Asset Sales/Labor & Employment

Labor Issues in 363 Sales: Things You Need to Know

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Labor and Employment Claims in a Quick-Sale, Quick-Sand, Post-Jevic Era

2016 ABI Spring Meeting

AMERICAN BANKRUPTCY INSTITUTE

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WARN Act – Brief Summary

- **Federal WARN Act (29 U.S.C. § 2101-2109)**
  - Applies to "Employers" with 100 or more full-time employees.
  - Requires sixty days prior notice of a:
    - "plant closing" involving 50 or more full-time employees; or a
    - "mass layoff" involving 33 percent and at least 50 full-time employees (or 500 full-time employees).
  - **Remedy – up to 60 days back pay (plus $500 per day penalty).**
- Affiliated entities may be subject to WARN Act liability as a single business enterprise based on (a) common ownership; (b) common directors/officers, (c) de facto control, (d) unity of personnel policies, and (e) dependency of operations.

Three Traditional Endings to a Chapter 11 Case

- A plan
- Conversion to chapter 7
- Dismissal

Commonly Cited Statutory Authority for Structured Dismissal

- Section 105(a) (general equitable power)
- Section 305 (abstention)
- Section 349(b) (effect of dismissal)
- Section 1112(b)(1) (conversion or dismissal)

Bells and Whistles

- Gifting
- Continuing bankruptcy court jurisdiction
- Claims process
- Releases
- Effectiveness of prior orders

Structured Dismissals, Pre-Jevic

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

The Essential Resource for Today's Busy Insolvency Professional

Structured Chapter 11 Dismissals: A Viable and Growing Alternative after Asset Sales

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In recent years, it has become commonplace for a chapter 11 debtor to utilize bankruptcy to effectuate an orderly sale of all or substantially all of its assets pursuant to § 363 of the Bankruptcy Code, prior to confirmation of a chapter 11 plan. This is especially true in cases where the pre-petition lender is undersecured and the case is administratively insolvent. After a sale of all or substantially all of a debtor's assets, which could be in the form of a going-concern or a liquidation, and absent the agreement of the undersecured creditor, the debtor is typically left with no unsecured assets to administer or with insufficient unsecured assets to fund a confirmable chapter 11 plan.

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Chapter 11 debtors have traditionally chosen among three possible courses of action after a sale of their assets. First, a debtor could proceed with confirmation of a liquidating chapter 11 plan, which requires compliance with

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with a blanket lien on all of a debtor's assets, especially without that secured creditor's agreement to fund the often-significant costs of both a liquidating plan and the plan process. Second, a debtor could convert the chapter 11 case to a case under chapter 7 and allow a chapter 7 trustee to distribute a debtor's remaining assets, if any, to creditors and to prosecute any available avoidance actions. Third, a debtor could seek entry of a simple order dismissing the chapter 11 case, returning the parties to their state law rights and remedies.

This article discusses a less common but increasingly used approach known as a "structured" dismissal. A structured dismissal is a dismissal coupled with some or all of the following additional provisions in the dismissal order: releases (some more limited than

G. David Dean

or unpublished), there have been a number of rulings that are useful to understanding how structured dismissals have been presented by parties and viewed by courts. We begin with a discussion of the statutory bases relied on for structured dismissals, what factual showing might be required to obtain a structured dismissal and common provisions approved in structured dismissal orders.[1]

Statutory Framework

Parties requesting approval of structured dismissals rely on § 1112(b) and/or § 305(a)(1) of the Bankruptcy Code. Structured-dismissal motions grounded in either statutory provision are often coupled with a request pursuant to § 105(a) of the Code, which allows a bankruptcy court to enter orders that are "necessary or appropriate to carry out the provisions of" the Code. 11 U.S.C. § 105(a).

Section 1112(b), governing conversion or dismissal of a chapter 11 case, is generally utilized as the statutory basis for a structured dismissal when a debtor

Cover Feature

Structured Dismissals, Pre-*Jevic*

Structured Dismissals, or Cases Dismissed Outside of Code's Structure?

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A recent *ABI Journal* article discussed structured dismissals as an option for debtors who sell substantially all of their assets pre-confirmation, leaving them "with no unsecured assets to administer or with insufficient unsecured assets to fund a confirmable plan."[1] The authors describe a structured dismissal as:

> a dismissal coupled with some or all of the following additional provisions in the dismissal order: releases (some more limited than others), protocols for reconciling and paying claims, "gifting" of funds to unsecured creditors and provisions providing for the bankruptcy court's continued retention of jurisdiction over certain post-dismissal matters.[2]

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sible *sub rosa* plans.[6] Second, unlike chapter 7 liquidation, structured dismissals distribute assets without enforcing priorities, addressing litigation or ensuring accountability for distributing assets. Third, unlike traditional dismissals, structured dismissals fail to reinstate state law creditor remedies.

Plan Confirmation

Updated *Sub Rosa* Plan?

Structured dismissals are typically sought after court approval of asset

On Our Watch

sales or settlements.[7] Courts treat a

Structured dismissals are a new permutation of the *sub rosa* plan. Because structured dismissals are sought separately from the earlier sale or settlement, the sale or settlement itself does not present *sub rosa* plan issues because nothing therein limits disclosure or voting or predetermines plan terms. It is the subsequent structured dismissal that defines or restricts what would otherwise have been in a plan, such as distribution of sale or settlement proceeds, or disenfranchises other creditor rights normally attendant to plan confirmation. This process effectively bifurcates a single *sub rosa* plan. Structured dismissals should be similarly evaluated and disapproved where confirmation safeguards are circumvented.

Alternatively, a well-crafted sale order can avoid *sub rosa* plan bifurcation by precluding a subsequent structured dismissal. The estate does not generally benefit from a debtor in possession (DIP) selling over-encumbered property, and the DIP can abandon it under § 554 as

In re Jevic Holding Corp.

- Committee settles litigation against CIT and Sun
- $1.7 million in cash, to be distributed to tax, administrative, and unsecured creditors
- WARN Act claimants receive **$0** in the settlement
- Bankruptcy case to be dismissed

What is happening, post-<u>Jevic</u>?

- Post-Jevic Structured Dismissals
  - In re *WP Steel Venture LLC*, No. 12-11661 (Bankr. D. Del.)
  - In re *Endeavour Operation* Co., No 14-12308 (Bankr. D. Del.)

Key Takeaways?

Labor and Employment Claims in a Quick-Sale, Quick-Sand, Post-Jevic Era

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I. Structured Dismissals, Generally

After a debtor liquidates its assets under 363(b) of the Bankruptcy Code, what happens next? The Bankruptcy Code specifies only three endings to a bankruptcy case: (1) a plan, following approval of a disclosure statement, solicitation, and confirmation, (2) a conversion to chapter 7, with a trustee taking over all aspects of administration of the case and the remaining estate assets, or (3) a traditional dismissal, where prior orders of the bankruptcy court do not survive dismissal.

Some courts have approved "structured dismissals," through which the parties preserve relief and obtain finality not available through one of the three traditional exits to a chapter 11 case. A structured dismissal is commonly conceived as a dismissal plus at least one other form of relief that would typically be found in a chapter 11 plan, such as release and exculpation provisions, claims-resolution processes and distribution procedures, class-skipping carveouts or "gifts," conditions to dismissal, enforceability of prior orders, or retentions of the bankruptcy court's jurisdiction.

II. Commonly Cited Statutory Authority for Structured Dismissals

Courts have found statutory authority for structured dismissals in the following:

- Section 105(a) (general equitable power): "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." 11 U.S.C. § 105(a).

- Section 305 (abstention): "The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if . . . the interests of creditors and the debtor would be better served by such dismissal or suspension . . ." 11 U.S.C. § 305(a).

- Section 349(b) (effect of dismissal): "Unless the court, for cause, orders otherwise, a dismissal of a case . . . (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."

- Section 1112(b)(1) (conversion or dismissal): "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."

III. Recent Court Orders and Opinions on Structured Dismissals

A. Opinions

In re Jevic Holding Corp., 787 F.3d 173 (3d Cir. 2015) (affirming bankruptcy court and district court, and holding that structured dismissals that deviate from absolute priority rule can be approved where traditional exits from chapter 11 are unavailable, the settlement is the best feasible way to serve the interests of the estate and its creditors, and the bankruptcy court makes findings supporting those determinations)

In re Petersburg Regency LLC, 2015 Bankr. LEXIS 3756 (Bankr. D. N.J. Nov. 2, 2015) (citing Jevic, and holding that case before the court was "even better" case for structured dismissal, there being no class-skipping)

In re Naartjie Custom Kids, Inc., 534 B.R. 416 (Bankr. D. Utah, July 13, 2015) (dismissing a case over U.S. Trustee's objection, and finding that the case before it "was simply that rare case where cause is shown to alter the effect of dismissal" by including release provision, but that "[h]ad there been even a lone voice of a creditor arguing against this, the Court may have arrived at a different conclusion")

B. Orders Without Opinions

In re WP Steel Venture LLC, Case No. 12-11661 (KJC) (Bankr. D. Del., Oct. 15, 2015) [D.I. 4464]

In re Endeavor Operating Corporation, Case No. 14-12308 (KJC) (Bankr. D. Del., Oct. 3, 2015) [D.I. 987]

IV. Appended Material

Exhibit A – Oral Memorandum of the United States Bankruptcy Court for the District of Delaware, dated December 4, 2012.

Exhibit B – Opinion – In re Jevic Holding Corp., 787 F.3d 173 (3d Cir. 2015).

Exhibit A

APPENDIX E

ORAL MEMORANDUM

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

UNKNOWN: None from the Debtor, Your Honor.

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

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

THE COURT: Yes, Mr. Ackerly.

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

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

MR. ACKERLY: Thank you, sir.

THE COURT: Right, any questions?

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

THE COURT: Yes, sir.

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

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

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

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

THE COURT: Is briefing not complete in that?

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

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

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

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

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

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

UNKNOWN: Thank you.

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

THE COURT: I think—

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

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

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

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

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

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

(Court Adjourned)

Exhibit B

KeyCite Blue Flag – Appeal Notification
Petition for Certiorari Docketed by CASIMIR CZYZEWSKI, ET AL. v. JEVIC HOLDING CORP., ET AL., U.S., November 17, 2015

787 F.3d 173
United States Court of Appeals,
Third Circuit.

In re JEVIC HOLDING CORP., et al., Debtors
Official Committee of Unsecured Creditors on behalf of the bankruptcy estates of Jevic Holding Corp., et al.
v.
CIT Group/Business Credit Inc., in its capacity as Agent; Sun Capital Partners, Inc.; Sun Capital Partners IV, LP; Sun Capital Partners Management IV, LLC
Casimir Czyzewski; Melvin L. Myers; Jeffrey Oehlers; Arthur E. Perigard and Daniel C. Richards, on behalf of themselves and all others similarly situated, Appellants.

No. 14–1465.
|
Argued Jan. 14, 2015.
|
Filed: May 21, 2015.
|
Amended: Aug. 18, 2015.

Synopsis
Background: Order was entered by the United States Bankruptcy Court for the District of Delaware, approving settlement that resulted in structured dismissal of Chapter 11 case, and appeal was taken. The District Court, Sue L. Robinson, J., 2014 WL 268613, affirmed.

Holdings: The Court of Appeals, Hardiman, Circuit Judge, held that:

[1] absent showing that structured dismissal of Chapter 11 case has been contrived to evade procedural protections and safeguards of the plan confirmation or conversion processes, bankruptcy court has discretion to order such a disposition;

[2] as matter of apparent first impression, "absolute priority" rule is not necessarily implicated outside plan confirmation context, when settlement is presented for court approval apart from a reorganization plan; and

[3] bankruptcy judge had sufficient basis for approving settlement which resulted in structured dismissal of Chapter 11 case with creditor distributions that did not comply with the Code's distribution scheme.

Affirmed.

Scirica, Circuit Judge, concurred in part, but dissented from decision to affirm, and filed opinion.

West Headnotes (11)

[1] **Bankruptcy**
Conclusions of law; de novo review
Bankruptcy
Discretion
Bankruptcy
Clear error

On appeal from district court's judgment in its bankruptcy appellate capacity, the Court of Appeals conducts the same review of bankruptcy court's order as did the district court, reviewing questions of law de novo, findings of fact for clear error, and exercises of discretion for abuse thereof. Fed.Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.

3 Cases that cite this headnote

[2] **Bankruptcy**
Judicial authority or approval

In deciding whether to approve a proposed settlement, bankruptcy court must consider (1) probability of success in litigation, (2) likely difficulties in collection, (3) complexity of the litigation involved and the expense, inconvenience and delay necessarily attending it, and (4) paramount interest of creditors. Fed.Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

1 Cases that cite this headnote

[3] **Bankruptcy**
Proceedings
Bankruptcy
Effect; proceedings in converted case

Bankruptcy Code does not strictly require dismissal of Chapter 11 case to be a hard reset, that has effect of returning parties to status quo ante; in appropriate case, court may approve a structured dismissal that is preceded by orders of bankruptcy court which will remain in effect following dismissal. 11 U.S.C.A. § 349(b).

2 Cases that cite this headnote

[4] **Bankruptcy**
Proceedings

Absent showing that structured dismissal of Chapter 11 case has been contrived to evade procedural protections and safeguards of the plan confirmation or conversion processes, bankruptcy court has discretion to order such a disposition. 11 U.S.C.A. § 349(b).

2 Cases that cite this headnote

[5] **Bankruptcy**
Judicial authority or approval
Bankruptcy
Preservation of priority

"Absolute priority" rule is not necessarily implicated outside the Chapter 11 plan confirmation context, when settlement is presented for court approval apart from a reorganization plan.

Cases that cite this headnote

[6] **Bankruptcy**
Judicial authority or approval

Whether the distributions under a pre-plan settlement will comply with the Bankruptcy Code's priority scheme is the most important factor for bankruptcy court to consider when deciding whether settlement is "fair and equitable"; however, even a noncompliant settlement may be approved when the remaining factors weigh heavily in favor of approval of settlement. Fed.Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

2 Cases that cite this headnote

[7] **Bankruptcy**
Compromises, Releases, and Stipulations

As in other areas of the law, settlements are favored in bankruptcy. Fed.Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

1 Cases that cite this headnote

[8] **Bankruptcy**
Judicial authority or approval

Compliance with the Bankruptcy Code's priority scheme will usually be dispositive of whether a proposed settlement is "fair and equitable," and settlements that skip objecting creditors in distributing estate assets raise justifiable concerns about collusion among debtors, creditors, and their attorneys and other professionals. Fed.Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

Cases that cite this headnote

[9] **Bankruptcy**
Judicial authority or approval

Bankruptcy courts may approve settlements that deviate from the Bankruptcy Code's priority scheme only if they have specific and credible grounds to justify the deviation. Fed.Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

Cases that cite this headnote

[10] **Bankruptcy**
Judicial authority or approval

Bankruptcy judge had sufficient basis for approving settlement which resulted in structured dismissal of Chapter 11 case with creditor distributions that, in omitting employees with priority wage claims under the Worker Adjustment and Retraining Notification

(WARN) Act that they did not have a chance to litigate prior to dismissal of case, did not comply with the Bankruptcy Code's priority scheme, where debtor, which no longer had any business to operate and was rapidly losing funds, had no ability to confirm a Chapter 11 plan, where conversion to Chapter 7 would be "a bridge to nowhere," and where settlement provided only avenue for any distribution on creditor claims. 11 U.S.C.A. § 507; Worker Adjustment and Retraining Notification Act, § 2 et seq., 29 U.S.C.A. § 2101 et seq.; Fed.Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

1 Cases that cite this headnote

[11] **Bankruptcy**
Judicial authority or approval

Question for bankruptcy judge, in deciding whether to approve a proposed settlement, was whether the settlement served interests of estate, not of one particular group of creditors. Fed.Rules Bankr.Proc.Rule 9019, 11 U.S.C.A.

Cases that cite this headnote

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Before: HARDIMAN, SCIRICA and BARRY, Circuit Judges.

OPINION OF THE COURT

HARDIMAN, Circuit Judge.

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

I

A

Jevic Transportation, Inc. was a trucking company headquartered in New Jersey. In 2006, after Jevic's business began to decline, a subsidiary of the private equity firm Sun Capital Partners acquired the company in a leveraged buyout financed by a group of lenders led by CIT Group. The buyout entailed the extension of an $85 million revolving credit facility by CIT to Jevic, which Jevic could access as long as it maintained at least $5 million in assets and collateral. The company continued to struggle in the two years that followed, however, and had to reach a forbearance agreement with CIT—which included a $2 million guarantee by Sun—to prevent CIT from foreclosing on the assets securing the loans. By May 2008, with the company's performance stagnant and the expiration of the forbearance agreement looming, Jevic's board of directors authorized a bankruptcy filing. The company ceased substantially all of ***176** its operations, and its employees received notice of their impending terminations on May 19, 2008.

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

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

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

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

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

There was just one problem with the settlement: it left out the Drivers, even though they had an uncontested WARN Act claim against Jevic. [2] The Drivers never got the chance to present a damages case in the Bankruptcy Court, but they estimate their claim to have been worth $12,400,000, of which $8,300,000 was a priority wage claim under 11 U.S.C. § 507(a)(4). *See* Drivers' Br. 6 & n. 3; *In re Powermate Holding Corp.,* 394 B.R. 765, 773 (Bankr.D.Del.2008) ("Courts have consistently held that WARN Act damages are within 'the nature of wages' for which § 507(a)(4) provides."). The record is not explicit as to why the settlement did not provide for any payment to the Drivers even though they held claims of higher priority than the tax and trade creditors' claims. [3] It seems that the Drivers and the other parties were unable to agree on a settlement of the WARN Act claim, and Sun was unwilling to pay the Drivers as long as the WARN Act lawsuit continued because Sun was a defendant in those proceedings and did not want to fund litigation against itself. [4] The settling parties ***178** also accept the Drivers' contention that it was "the paramount interest of the Committee to negotiate a deal under which the [Drivers] were excluded" because a settlement that paid the Drivers' priority claim would have left the Committee's constituents with nothing. Appellees' Br. 26 (quoting Drivers' Br. 28).

B

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

The Bankruptcy Court began by recognizing the absence of any "provision in the code for distribution and dismissal contemplated by the settlement motion," but it noted that similar relief has been granted by other courts. App. 31 (Bankr. Op. 9). Summarizing its assessment, the Court found that "the dire circumstances that are present in this case warrant the relief requested here by the Debtor, the Committee and the secured lenders." *Id.* The Court went on to make findings establishing those dire circumstances. It found that there was "no realistic prospect" of a meaningful distribution to anyone but the secured creditors unless the settlement were approved because the traditional routes out of Chapter 11 bankruptcy were impracticable. App. 32 (Bankr. Op. 10). First, there was "no prospect" of a confirmable Chapter 11 plan of reorganization or liquidation being filed. *Id.* Second, conversion to liquidation under Chapter 7 of the Bankruptcy Code would have been unavailing for any party because a Chapter 7 trustee would not have had sufficient funds "to operate, investigate or litigate" (since all the cash left in the estate was encumbered) and the secured creditors had "stated unequivocally and credibly that they would not do this deal in a Chapter 7." *Id.*

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

Finally, the Bankruptcy Court applied the multifactor test of *In re Martin,* 91 F.3d 389 (3d Cir.1996), for evaluating settlements under Federal Rule of Bankruptcy Procedure 9019. It found that the ***179** Committee's likelihood of success in the fraudulent conveyance action was "uncertain at best," given the legal hurdles to recovery, the substantial resources of CIT and Sun, and the scarcity of funds in the estate to finance further litigation. App. 34–35 (Bankr. Op. 12–13). The Court highlighted the complexity of the litigation and expressed its skepticism that new counsel or a Chapter 7 trustee could be retained to continue the fraudulent conveyance suit on a contingent fee basis. App. 35–36 (Bankr. Op. 13–14) ("[O]n these facts I think any lawyer or firm that signed up for that role should have his head examined."). Faced with, in its view, either "a meaningful return or zero," the Court decided that "[t]he paramount interest of the creditors mandates approval of the settlement" and nothing in the Bankruptcy Code dictated otherwise. App. 36 (Bankr. Op. 14). The Bankruptcy Court therefore approved the settlement and dismissed Jevic's Chapter 11 case.

C

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

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

II

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

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

III

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

***180** [2] First, Federal Rule of Bankruptcy Procedure 9019 authorizes settlements as long as they are "fair and equitable." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson (TMT Trailer Ferry),* 390 U.S. 414, 424, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968). In *Martin,* we gleaned from *TMT Trailer Ferry* four factors to guide bankruptcy courts in this regard: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." 91 F.3d at 393. None of the objectors contends that the Bankruptcy Court erred in concluding that the balance of these factors favors settlement, and we agree. Although the Committee's fraudulent conveyance suit survived a motion to dismiss, it was far from compelling, especially in view of CIT's and Sun's substantial resources and the Committee's lack thereof. App. 35 (Bankr. Op. 13); *see* App. 1273 (summarizing expert testimony CIT planned to offer that Jevic's failure was caused by systemic economic and industrial problems, not the leveraged buyout); *In re World Health Alts., Inc.,* 344 B.R. 291, 302 (Bankr.D.Del.2006) ("[S]uccessful challenges to a pre-petition first lien creditor's position are unusual, if not rare."). The litigation promised to be complex and lengthy, whereas the settlement offered most of Jevic's creditors actual distributions.

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

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

A

We begin by considering whether structured dismissals are ever permissible under the Bankruptcy Code. The Drivers submit that "Chapter 11 provides debtors only three exits from bankruptcy": confirmation of a plan of reorganization, conversion to Chapter 7 liquidation, or plain dismissal with no strings attached. Drivers' Br. 18. They argue that there is no statutory authority for structured dismissals and that "[t]he Bankruptcy Court admitted as much." *Id.* at 44. They cite a provision of the Code and accompanying legislative history indicating that Congress understood the ordinary effect of dismissal to be reversion to the status quo ante. *Id.* at 45 (citing 11 U.S.C. § 349(b)(3); H.R. Rep. No. 595, 95th Cong., 1st Sess. 338 (1977), 1978 U.S.C.C.A.N. 5963).

***181** [3] The Drivers are correct that, as the Bankruptcy Court acknowledged, the Code does not expressly authorize structured dismissals. *See* App. 31 (Bankr. Op. 9). And as structured dismissals have occurred with increased frequency,[5] even commentators who seem to favor this trend have expressed uncertainty about whether the Code permits them.[6] As we understand them, however, structured dismissals are simply dismissals that are preceded by other orders of the bankruptcy court (*e.g.,* orders approving settlements, granting releases, and so forth) that remain in effect after dismissal. And though § 349 of the Code contemplates that dismissal will typically reinstate the pre-petition state of affairs by revesting property in the debtor and vacating orders and judgments of the bankruptcy court, it also explicitly authorizes the bankruptcy court to alter the effect of dismissal "for cause"—in other words, the Code does not strictly require dismissal of a Chapter 11 case to be a hard reset. 11 U.S.C. § 349(b); H.R. Rep. No. 595 at 338, 1978 U.S.C.C.A.N. 5963 at 6294 ("The court is permitted to order a different result for cause."); *see also Matter of Sadler,* 935 F.2d 918, 921 (7th Cir.1991) (" 'Cause' under § 349(b) means an acceptable reason.").

Quoting Justice Scalia's oft-repeated quip "Congress ... does not, one might say, hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001), the Drivers forcefully argue that Congress would have spoken more clearly if it had intended to leave open an end run around the procedures that govern plan confirmation and conversion to Chapter 7, Drivers' Br. 22. According to the Drivers, the position of the District Court, the Bankruptcy Court, and Appellees overestimates the breadth of bankruptcy courts' settlement-approval power under Rule 9019, "render[ing] plan confirmation superfluous" and paving the way for illegitimate *sub rosa* plans engineered by creditors with overwhelming bargaining power. *Id.; see also id.* at 24–25. Neither "dire circumstances" nor the bankruptcy courts' general power to carry out the provisions of the Code under 11 U.S.C. § 105(a), the Drivers say, authorizes a court to evade the Code's requirements. *Id.* at 32–35, 40–41.

[4] But even if we accept all that as true, the Drivers have proved only that the Code forbids structured dismissals when they are used to circumvent the plan confirmation process or conversion to Chapter 7. Here, the Drivers mount no real challenge to the Bankruptcy Court's findings that there was no prospect of a confirmable plan in this case and that conversion to Chapter 7 was a bridge to nowhere. So this appeal does not require us to decide whether structured dismissals are permissible when a confirmable plan is in the offing or conversion to Chapter 7 might be ***182** worthwhile. For present purposes, it suffices to say that absent a showing that a structured dismissal has been contrived to evade the procedural protections and safeguards of the plan confirmation or conversion processes, a bankruptcy court has discretion to order such a disposition.

B

Having determined that bankruptcy courts have the power, in appropriate circumstances, to approve structured dismissals, we now consider whether settlements in that context may ever skip a class of objecting creditors in favor of more junior creditors. *See In re Buffet Partners, L.P.,* 2014 WL 3735804, at *4 (Bankr.N.D.Tex. July 28, 2014) (approving a structured dismissal while "emphasiz[ing] that not one party with an economic stake in the case has objected to the dismissal in this manner"). The Drivers' primary argument in this regard is that even if structured dismissals are permissible, they cannot be approved if they distribute estate assets in derogation of the priority scheme of § 507 of the Code. They contend that § 507 applies to all distributions of estate property under Chapter 11, meaning the Bankruptcy Court was powerless to approve a settlement that skipped priority employee creditors in favor of tax and general unsecured creditors. Drivers' Br. 21, 35–36; *see* 11 U.S.C. § 103(a) ("[C]hapters 1, 3, and 5 of this title apply in a case under chapter 7, 11, 12, or 13[.]"); *Law v. Siegel,* — U.S. ——, 134 S.Ct. 1188, 1194, 188 L.Ed.2d 146 (2014) (" '[W]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code." (citation omitted)).

The Drivers' argument is not without force. Although we are skeptical that § 103(a) requires settlements in Chapter 11 cases to strictly comply with the § 507 priorities,[7] there is some tacit support in the caselaw for the Drivers' position. For example, in *TMT Trailer Ferry,* the Supreme Court held that the "requirement[ ] ... that plans of reorganization be both 'fair and equitable,' appl[ies] to compromises just as to other aspects of reorganizations." 390 U.S. at 424, 88 S.Ct. 1157. The Court also noted that "a bankruptcy court is not to approve or confirm a plan of reorganization unless it is found to be 'fair and equitable.' This standard incorporates the absolute priority doctrine under which creditors and stockholders may participate only in accordance with their respective priorities[.]" *Id.* at 441, 88 S.Ct. 1157; *see also* 11 U.S.C. § 1129(b)(2)(B)(ii) (codifying the absolute priority rule by requiring that a plan of reorganization pay senior creditors before junior creditors in order to be "fair and equitable" and confirmable). This latter statement comports with a line of cases describing "fair and equitable" as " 'words of art' which mean that senior interests are entitled to full priority over junior ones[.]" *SEC v. Am. Trailer Rentals Co.,* 379 U.S. 594, 611, 85 S.Ct. 513, 13 L.Ed.2d 510 (1965); *accord Otis & Co. v. SEC,* 323 U.S. 624, 634, 65 S.Ct. 483, 89 L.Ed. 511 (1945); *Case v. L.A. Lumber Prods. Co.,* 308 U.S. 106, 115–16, 60 S.Ct. 1, 84 L.Ed. 110 (1939).

***183** Although these cases provide some support to the Drivers, they are not dispositive because each of them spoke in the context of plans of reorganization, not settlements. *See, e.g., TMT Trailer Ferry,* 390 U.S. at 441, 88 S.Ct. 1157; *Am. Trailer Rentals,* 379 U.S. at 611, 85 S.Ct. 513; *see also In re Armstrong World Indus., Inc.,* 432 F.3d 507 (3d Cir.2005) (applying the absolute priority rule to deny confirmation of a proposed plan). When Congress codified the absolute priority rule discussed in the line of Supreme Court decisions cited above, it did so in the specific context of plan confirmation, *see* § 1129(b)(2)(B)(ii), and neither Congress nor the Supreme Court has ever said that the rule applies to settlements in bankruptcy. Indeed, the Drivers themselves admit that the absolute priority rule "plainly does not apply here," even as they insist that the legal principle embodied by the rule dictates a result in their favor. Drivers' Br. 37.

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

[5] [6] Criticizing the Fifth Circuit's rule in *AWECO,* the Second Circuit adopted a more flexible approach in *In re Iridium Operating LLC,* 478 F.3d 452 (2007). There, the unsecured creditors' committee sought to settle a suit it had brought on the estate's behalf against a group of secured lenders; the proposed settlement split the estate's cash between the lenders and a litigation trust set up to fund a different debtor action against Motorola, a priority administrative creditor. *Id.* at 456, 459–60. Motorola objected to the settlement on the ground that the distribution violated the Code's priority system by skipping Motorola and distributing funds to lower-priority creditors. *Id.* at 456. Rejecting the approach taken by the Fifth Circuit in *AWECO* as "too rigid," the Second Circuit held that the absolute priority rule "is not necessarily implicated" when "a settlement is presented for court approval apart from a reorganization plan[.]" *Id.* at 463–64. The Court held that "whether a particular settlement's distribution scheme complies with the Code's priority scheme must be the most important factor for the bankruptcy court to consider when determining whether a settlement is 'fair and equitable' under Rule 9019," but a noncompliant settlement could be approved when "the remaining factors weigh heavily in favor of approving a settlement[.]" *Id.* at 464.

Applying its holding to the facts of the case, the Second Circuit noted that the settlement at issue deviated from the Code priorities in two respects: first, by skipping Motorola in distributing estate assets to the litigation fund created to finance the unsecured creditors committee's suit against Motorola; and second, by skipping Motorola again in providing that any money remaining in the fund after the litigation concluded would go straight to the unsecured creditors. 478 F.3d at 459, 465–66. The Court indicated that the first deviation was acceptable even though it skipped Motorola:

> It is clear from the record why the Settlement distributes money from the Estate to the [litigation vehicle]. The alternative to settling with the Lenders ***184** —pursuing the challenge to the Lenders' liens —presented too much risk for the Estate, including the administrative creditors. If the Estate lost against the Lenders (after years of litigation and paying legal fees), the Estate would be devastated, all its cash and remaining assets liquidated, and the Lenders would still possess a lien over the Motorola Estate Action. Similarly, administrative creditors would not be paid if the Estate was unsuccessful against the Lenders. Further, as noted at the Settlement hearing, having a well-funded litigation trust was preferable to attempting to procure contingent fee-based representation.

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

[7] We agree with the Second Circuit's approach in *Iridium*—which, we note, the Drivers and the United States Trustee cite throughout their briefs and never quarrel with. *See* Drivers' Br. 27, 36; Reply Br. 11–13; Trustee Br. 21. As in other areas of the law, settlements are favored in bankruptcy. *In re Nutraquest*, 434 F.3d 639, 644 (3d Cir.2006). "Indeed, it is an unusual case in which there is not some litigation that is settled between the representative of the estate and an adverse party." *Martin*, 91 F.3d at 393. Given the "dynamic status of some pre-plan bankruptcy settlements," *Iridium*, 478 F.3d at 464, it would make sense for the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure to leave bankruptcy courts more flexibility in approving settlements than in confirming plans of reorganization. For instance, if a settlement is proposed during the early stages of a Chapter 11 bankruptcy, the "nature and extent of the [e]state and the claims against it" may be unresolved. *Id.* at 464. The inquiry outlined in *Iridium* better accounts for these concerns, we think, than does the per se rule of *AWECO*.

[8] [9] At the same time, we agree with the Second Circuit's statement that compliance with the Code priorities will usually be dispositive of whether a proposed settlement is fair and equitable. *Id.* at 455. Settlements that skip objecting creditors in distributing estate assets raise justifiable concerns about collusion among debtors, creditors, and their attorneys and other professionals. *See id.* at 464. Although Appellees have persuaded us to hold that the Code and the Rules do not extend the absolute priority rule to settlements in bankruptcy, we think that the policy underlying that rule—ensuring the evenhanded and predictable treatment of creditors—applies in the settlement context. As the Drivers note, nothing in the Code or the Rules obliges a creditor to cut a deal in order to receive a distribution of estate assets to which he is entitled. Drivers' Br. 42–43. If the "fair and equitable" standard is to have any teeth, it must mean that bankruptcy courts cannot approve settlements and structured dismissals devised by certain creditors in order to increase their shares of the estate at the expense of other creditors. We therefore hold that bankruptcy courts may approve settlements that deviate from the priority scheme of § 507 of the Bankruptcy Code only if they have "specific and credible grounds to justify [the] deviation." *Iridium*, 478 F.3d at 466.

C

[10] We admit that it is a close call, but in view of the foregoing, we conclude ***185** that the Bankruptcy Court had sufficient reason to approve the settlement and structured dismissal of Jevic's Chapter 11 case. This disposition, unsatisfying as it was, remained the least bad alternative since there was "no prospect" of a plan being confirmed and conversion to Chapter 7 would have resulted in the secured creditors taking all that remained of the estate in "short order." App. 32 (Bankr. Op. 10).

[11] Our dissenting colleague's contrary view rests on the counterfactual premise that the parties could have reached an agreeable settlement that conformed to the Code priorities. He would have us make a finding of fact to that effect and order the Bankruptcy Court to redesign the settlement to comply with § 507. We decline to do so because, even if it were appropriate for us to review findings of fact de novo and equitably reform settlements on appeal, there is no evidence calling into question the Bankruptcy Court's conclusion that there was "no realistic prospect" of a meaningful distribution to Jevic's unsecured creditors apart from the settlement

under review. App. 32 (Bankr. Op. 10). If courts required settlements to be perfect, they would seldom be approved; though it's regrettable that the Drivers were left out of this one, the question—as Judge Scirica recognizes—is whether the settlement serves the interests of the estate, not one particular group of creditors. There is no support in the record for the proposition that a viable alternative existed that would have better served the estate and the creditors as a whole.

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

Counsel for the United States Trustee told the Bankruptcy Court that it is immaterial whether there is a viable alternative to a structured dismissal that does not comply with the Bankruptcy Code's priority scheme. "[W]e have to accept the fact that we are sometimes going to get a really ugly result, an economically ugly result, but it's an economically ugly result that is dictated by the provisions of the code," he said. App. 1327. We doubt that our national bankruptcy policy is quite so nihilistic and distrustful of bankruptcy judges. Rather, we believe the Code permits a structured dismissal, even one that ***186** deviates from the § 507 priorities, when a bankruptcy judge makes sound findings of fact that the traditional routes out of Chapter 11 are unavailable and the settlement is the best feasible way of serving the interests of the estate and its creditors. Although this result is likely to be justified only rarely, in this case the Bankruptcy Court provided sufficient reasons to support its approval of the settlement under Rule 9019. For that reason, we will affirm the order of the District Court.

SCIRICA, Circuit Judge.

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

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

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

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

More fundamentally, I find the settlement at odds with the goals of the Bankruptcy Code. One of the Code's core goals is to maximize the value of the bankruptcy estate, *see Toibb v. Radloff,* 501 U.S. 157, 163, 111 S.Ct. 2197, 115 L.Ed.2d 145 (1991), and it is the duty of a bankruptcy trustee or debtor-in-possession to work toward that goal, including by prosecuting estate causes of action,[1] *see Commodity Futures Trading Comm'n v. Weintraub,* 471 U.S. 343, 352, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985); *Official Comm. of* ***187** *Unsecured Creditors of Cybergenics Corp. v. Chinery,* 330 F.3d 548, 573 (3d Cir.2003). The reason creditors' committees may bring fraudulent conveyance actions on behalf of the estate is that such committees are likely to maximize estate value; "[t]he possibility of a derivative suit by a creditors' committee provides a critical safeguard against lax pursuit of avoidance actions [by a debtor-in-possession]." *Cybergenics,* 330 F.3d at 573. The settlement of estate causes of action can, and often does, play a crucial role in maximizing estate value, as settlements may save the estate the time, expense, and uncertainties associated with litigation. *See Protective Comm. for Ind. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,* 390 U.S. 414, 424, 88 S.Ct. 1157, 20 L.Ed.2d 1 (1968) ("In administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts."); *In re A & C Props.,* 784 F.2d 1377, 1380–81 (9th Cir.1986) ("The purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims."). Thus, to the extent that a settlement's departure from the Code's priority scheme was necessary to maximize the estate's overall value, I would not object.

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

In this sense, then, the settlement and structured dismissal raise the same concern as transactions invalidated under the *sub rosa* plan doctrine. In *In re Braniff Airways, Inc.,* 700 F.2d 935 (5th Cir.1983), the Court of Appeals for the Fifth Circuit rejected an asset sale that "had the practical effect of dictating some of the terms of any future reorganization plan." *Id.* at 940. The sale was impermissible because the transaction "short circuit[ed] the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets." *Id.* "When a proposed transaction specifies terms for adopting a reorganization plan, 'the parties and the district court must scale the hurdles erected in Chapter 11.' " *In re Cont'l Air Lines, Inc.,* 780 F.2d 1223, 1226 (5th Cir.1986) (quoting ***188** *Braniff,* 700 F.2d at 940). Although the combination of the settlement and structured dismissal here does not, strictly speaking, constitute a *sub rosa* plan—the hallmark of such a plan is that it dictates the terms of a reorganization plan, and the settlement here does not do so—the broader concerns underlying the *sub rosa* doctrine are at play. The settlement reallocated assets of the estate in a way that would not have been possible without the authority conferred upon the creditors' committee by Chapter 11 and effectively terminated the Chapter 11 case, but it failed to observe Chapter 11's "safeguards of disclosure, voting, acceptance, and confirmation." *In re Lionel Corp.,* 722 F.2d 1063, 1071 (2d Cir.1983); *see also In re Biolitec Inc.,* 528 B.R. 261, 272 (Bankr.D.N.J.2014) (rejecting settlement and structured dismissal that assigned rights and interests but did not allow parties to vote on settlement's provisions in part because it "resemble[d] an impermissible *sub rosa* plan"). This settlement then appears to constitute an impermissible end-run around the carefully designed routes by which a debtor may emerge from Chapter 11 proceedings.

Critical to this analysis is the fact that the money paid by the secured creditors in the settlement was property of the estate. A cause of action held by the debtor is property of the estate, *see Bd. of Trs. of Teamsters Local 863 v. Foodtown, Inc.,* 296 F.3d 164, 169 (3d Cir.2002), and "proceeds ... of or from property of the estate" are considered estate property as well, 11 U.S.C. § 541(a)(6). Here, the administrative and unsecured creditors received the $3.7 million as consideration for the releases from the fraudulent conveyance action, so this payment qualifies as "proceeds" from the estate's cause of action.[3] *See* Black's Law Dictionary 1325 (9th ed.2009) (defining proceeds as "[s]omething received upon selling, exchanging, collecting, or otherwise disposing of collateral"); *see also Strauss v. Morn,* Nos. 97–16481 & 97–16483, 1998 WL 546957, at *3 (9th Cir.1998) (" § 541(a)(6) mandates the broad interpretation of the term 'proceeds' to encompass all proceeds of property of the estate"); *In re Rossmiller,* No. 951249, 1996 WL 175369, at *2 (10th Cir.1996) (similar). This case is thus distinguishable from the so-called "gifting" cases such as *In re World Health Alternatives,* 344 B.R.

291 (Bankr.D.Del.2006), and *In re SPM Manufacturing Corp.*, 984 F.2d 1305 (1st Cir.1993). In fact, those courts explicitly distinguished estate from non-estate property, and approved the class-skipping arrangements only because the proceeds being distributed were *not* estate property. *See World Health*, 344 B.R. at 299–300; *SPM*, 984 F.2d at 1313. The arrangement here is closer to a § 363 asset sale where the proceeds from the debtor's assets are distributed directly to certain creditors, rather than the bankruptcy estate. *Cf. In re Chrysler LLC*, 576 F.3d 108, 118 (2d Cir.2009) (noting, in upholding a § 363 sale, that the bankruptcy court demonstrated "proper solicitude for the priority between creditors and deemed it essential that the [s]ale in no way upset that priority"), *vacated as* ***189** *moot*, 592 F.3d 370 (2nd Cir.2010). It is doubtful that such an arrangement would be permissible.

The majority likens the deviation in this case to the first deviation in *Iridium*, in which the settlement would initially distribute funds to the litigation trust instead of the Motorola administrative creditors. For two reasons, however, I find this analogy unavailing. First, it is not clear to me that the Second Circuit saw the settlement's initial distribution of funds to the litigation trust as a deviation from the Code's priority scheme at all. As the Second Circuit explained, if the litigation was successful, the majority of the proceeds from that litigation would actually flow back to the estate, then to be distributed in accordance with the Code's priority scheme. 478 F.3d at 462.[4] Second, the critical (and, in my view, determinative) characteristic of the settlement in this case is that it skips over an entire class of creditors. That is precisely what the second "deviation" in *Iridium* did, and the Second Circuit remanded to the bankruptcy court for further consideration of that aspect of the settlement.

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

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

The able bankruptcy court here was faced with an unpalatable set of alternatives. But I do not believe the situation it faced was entirely *sui generis*. It is not unusual for a debtor to enter bankruptcy with liens on all of its assets, nor is it unusual for a debtor to enter Chapter 11 proceedings—the flexibility of which enabled appellees to craft this settlement in the first place—with the goal of liquidating, rather than rehabilitating, the debtor.[5] ***190** It is also not difficult to imagine another secured creditor who wants to avoid providing funds to priority unsecured creditors, particularly where the secured creditor is also the debtor's ultimate parent and may have obligations to the debtor's employees. Accordingly, approval of the bankruptcy court's ruling in this case would appear to undermine the general prohibition on settlements that deviate from the Code's priority scheme.

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

All Citations

787 F.3d 173, 165 Lab.Cas. P 10,774, 61 Bankr.Ct.Dec. 21, Bankr. L. Rep. P 82,826

Footnotes

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

2 Although Sun was eventually granted summary judgment in the WARN Act litigation because it did not qualify as an employer of the Drivers, *In re Jevic Holding Corp.*, 492 B.R. 416, 425 (Bankr.D.Del.2013), the Bankruptcy Court entered summary judgment against Jevic because it had "undisputed[ly]" violated the state WARN Act, *In re Jevic Holding Corp.*, 496 B.R. 151, 165 (Bankr.D.Del.2013).

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

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

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

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

5 *See* Norman L. Pernick & G. David Dean, *Structured Chapter 11 Dismissals: A Viable and Growing Alternative After Asset Sales,* Am. Bankr. Inst. J., June 2010, at 1; *see, e.g., In re Kainos Partners Holding Co.*, 2012 WL 6028927 (D.Del. Nov. 30, 2012); *World Health Alts.*, 344 B.R. at 293–95. *But cf. In re Biolitec, Inc.*, 528 B.R. 261 (Bankr.D.N.J.2014) (rejecting a proposed structured dismissal as invalid under the Code).

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

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

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

* * *

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

2 This point is reinforced with an analogy to trust law. Where there are two or more beneficiaries of a trust, the trustee is under a duty to deal with them impartially, and cannot take an action that rewards certain beneficiaries while harming others. Restatement (Second) of Trusts § 183 (1959); *see also Varity Corp. v. Howe*, 516 U.S. 489, 514, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) ("The common law of trusts recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interests of all beneficiaries."). Yet that is what

the Committee did here. This duty persists even where the trustee is a beneficiary of the trust himself, like the creditors' committee was here. *See* Restatement (Third) of Trusts § 32 (2003) ("A natural person, including a settlor or beneficiary, has capacity ... to administer trust property and act as trustee....")

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

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

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

6 At this point, the WARN litigation has largely concluded, with the WARN Plaintiffs having established liability on their New Jersey WARN claims against Jevic but having lost on all other claims. On May 10, 2013, the bankruptcy court dismissed the WARN Plaintiffs' claims against Sun (but not Jevic) on the grounds that Sun was not a "single employer" for purposes of the WARN Acts. The district court affirmed that decision on September 29, 2014. *In re Jevic Holding Corp.,* 526 B.R. 547 (D.Del.2014). In a separate opinion on May 10, 2013, the bankruptcy court dismissed the federal WARN Act claims against Jevic, but granted summary judgment in favor of the WARN Plaintiffs against Jevic on their New Jersey WARN Act claims. No appeal was taken of that ruling; in fact, Jevic did not contest liability on the New Jersey WARN Act claims.

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