of property of the estate and distribution of the proceeds among creditors. §1123(a)(5)(D), (b)(4). It may modify the terms of loans. §1123(a)(5)(E)-(H), (b)(5). It may provide that claims belonging to the estate—like the fraudulent transfer suit against CIT and Sun in this case—will be litigated after confirmation, or alternatively, for the "settlement or adjustment" of such claims and distribution of the proceeds. §1123(b)(3)(A). And the plan may allocate the value of the estate's assets among creditors in any way agreed upon by the parties, so long as all affected classes of creditors consent. §1129(a)(7)-(9).

But a plan cannot be confirmed over the objection of a class of creditors unless the plan complies with both the absolute priority rule and the §507 priority scheme. §1129(a)(1), (9), (b)(1)-(2). If the settlement and distribution of estate assets approved here had been embodied in a Chapter 11 plan, it is undisputed that the plan could not have been confirmed. The settlement of the estate's suit against CIT and Sun could have been provided for in a plan, §1123(b)(3)(A), but the settlement proceeds could not have been distributed to general unsecured creditors over petitioners' objection unless their higher-priority claims were paid in full on the effective date of the plan, §1129(a)(9), (b)(2)(B).

Because bankruptcy cases frequently involve competition among different constituencies for limited value, creditors or equity-holders will at times attempt to subvert the statutory priority structure in favor of some other scheme of distribution more favorable to them. *See* Roe & Tung, *Breaking Bankruptcy Priority*, 99 Va. L. Rev. 1235, 1246, 1279 (2013). But despite the considerable flexibility that Congress built into the Chapter 11 plan process, it made a clear judgment that priority must be respected in the distribution of the value of the estate, absent creditors' consent to different treatment. That is the case even where, as here, the court believes that departing from priority would be the "least bad alternative" and would better serve the interests of creditors. *See Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197, 206-207 (1988) (equitable considerations cannot justify a violation of the absolute priority rule in a Chapter 11 plan).

b. In a few instances, the Code authorizes the distribution of estate assets to a creditor during an ongoing case, rather than through a plan. For example, a bankruptcy court may authorize cash payments to a prepetition secured creditor as "adequate protection" against diminution in the value of its collateral during the bankruptcy case. §361(1). The court may also authorize a debtor to assume an executory contract before confirmation of a plan, provided that the debtor promptly cures any default under the contract and compensates the counterparty, including paying any prepetition claim resulting from the default. §365(a)-(b), (d)(2). And a Chapter 11 debtor-in-possession may operate its business during the case and pay postpetition expenses incurred in the ordinary course of business during the bankruptcy case. §§363(c)(1), 1108.

Those provisions are narrow in scope and are designed to enable the debtor to continue operating as a going concern in bankruptcy, while compensating the affected parties. Moreover, unlike the distribution here, each provision is consistent with the Code's priority scheme. Secured creditors have priority in the proceeds of their collateral, §§725, 1129(b)(2)(A); claims arising under assumed contracts are administrative expenses entitled to priority, §§503(b), 507; and postbankruptcy claims incurred in the ordinary course of business to preserve the estate are likewise administrative expenses entitled to priority, §§364(a), 503(b), 507(a)(2). These limited provisions for distribution of assets outside a plan thus only underline the centrality of the Code's priority scheme to all bankruptcy cases, however resolved.

2. Conversion to Chapter 7

If a plan cannot be confirmed, the debtor may convert the case to Chapter 7, or the court may do so for cause. §1112(a), (b)(1). Upon conversion, the Chapter 7 trustee must "collect and reduce to money the property of the estate." §704(a)(1). That includes pursuing to judgment, or negotiating a settlement of, any legal claims held by the estate. *See infra* pp.30-31.

Once the Chapter 7 trustee has accounted for all assets of the estate, the trustee distributes to secured creditors the value of any property encumbered by their security interest (up to the value of their secured claim). §725 (trustee "shall dispose of any property in which an entity other than the estate has an interest, such as a lien"). After secured creditors receive the proceeds of their collateral, the trustee distributes any remaining property of the estate "first, in payment of claims of the kind specified in, and in the order specified in" §507—*i.e.*, to priority unsecured creditors. §726(a)(1). Only if all such claims are paid in full may the trustee distribute any remaining assets to general unsecured creditors. §726(a)(2).

As in Chapter 11, Congress denied bankruptcy courts any authority in Chapter 7 to order *ad hoc* departures from the Code's priority scheme. The only exceptions to the priority "waterfall" described above are expressly set out and narrow in scope. Thus, §726(a) provides that a priority claim may receive less favorable treatment if it is subject to legal or equitable subordination under §510. And §726(b) provides that, when a case has been converted from Chapter 11 to Chapter 7, priority claims for the cost of administering the Chapter 7 estate are paid before priority claims for administrative expenses incurred in the preceding Chapter 11 case. No provision of the Code permits the trustee or the bankruptcy court to deviate from Chapter 7's prescribed hierarchy of payments simply to produce a result perceived as more equitable. Thus, it is undisputed that the distribution ordered in this case also could not have occurred in Chapter 7.

3. Dismissal

If a Chapter 11 plan cannot be confirmed and the case is not converted to Chapter 7, the last option for exiting Chapter 11 is dismissal of the bankruptcy case in its entirety. §1112(b). Dismissal is fundamentally different from either confirmation of a Chapter 11 plan or conversion to Chapter 7. It is a backward-looking rather than a forward-looking exit from bankruptcy. The "day of reckoning" on which all of the estate's value is tallied up and redistributed does not occur. *Cf.* Baird, *Elements of Bankruptcy* 59 (6th ed. 2014). Thus, dismissal does not involve any distribution of the estate to creditors. Instead, estate assets revert to their prior owners.

The Code provides that dismissal of a bankruptcy case ordinarily "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case." §349(b)(3). The Code thus "contemplates that on dismissal a bankrupt is reinvested with the estate" property it possessed before bankruptcy, "subject to all encumbrances which existed prior to the bankruptcy." *In re Income Prop. Builders, Inc.*, 699 F.2d 963, 965 (9th Cir. 1982) (per curiam). In addition, any property that the estate has recovered from third parties pursuant to fraudulent transfer and preference actions is typically returned to the third party in question. §349(b)(1)(B). Creditors' claims against the debtor are not discharged, and creditors' rights to collect those claims from third parties under state fraudulent-transfer law are reinstated. Revesting under §349(b) therefore permits creditors to pursue their claims against both the debtor and third parties according to their nonbankruptcy rights.

As discussed below, a bankruptcy court has limited authority to depart from this revesting rule "for cause." "Cause" means "an acceptable reason," *In re Sadler*, 935 F.2d 918, 921 (7th Cir. 1991), such as protecting a third party who changed position irreversibly in reliance on the bankruptcy. "The basic purpose of [§349(b)] is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case." H.R. Rep. No. 95-595, at 338 (1977). The "cause" exception allows the court to "make the appropriate orders to protect rights acquired in reliance on the bankruptcy case," *id.*, while otherwise restoring the parties as much as possible to the status quo ante.

* * *

In contrast to the three alternatives discussed above, what happened here is contemplated nowhere in the Bankruptcy Code. No provision of the Code permits nonconsensual deviations from the otherwise mandatory priority scheme simply because the value of the estate is being distributed through a structured dismissal. The priority scheme is the way the Bankruptcy Code implements its primary purpose—the equitable distribution of estate property to creditors. Its careful and detailed provisions preclude any inference that debtors can cooperate with junior creditors to create an exit from Chapter 11 that excludes senior creditors from the distributions to which they are entitled.

B. No Other Provision Of The Bankruptcy Code Or Rules Grants Authority For A Priority-Skipping Structured Dismissal

Neither the bankruptcy court's power to approve a settlement under Federal Rule of Bankruptcy Procedure 9019 or §363 of the Bankruptcy Code, nor its power to dismiss a Chapter 11 case under §1112(b) and §349(b) of the Code, provides the authority to circumvent the Bankruptcy Code's priority scheme through a structured dismissal.

1. Settlement

a. The lower courts relied primarily on Federal Rule of Bankruptcy Procedure 9019 as the authority for the settlement and priority-skipping structured dismissal here. Pet. App. 11a, 60a. Rule 9019(a) provides that "[o]n motion by the trustee [or debtor-in-possession] and after notice and a hearing, the court may approve a compromise or settlement." It confers no authority to distribute estate value in violation of priority. In the first place, Rule 9019 is merely a rule of procedure, and as such cannot provide any basis to depart from the statutory priority scheme that Congress has enacted. *See* 28 U.S.C. §2075 (authorizing promulgation of procedural rules that do not "abridge, enlarge, or modify any substantive right").

Nor does Rule 9019 purport to govern the distribution of estate value. It applies to the settlement of contested claims, not the distribution of settlement proceeds. That is consistent with the Bankruptcy Code's basic division between the process of marshaling the estate's assets and maximizing their value, on the one hand, and the priority scheme for distributing that value to creditors at the end of the case, on the other. *See, e.g.*, Jackson, *The Logic and Limits of Bankruptcy Law* 7-19 (1986).

When the estate's assets include an unliquidated cause of action, the value of that cause of action can be maximized through two alternative means: litigation or settlement. If the estate litigates and prevails, it will obtain a judgment requiring the defendant to pay the estate a judicially determined sum. But whether the estate will win, and the size of any damages award, may be uncertain. Moreover, litigating the claim could require the estate to incur significant litigation expenses, which have priority over general unsecured claims, §§330, 503(b)(2), 507(a)(2), and could take months or even years, delaying the distribution of any ultimate recovery.

Accordingly, "[i]n administering reorganization proceeding in an economical and practical manner it will often be wise to arrange the settlement of claims." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 424 (1968). When a bankruptcy court is asked to approve a settlement, it should make a "full and fair assessment of the wisdom of the proposed compromise," informed by "all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated," as well as "an educated estimate of the complexity, expense, and likely duration of such litigation" and "the possible difficulties of collecting on any judgment." *Id.*

If the settlement is approved, the value of the estate's claim will be fixed at the amount of the settlement, and the proceeds will become part of the bankruptcy estate. §541(a)(1), (3), (6). The distribution of those proceeds is then governed by the Code's priority scheme. Thus, while Rule 9019 sets out the procedure for a court to approve the compromise of a claim of uncertain value, it provides no basis to "compromise" the Code's specific priority scheme in the absence of priority creditors' consent. Nor can parties to a bankruptcy, merely by agreeing to contravene that scheme as part of a "settlement," give the Court the authority to do what Congress otherwise specifically prohibited. *Cf. In re Zale Corp.*, 62 F.3d 746, 754-757, 759-766 (5th Cir. 1995) (holding that authority to approve settlement of estate's claims did not permit court to approve settlement term barring nondebtor third party's claim against defendant over which court lacked jurisdiction; "parties c[an] not accomplish through settlement what they c[an] not attain directly").[6]

The court of appeals majority here reasoned that "it would make sense for the Bankruptcy Code … to leave bankruptcy courts more flexibility" to authorize departures from the priority scheme when approving settlements outside a plan. Pet. App. 20a. But it failed to cite any provision of the Code permitting such a departure, and there is none.

b. Neither respondents nor the courts below identified or relied on the *statutory* authority for settling an estate cause of action, which Rule 9019, as a rule of procedure, cannot provide on its own. The relevant provision is §363 of the Bankruptcy Code, which grants the

[6] In *TMT Trailer*, the Court held that a settlement approved as part of a reorganization plan must be "fair and equitable" to all creditors, a term of art incorporating "the absolute priority doctrine." 390 U.S. at 424, 441. The Fifth Circuit has interpreted that decision to require compliance with the priority scheme whenever a bankruptcy court approves a settlement that entails the distribution of estate assets to creditors, whether as part of or before the confirmation of a Chapter 11 plan. *In re AWECO, Inc.*, 725 F.2d 293, 298 (5th Cir. 1984) (citing *TMT Trailer*, 390 U.S. at 424, 441). The rule adopted in *AWECO* is sound in the context of structured dismissals for the reasons discussed above. That said, the relevant consideration is not whether the bankruptcy court is approving a settlement, but rather whether it is distributing estate assets—such as the proceeds of settling an estate cause of action—to creditors in satisfaction of their claims.

debtor-in-possession limited authority to use, sell, or lease property of the estate. A cause of action belonging to the estate is estate property. §541(a). The settlement of an estate cause of action is thus, in substance, a sale of estate property and is subject to the requirements of §363. *See, e.g.*, *In re Moore*, 608 F.3d 253, 263-265 (5th Cir. 2010); *Northview Motors, Inc.* v. *Chrysler Motors Corp.*, 186 F.3d 346, 350-351 & n.4 (3d Cir. 1999); *In re Martin*, 91 F.3d 389, 394-395 & n.2 (3d Cir. 1996). Like Rule 9019, §363 provides no authority to contravene the priority scheme.

Section 363 permits a Chapter 11 debtor-in-possession to use and sell estate property in the ordinary course of business without court approval, §§363(c)(1), 1107(a), 1108, but requires "notice and a hearing" before the debtor may "use, sell, or lease" estate property outside the ordinary course of business, §363(b)(1); *In re Roth Am., Inc.*, 975 F.2d 949, 952 (3d Cir. 1992). While Chapter 11 contemplates that disposition of significant estate assets will occur under a plan, §363(b) authorizes the debtor to dispose of such assets before a plan is confirmed where doing so will maximize the value realized from those assets. *See In re Lionel Corp.*, 722 F.2d 1063, 1069-1071 (2d Cir. 1983) (§363(b) authorizes preconfirmation sales where a "good business opportunity" may be lost unless "parties could act quickly"); *In re Chrysler LLC*, 405 B.R. 84, 96 (Bankr. S.D.N.Y. 2009) (authorizing preconfirmation sale "to preserve … the going concern value of the [debtor's] business and to maximize the value of the Debtors' estates" where debtor lacked funding to continue operations); *In re General Motors Corp.*, 407 B.R. 463, 474, 491-492 (Bankr. S.D.N.Y. 2009) (same), *aff'd on other grounds*, 428 B.R. 43 (S.D.N.Y. 2010).

While §363(b) authorizes the debtor, through sale or settlement, to reduce the assets of the bankruptcy estate to cash value, it says nothing about how the proceeds are to be distributed among creditors. The Bankruptcy Code's provisions governing priority, by contrast, establish a comprehensive, detailed scheme that specifically addresses how the estate is to be distributed among creditors. Whatever authority §363 may give a bankruptcy court to approve settlements outside a plan, it does not and cannot confer the authority to distribute the estate in contravention of that scheme. *See, e.g.*, *In re Braniff Airways, Inc.*, 700 F.2d 935, 939-940 (5th Cir. 1983) (§363(b) does not authorize a sale and settlement dictating distribution of proceeds contrary to the Code's absolute-priority rule); *In re Cajun Elec. Power Coop.*, 119 F.3d 349, 354 (5th Cir. 1997) (§363(b) "does not authorize the trustee to enter a settlement" that "'short circuit[s] the requirements of Chapter 11 for confirmation of a reorganization plan'"); *In re Continental Air Lines, Inc.*, 780 F.2d 1223, 1224, 1226-1228 (5th Cir. 1986) (§363(b) does not permit "an end run around the protection granted creditors in Chapter 11"); *Lionel*, 722 F.2d at 1069-1071 (§363(b) does not "grant[] the bankruptcy judge *carte blanche*" to "swallow[] up Chapter 11's safeguards"); *In re Westpoint Stevens, Inc.*, 333 B.R. 30, 50-54 (S.D.N.Y. 2005) (§363 did not authorize distribution of sale proceeds to junior creditors, over objection of senior secured creditors, contrary to Chapter 11's absolute priority rule), *aff'd in part & rev'd in part on other grounds*, 600 F.3d 231 (2d Cir. 2010).

2. Dismissal

Nor did the bankruptcy court's authority to dismiss a Chapter 11 case give it the power to distribute the estate in violation of the Code's priority scheme.

If a Chapter 11 debtor cannot confirm a plan, the court may convert the case to Chapter 7 or dismiss it. §1112(b). As discussed above (at 28-29), §349 provides that dismissal of a Chapter 11 case revests estate assets in the entities that owned those assets before the bankruptcy, returning the debtor and its creditors to the prebankruptcy status quo. §349(b).

A bankruptcy court may depart from §349's revesting rule only for "cause." §349(b). For instance, a bankruptcy court might choose, in order to protect creditors' interests, not to unwind a fraudulent-transfer or preference recovery by the estate. *Sadler*, 935 F.3d at 921. Or it might not reinstate a debtor's cause of action against a defendant who, in reliance on a release of that claim in the debtor's plan, gave up a lien on cash that was subsequently dispersed in the bankruptcy. *See Wiese* v. *Community Bank of Cent. Wis.*, 552 F.3d 584, 590 (7th Cir. 2009). But "'[c]ause' under §349(b) means an acceptable reason. Desire to make an end run around a statute is not an adequate reason." *Sadler*, 935 F.3d at 921.

Sadler involved family farmers who filed for Chapter 13 bankruptcy before the enactment of Chapter 12, which is specifically designed for family farms. In the Chapter 13 case, the debtors avoided a bank lien on their property through a preference action. After Chapter 12 was enacted, the debtors wanted to obtain its benefits, but the statute prohibited converting a Chapter 13 case pending on the date of enactment to a Chapter 12 case. The lower courts nonetheless permitted the debtors to achieve the same result by dismissing their Chapter 13 case and filing a new Chapter 12 case. Under §349(b), dismissal of the Chapter 13 case would unwind the avoidance of the bank's lien, and the lien could not have been avoided in the new Chapter 12 case. But the district court reasoned that "the benefits of conversion to Chapter 12, coupled with the desire to avoid a windfall for the Bank, were 'cause' to specify that the dismissal did not reinstate the Bank's lien." *Sadler*, 935 F.3d at 920. The Seventh Circuit reversed, explaining that the debtors could not achieve the equivalent of conversion through a dismissal whose effects had been modified for "cause." "It is not part of the judicial office to seek out creative ways to defeat statutes. Although the [debtors] contend that equities cut in their favor, there is no equitable claim to achieve what Congress forbade." *Id.* at 921.

So too here. By authorizing limited departures from a "hard reset" of creditors' prebankruptcy rights upon dismissal (Pet. App. 14a), Congress did not grant bankruptcy courts the authority to distribute the estate's remaining assets to prepetition creditors in a way that would be flatly unlawful under any Chapter 11 plan that could be proposed.

The harm of allowing §349(b) to become a means of distributing estate assets, without complying with the Code's priority scheme, is well illustrated by this case. Had the Jevic bankruptcy case simply been dismissed, the estate's remaining assets would have revested in their prepetition owners, thereby restoring the estate's cash to Jevic and the state-law fraudulent-transfer claims to Jevic's creditors, who would have retained their state-law rights. Petitioners could have then pursued Sun and CIT under state fraudulent-transfer law for satisfaction of Jevic's unpaid debts to petitioners.

Supra p.17 & n.5. Instead, Sun and CIT were able to obtain a release of liability from the estate within the bankruptcy case, extinguishing petitioners' state-law remedies, in exchange for a distribution of estate property that deliberately skipped over petitioners. Section 349 cannot be read to permit such an evasion of the priority scheme.[7]

C. The Bankruptcy Code's Intricate Priority Scheme And Limited Options For Exiting Chapter 11 Foreclose A Priority-Skipping Structured Dismissal

Ordinary principles of statutory interpretation and this Court's precedent reinforce the common-sense conclusion that the general provisions granting authority to approve settlements and dismiss cases cannot override the specific priority scheme that applies to every Chapter 7 case and every Chapter 11 plan. Nor

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[7] The bankruptcy court also lacked authority to approve the priority-skipping structured dismissal under its alternative rationale that secured creditors may dispose of their collateral as they wish. As an initial matter, respondents abandoned this argument on appeal, *see, e.g.*, Resp. C.A. Br. 15-17, and the court of appeals did not address it, resolving the case instead on the premise that the funds at issue were unencumbered estate assets. In any event, as noted, Sun relinquished its interest in the estate's remaining cash to settle the estate's action to avoid its liens and recover other transfers (*supra* n.4), and the settlement proceeds were accordingly estate property subject to the priority scheme—not Sun's property, §541(a)(3), (6). This case therefore does not present the question whether secured creditors may "gift" property to which they would otherwise be entitled to junior creditors while skipping an intermediate class of creditors. *See* American Bankruptcy Institute Commission To Study the Reform of Chapter 11, *2012-2014 Final Report and Recommendations* 237-238 (2014) (discussing division of authority over such "gifting" cases).

can any residual equitable authority the bankruptcy court might have provide a basis for rewriting the priority scheme Congress enacted.

1. The Bankruptcy Code's specific provisions governing distribution of estate assets trump general provisions permitting settlement and dismissal

"[I]t is a commonplace of statutory construction that the specific governs the general." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *accord Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 206-209 (1932). "'[G]eneral language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012); *see, e.g.*, *Hinck* v. *United States*, 550 U.S. 501, 506-507 (2007) (holding Tax Court jurisdiction exclusive, "despite Congress's failure explicitly" to say so, under "well-established principle" that "a precisely drawn, detailed statute pre-empts more general remedies" (internal quotation marks omitted)); *United States* v. *Fausto*, 484 U.S. 439, 453-455 (1988) (holding that Congress's decision in the Civil Service Reform Act to provide judicial review of adverse personnel actions only for certain federal employees impliedly forbade other employees from seeking review under more general remedies predating CSRA).

Relatedly, as this Court has explained, "[s]tatutory construction … is a holistic endeavor," and statutory provisions should be construed in a way that "produces a substantive effect that is compatible with the rest of the law." *Timbers*, 484 U.S. at 371; *see also King* v.

Burwell, 135 S. Ct. 2480, 2489 (2015) ("[W]e must read the words [of a statute] 'in their context and with a view to their place in the overall statutory scheme.'"); *Kelly*, 479 U.S. at 43 ("In expounding [the Bankruptcy Code], we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (internal quotation marks omitted)).

In *Timbers*, this Court applied these principles to reject a construction of the Bankruptcy Code that would read a general administrative provision to authorize a result inconsistent with a specific provision elsewhere in the Code. The question in *Timbers* was whether the Bankruptcy Code's provisions for adequate protection for secured creditors required that undersecured creditors be paid postpetition interest to account for the time value of money. 484 U.S. at 369. Although §362(d)(1)'s broad language protecting a secured creditor's "interest" in collateral "could reasonably … mean[]" that undersecured creditors must receive postpetition interest, this Court rejected that reading because it would "contradict[] the carefully drawn disposition of §506(b)," which authorizes postpetition interest only for oversecured creditors. *Id.* at 371, 373.

Likewise, in *Hartford Underwriters Insurance Co.* v. *Union Planters Bank, N.A.*, this Court construed §506(c) of the Bankruptcy Code, which provides that "[t]he trustee may recover" from a secured creditor certain costs incurred to preserve the creditor's collateral. 530 U.S. 1, 5 (2000). Petitioner, an unsecured creditor, claimed that it was entitled to such a recovery, arguing that the statute said only "that the trustee may seek recovery …, not that others may not." *Id.* at 6. This Court had "little difficulty" rejecting that position, noting that "[s]everal contextual features" of the Code demonstrated that it is a "proper inference that the trustee is the only party empowered to invoke the provision." *Id.* Here too, respondents contend that the Bankruptcy Code does not expressly forbid priority-violating distributions outside a plan. And here too, the provisions of the Code give rise to a clear negative inference prohibiting such distributions. Chapter 11 does not specify any means of distributing the estate's value at the end of the case except a plan, and a plan must respect priority; the common-sense conclusion is that Chapter 11 does not permit what was done here.

More recently, in *RadLAX*, this Court addressed a closely analogous question. There, the debtors argued that the Code provides two options for selling a creditor's collateral under a plan—in a sale meeting specified conditions or on other terms giving the creditor the "indubitable equivalent" of its secured claim—and that the Code expressly grants the creditor the right to credit-bid only under the first option. They reasoned that creditors may thus be forbidden to credit-bid under the second option as long as the sale satisfies the "'indubitable equivalent'" standard. 132 S. Ct. at 2070; *see* §1129(b)(2)(A)(ii)-(iii). This Court rejected that reading as "hyperliteral and contrary to common sense," holding that where "a general authorization and a more limited, specific authorization exist side-by-side," the "terms of the specific authorization must be complied with." *RadLAX*, 132 S. Ct. at 2070, 2071. "That is particularly true where, as in §1129(b)(2)(A), 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *Id.* at 2071.

Respondents here similarly argue that Chapter 11 requires compliance with priority when the estate's value is distributed under a plan but not when the bankruptcy court is using its power to approve settlements or dismiss a case. That argument fails here just as it did in *RadLAX*. The Bankruptcy Code establishes a comprehensive scheme that targets a specific problem—a debtor whose assets may prove insufficient to pay all creditors in full—and responds with a specific solution—a detailed regime for distributing the debtor's value among competing stakeholders. Indeed, that is bankruptcy's core function. The Bankruptcy Code largely leaves the substance of creditors' claims to nonbankruptcy law; its primary object is to apportion the debtor's limited value in satisfaction of those claims. §502(b)(1); *Butner* v. *United States*, 440 U.S. 48, 54-57 (1979); Jackson 7-19; Baird 57-75.

"Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The Code cannot sensibly be read to give bankruptcy courts the authority to override the priority scheme Congress mandated through ancillary provisions governing the settlement of disputed claims or dismissal of failed Chapter 11 cases.

2. The bankruptcy court's "equitable" powers do not authorize departures from the priority scheme

The bankruptcy court believed that its departure from the Code's priority scheme would better serve "the paramount interest of the creditors." Pet. App.

61a.[8] Likewise, the Third Circuit defended the bankruptcy court's decision on the ground that, while "unsatisfying," it was the "least bad alternative." *Id.* 21a.

But 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 *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. at 200-201, 207. 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 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, 536, 540 (1996). In *Noland*, the United States had claims for taxes, interest, and penal-

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[8] The bankruptcy court's order (Pet. App. 45a-46a) invoked §105(a), which codifies the bankruptcy court's residual equitable authority to enter orders "necessary or appropriate to carry out the provisions" of the Bankruptcy Code. Respondents have since disclaimed any reliance on §105(a). Opp. 18 n.3.

ties entitled to priority under §503 and §507. *Id.* at 537. While acknowledging the claims' priority status, the bankruptcy court 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 judgment, holding that courts cannot rewrite the Code's priority scheme to produce outcomes that they believe to be fairer. *Id.* at 540-541, 543.

Most recently, in *Law*, this Court rejected an attempt to use §105(a) in a way that contravened provisions of the Code, explaining that §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." 134 S. Ct. at 1194. In *Law*, the Court held that a bankruptcy court could not sanction a debtor for egregious misconduct by denying him the benefit of the homestead exemption granted by the Code. *Id.* at 1198. Because the Code already contained a "mind-numbingly detailed[] enumeration" of the circumstances 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. "That is simply an application of the axiom that a statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere." *Id.* at 1194.

The same is true here. Congress has determined that the value 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. Contrary to the court of appeals' characterization, there is nothing "nihilistic" about that conclusion. Pet. App. 23a. Congress considered the matter and, notwithstanding the significant flexibility Chapter 11 provides, it chose not to give bankruptcy courts the discretion to alter priority without the consent of the affected class of creditors. In choosing to specify exactly how estate assets must be distributed, rather than grant bankruptcy courts leeway to vary that distribution to "serv[e] the interests of the estate and its creditors" (*id.*), Congress chose a clear default rule, rather than a murky standard, to govern the parties' dealings in bankruptcy. That choice must be respected.

II. A Contrary Rule Would Threaten The Judgments Congress Made In §507 And Would Invite Collusion To Squeeze Out Disfavored Creditors

Allowing debtors and select creditors to avoid the priority scheme by structured dismissal not only violates the text and overall structure of Chapter 11, but is also inconsistent with the history and purpose of the priority scheme. The rule of absolute priority took hold in this Court's decisions and was later enshrined in the Code to prevent precisely the same dynamic that occurred here: collaboration between senior creditors and junior creditors or equity-holders to squeeze out disfavored intermediate creditors. Congress also made a principled judgment to prefer some unsecured claims over others in the priority scheme. The decision below wrongly licenses private parties and bankruptcy courts to disregard those policy choices.

Against those significant costs, the rule adopted below has virtually no countervailing benefits. Allowing priority-skipping settlements and structured dismissals will not facilitate settlement, as the panel majority claimed, but will merely redistribute the proceeds of settlement away from the priority creditors whom Congress sought to protect. Nor will such an outcome be confined to the occasional "rare" case in which there are no better alternatives (a criterion not even met in this very case). The threat of a priority-skipping distribution in a structured dismissal over the objection of an impaired class of priority creditors will profoundly alter Chapter 11 plan negotiations in a manner Congress did not anticipate and the Code does not condone.

A. The Priority Scheme Plays An Essential Role In Chapter 11

1. Strict adherence to the priority scheme when distributing estate assets to creditors is critical to effectuate and protect the choices Congress made in that scheme. The decision to prefer an entire category of unsecured claims over others is quintessentially "a legislative type of decision." *Noland*, 517 U.S. at 541. Allowing bankruptcy courts to approve structured dismissals that violate the priority scheme will undermine those legislative decisions and upset the policy commitments embedded in §507.

The claims at issue here are illustrative. Congress has long given priority to claims by employees of the debtor for unpaid wages, salaries, or commissions, §507(a)(4), and unpaid contributions to an employee benefit plan, §507(a)(5). Indeed, a "preferred position" for claims for unpaid "wages … due to workmen" has been a feature of bankruptcy law since 1841. *United States* v. *Embassy Rest., Inc.*, 359 U.S. 29, 31 & n.4 (1959); *see also* Bankruptcy Act of July 1, 1898, ch. 541, §64(b)(4), 30 Stat. 544, 563 (priority for "wages due to workmen, clerks, or servants"). As Judge Hand explained, Congress extended that special treatment in part because employees, unlike other creditors, often cannot "be expected to know anything of the credit of their employer" and instead "accept a job as it comes." *In re Lawsam Elec. Co.*, 300 F. 736, 736 (S.D.N.Y. 1924). Employees also likely have no other sources of income and no means of demanding security from their employer when extending credit, so they and their families are especially harmed by an employer's failure. Kauper, *Insolvency Statutes Preferring Wages Due Employees*, 30 Mich. L. Rev. 504, 507-508 (1932). And, finally, the wage priority encourages employees not to jump ship when a business is failing—a prospect that could both hasten bankruptcy and make a successful reorganization more difficult, harming all creditors. *See supra* p.10.

Nothing in the Code suggests that Congress intended those protections to apply in Chapter 11 cases that result in a confirmed plan, but not in Chapter 11 cases that result in a structured dismissal—an outcome employees cannot predict in advance, when they must decide whether to join or stay with a financially distressed business.[9] If anything, a bankruptcy that ends in a structured dismissal is likely to leave employees

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[9] The same timing concern applies to other claims as well. For example, Congress gave superpriority to certain postpetition financing, §364(d), to encourage such lending as a means of preserving and maximizing the value of the estate. That incentive to extend credit will be substantially undercut if a lender must guess, in advance, whether its priority will actually be honored. The same is true for the priority given to postpetition administrative expenses, §§503(b), 507(a)(2), which encourages counterparties to continue doing business with the debtor during its reorganization efforts.

worse off than a successful reorganization, insofar as the debtor ceases to do business entirely, thus making a small measure of protection for the employees' prepetition unpaid wages even more important.

Allowing structured dismissals to evade §507 would also be inconsistent with the priority scheme's broader place in the architecture of the Code. *See supra* pp.23-29. In fact, in defending the settlement and dismissal that occurred below, even respondents recognized "the importance of the priority system," and they urged a rule under which "'compliance with the Code priorities *will usually be dispositive* of whether a proposed settlement is fair and equitable'" to all creditors. Opp. 19 (quoting Pet. App. 20a). If it were true, as respondents contend, that compliance with the priority scheme is not required for a settlement and structured dismissal because no provision of the Code says so expressly, it is hard to see why compliance would nevertheless "usually" be required. A far more compelling reading of the Code is that compliance is always required, in order to protect the categorical judgments Congress made.

2. Allowing priority-skipping distributions like the one that occurred here would also invite the same dangers of collusion that motivated the Court to develop and apply the concept of absolute priority. The doctrine originated in equity receivership cases, largely involving railroads, to protect junior creditors from the danger that senior creditors, corporate insiders, and stockholders—sometimes the same persons—would collude during reorganizations to benefit themselves while cutting junior creditors out of the process. *See, e.g.*, *Louisville Trust Co.* v. *Louisville, New Albany & Chi. Ry.*, 174 U.S. 674, 684 (1899); *Northern Pac. Ry.* v. *Boyd*, 228 U.S. 482, 504-508 (1913); *see also* Baird 59-67. To forestall such collusion, the 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.* v. *Central Union Trust Co. of N.Y.*, 271 U.S. 445, 454 (1926) (quoting *Boyd*, 228 U.S. at 507).

In *Case* v. *Los Angeles Lumber Products Co.*, the Court held that Congress codified the rule of absolute priority by amending 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," meaning a "rule of full or absolute priority." *Id.* at 115, 117; *accord Marine Harbor Props., Inc.* v. *Manufacturers Trust Co.*, 317 U.S. 78, 85 (1942). The modern Code, unlike the Bankruptcy Act, spells out in detail the requirement for compliance with absolute priority in meeting the "fair and equitable" standard, §1129(b)(2), but the underlying principle has remained unchanged. A "'dissenting class of [senior] creditors must be provided for in full before any junior class can receive or retain any property'" in a reorganization, absent consent to different treatment. *Ahlers*, 485 U.S. at 202.

As a result, absolute priority "has been the cornerstone of reorganization practice and theory" for over 75 years. Markell, *Owners, Auctions, and Absolute Priority in Bankruptcy Reorganizations*, 44 Stan. L. Rev. 69, 123 (1991); *see* Roe & Tung, 99 Va. L. Rev. at 1236 ("Absolute priority is central to the structure of business reorganization and is, quite appropriately, bankruptcy's most important and famous rule."). It has remained so important in theory and practice because of 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," at the expense of disfavored creditors. *203 N. LaSalle*, 526 U.S. at 444 (citing H.R. Doc. No. 93-137, pt. I, at 255 (1973) (absolute priority rule developed to protect against "the ability of a few insiders, whether representatives of management or major creditors, to use the reorganization process to gain an unfair advantage")); *see also In re Hutch Holdings, Inc.*, 532 B.R. 866, 884 (Bankr. S.D. Ga. 2015) (Bankruptcy Code's enactment was driven in part by "'the need for greater transparency and dismantling of the 'bankruptcy ring' of perceived insiders among bankruptcy specialists and the courts'"); H.R. Rep. No. 95-595, at 92 (Congress was addressing concern that "the bankruptcy system operates more for the benefit of attorneys than for the benefit of creditors").

Precisely those same dangers are present for structured dismissals, as illustrated by this case. If senior creditors and general unsecured creditors can arrange to dismiss a Chapter 11 case and distribute the estate's remaining property in violation of the priority scheme, squeezing out disfavored intermediate priority creditors, they will have substantial incentives to do so in many cases. Here, the committee of general unsecured creditors was allowed to settle the estate's claims and to agree with the debtor and senior creditors to a distribution of estate assets that paid the committee's attorneys' fees and a portion of general unsecured creditors' claims, while skipping over petitioners' higher-priority claims. *Supra* pp.14-15. Sun and CIT received a full release of the estate's claims against them; the committee's lawyers and certain other administrative and priority claimants were paid; the committee arranged for general unsecured creditors to be paid; but petitioners' priority claims were deliberately left unpaid, and petitioners were barred from pursuing fraudulent-transfer claims against Sun and CIT that might have given them a recovery. The Code's priority scheme is intended to prevent just this kind of outcome.

Even the court of appeals acknowledged the "justifiable concerns about collusion" raised by a priority-skipping distribution. Pet. App. 20a. The lesson of history, drawn from this Court's precedent, is that "rigid adherence" to the priority scheme is necessary to prevent such collusion. *Kansas City Terminal Ry.*, 271 U.S. at 454.

B. Compliance With The Priority Scheme Promotes Settlement

The court of appeals reasoned that bankruptcy courts need "more flexibility in approving settlements than in confirming plans" and therefore that they should be permitted to approve nonconsensual departures from the priority scheme to promote settlement. Pet. App. 20a. There is no basis for that view. To the contrary, in bankruptcy as elsewhere, clear and stable rules facilitate settlement by making the law more predictable to all parties in advance. *See, e.g.*, Landes & Posner, *Legal Precedent*, 19 J.L. & Econ. 249, 271 (1976) (noting that "the ratio of lawsuits to settlements is mainly a function of the amount of uncertainty, which leads to divergent estimates by the parties of the probable outcome"); *cf. Blue Cross & Blue Shield Ass'n* v. *American Express Co.*, 467 F.3d 634, 640 (7th Cir. 2006) ("In the long run, everyone gains from predictability (and from rules that reduce the expense of litigating about such transactions)."). Having such clear rules is particularly valuable in the "unruly" context of bankruptcy law. *RadLAX*, 132 S. Ct. at 2073. Uncertainty as to whether priority will be respected would affect the terms and pricing of loans to many companies outside of bankruptcy; and once in bankruptcy, the additional litigation promoted by such uncertainty "takes money directly out of the pockets of creditors." *General Motors*, 407 B.R. at 504.

The court of appeals' concern for additional flexibility was thus misplaced. All settlements are negotiated against the backdrop of legal rules. There is no reason to believe that respecting those rules in bankruptcy will prevent parties from reaching consensual settlements. Disregarding absolute priority in some unspecified set of "rare" cases (Pet. App. 2a) will simply result in settlements that are more favorable to the settling parties at the expense of disfavored priority creditors.

This case is again illustrative. To the panel majority and the bankruptcy court, the settlement approved here was defensible because there was no "viable alternative," meaning no other possible settlement and no prospect of a confirmable plan. Pet. App. 22a. However, as Judge Scirica correctly perceived in dissent, the putative impossibility of alternative arrangements was "at least in part, a product of [respondents'] own making." *Id.* 25a. Sun, one of the defendants in the estate's fraudulent conveyance action, claimed it would not agree to any settlement of that action that provided funds to petitioners, who were separately suing Sun for violating the WARN Act (*id.* 6a n.4); but it is highly implausible that Sun would have paid *nothing* to achieve the benefits it obtained through the settlement if the bankruptcy court had required that priority be respected. Permitting courts to approve departures from priority allows settling parties to avoid complying with the priority scheme merely by making such self-serving statements. And even if such a settlement had truly been impossible, the answer would not have been to disregard the Code's requirements. Rather, the Code already provides ready alternatives if a Chapter 11 plan cannot be confirmed: conversion to Chapter 7 for liquidation or dismissal of the case, with a return to the prepetition status quo. §1112(a)-(b); *supra* pp.26-29.

C. Allowing Priority-Skipping Structured Dismissals In "Rare" Cases Is Untenable

The court of appeals asserted that its decision should be read to permit a priority-skipping settlement and structured dismissal only in a "rare case" (Pet. App. 2a), but that putative limitation is untenable.

First, allowing priority-skipping structured dismissals in *any* Chapter 11 cases will profoundly undermine the bargaining position of priority creditors in *all* cases. The absolute priority rule and the associated hierarchy of priorities provide the backbone for Chapter 11 plan negotiations. *See* Blum & Kaplan, *The Absolute Priority Doctrine in Corporate Reorganizations*, 41 U. Chi. L. Rev. 651, 653 (1974) (absolute priority is "a way of structuring negotiations so that they are sufficiently disciplined to be held within permissible areas"). The certainty that a plan cannot be confirmed over the objection of an impaired class of creditors if any lower-priority claims are paid provides "the heart of the leverage" these creditors are given by the Code in negotiations. Warren, *A Theory of Absolute Priority*, 1991 Ann. Surv. Am. L. 9, 30. "All negotiations" take place around that leverage, and, "[t]o 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." *Id.*

That framework explains why creditors in Chapter 11 are free to consent to less favorable treatment than the absolute priority rule might otherwise require. Congress envisioned Chapter 11 as a process in which interested parties, not courts, decide for themselves "how the value of the reorganizing company will be distributed," through consensual negotiations after full disclosure. H.R. Rep. No. 95-595, at 224. Particular creditors may well decide that a mutually beneficial plan that does not comply in all respects with absolute priority is preferable to other options. But the Code leaves that decision to the creditors.

Allowing priority-skipping structured dismissals will profoundly affect those negotiations, even if such departures from the priority scheme in fact remain rare. The background threat of such a distribution will hang over the parties' bargaining and will erode the leverage that Congress intended to provide in affording some unsecured claims priority over others. Priority creditors such as petitioners will never know whether their priority status is really absolute.

Second, as many commentators have already recognized, allowing priority-skipping structured dismissals in "rare" cases is an invitation to interested parties to try to *create* "rare" cases: "[O]nce the floodgates are opened, debtors and favored creditors can be expected to make every case that 'rare case.'" Rudzik, *A Priority Is A Priority Is A Priority—Except When It Isn't*, 34 Am. Bankr. Inst. J. 16, 17 (Sept. 2015).[10] And the

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[10] *See also* 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 Third Circuit's deci-

more willing judges appear to be to approve a priority-skipping structured dismissal as the best option among bad options, the "more likely that parties will find ways to orchestrate an environment in which it is the best option." Baird, *Bankruptcy's Quiet Revolution*, U. Chi. Coase-Sandor Inst. L. & Econ. Working Paper No. 755, at 13 (Apr. 2016). "The rationale for refusing to enforce such [settlement] agreements is the same as the rationale for outlawing the payment of ransom or putting in place a policy of never negotiating with terrorists." *Id.*

That is not mere speculation. 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 routinely included in large Chapter 11 plans of reorganization, *see* Silverstein, *Hiding in Plain View*, 23

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sion] purports to be narrow, it would seem to invite further litigation to test its boundaries."); 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); Swett, *Supreme Court to Review Priority-Skipping Settlement and Structured Dismissal of Chapter 11 Case* (Aug. 5, 2016), http://www.capdale.com/files/18529_Supreme_Court_to_review_priority-skipping_settlement_and_structured_dismissal_of_Chapter_11_case.pdf (*Jevic* "invites parties to devote their energies [to] 'gaming' bankruptcy cases without fully submitting either to Chapter 11 or Chapter 7, rather than negotiating or litigating within the prescribed framework").

Emory Bankr. Dev. J. 13, 18 (2006) (describing third-party releases as "increasingly common").

Third, bankruptcy judges will not be well positioned to judge whether a structured dismissal like this one is truly the option of last resort—whether there are, in the court of appeals' formulation, "'specific and credible grounds'" (Pet. App. 21a) to distinguish a given case from the mine run of failed Chapter 11 cases. "A mass of experience" in bankruptcy practice "reveals that courts have generally been prone to accept compromises in order to expedite termination of lengthy proceedings over complicated corporate financial matters," Blum & Kaplan, 41 U. Chi. L. Rev. at 664, and understandably so. The parties seeking approval of a structured dismissal have substantial control over how the circumstances are framed for the court, and many of the disfavored priority creditors who are likely to be squeezed out—employees, farmers, consumers, §507(a)(4)-(7)—are also likely to lack the means to contest that framing effectively. Nor should they be forced to do so, under the correct interpretation of the Code.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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. § 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C. § 349. Effect of dismissal

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(i)(1), 542, 550, or 553 of this title; and

(3) 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.

11 U.S.C. § 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b) (1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c) (1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(*l*) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(*o*) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

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 damag-

es 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. § 1112. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title unless—

(1) the debtor is not a debtor in possession;

(2) the case originally was commenced as an involuntary case under this chapter; or

(3) the case was converted to a case under this chapter other than on the debtor's request.

(b) (1) Except as provided in paragraph (2) and subsection (c), on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.

(2) The court may not convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter if the court finds and specifically identifies unusual circumstances establishing that converting or dismissing the case is not in the best interests of creditors and the estate, and the debtor or any other party in interest establishes that—

(A) there is a reasonable likelihood that a plan will be confirmed within the timeframes established in sections 1121(e) and 1129(e) of this title, or if such sections do not apply, within a reasonable period of time; and

(B) the grounds for converting or dismissing the case include an act or omission of the debtor other than under paragraph (4)(A)—

(i) for which there exists a reasonable justification for the act or omission; and

(ii) that will be cured within a reasonable period of time fixed by the court.

(3) The court shall commence the hearing on a motion under this subsection not later than 30 days after filing of the motion, and shall decide the motion not later than 15 days after commencement of such hearing, unless the movant expressly consents to a continuance for a specific period of time or compelling circumstances prevent the court from meeting the time limits established by this paragraph.

(4) For purposes of this subsection, the term "cause" includes—

(A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;

(B) gross mismanagement of the estate;

(C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;

(D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;

(E) failure to comply with an order of the court;

(F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;

(G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;

(H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);

(I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;

(J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;

(K) failure to pay any fees or charges required under chapter 123 of title 28;

(L) revocation of an order of confirmation under section 1144;

(M) inability to effectuate substantial consummation of a confirmed plan;

(N) material default by the debtor with respect to a confirmed plan;

(O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and

(P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

(c) The court may not convert a case under this chapter to a case under chapter 7 of this title if the debtor is a farmer or a corporation that is not a moneyed, business, or commercial corporation, unless the debtor requests such conversion.

(d) The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if—

(1) the debtor requests such conversion;

(2) the debtor has not been discharged under section 1141(d) of this title; and

(3) if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

(e) Except as provided in subsections (c) and (f), the court, on request of the United States trustee, may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate if the debtor in a voluntary case fails to file, within fifteen days after the filing of the petition commencing such case or such additional time as the court may allow, the information required by paragraph (1) of section 521(a), including a list containing the names and addresses of the holders of the twenty largest unsecured claims (or of all unsecured claims if there are fewer than twenty unsecured claims), and the approximate dollar amounts of each of such claims.

(f) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

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 domes-

tic 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).

Fed. R. Bankr. P. 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.