Another Way Out: Structured Dismissals in Jevic's Wake

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I. Introduction

As the story goes, the absolute priority rule emerged from a judicial construction of an “undefined” requirement in the Bankruptcy Act of 1898 that plans of reorganization be “fair and equitable.” ¹ Thereafter, as against a senior but “nonassenting creditor … [any] sale … [was] void in equity, regardless of the motive with which it was made.” ² In time, “incidentally and belatedly,” ³ this common law precept found statutory expression in § 1129(b)(2)(B) of the Bankruptcy Code (“Code”), a requirement for confirmation of contested plans of reorganization in Chapter 11 cases. ⁴ During the same span of time, by precedent’s accretion rather than statutory codification, ⁵ the same “fair and equitable” standard was transposed into Federal Rule of Bankruptcy Procedure 9019(a) (“Rule 9019(a)”), ⁶ the sole provision in the whole of bankruptcy law ⁷ governing settlements and compromises. ⁸ By such happenstance, Rule 9019(a) and § 1129(b)(2)(B) had come to enthrone the same principle. So convinced, court after court has subjected the settlements governed by Rule 9019(a) to the same absolute priority rule written into § 1129(b)(2)(B). For decades, this pattern held, just as the pre-Code past seemed to compel.

Recently, a peculiar approach to ending a flailing Chapter 11 case—the structured dismissal—has garnered attention and invited this history’s reexamination. A novel construct, ⁹ a “structured dismissal” has been defined as “a hybrid dismissal and confirmation order” ¹⁰ in which a Chapter 11 case’s “dismissal[…] … [is] preceded by other orders of the bankruptcy court (e.g., orders approving settlements, granting releases, and so forth) that remain in effect after[ward].” ¹¹ Whereas dismissal normally returns a debtor ¹² to the status quo ante, ¹³ these newfangled orders override that anodyne presumption; instead, at the parties’ behest, various “bells and whistles” are incorporated into the bankruptcy court’s final edict. ¹⁴ Most famously, these orders often authorize the transfer of funds obtained from an under-secured creditor pursuant to a settlement under Rule 9019(a) or a sale per § 363(b) to junior and unsecured claims rather than more senior ones, a result inconsistent with the absolute priority rule.

Due in part to this common and divisive extra, controversy dogs the structured dismissal. Each side claims the same sections—§ 305, § 349, § 105, and § 1112—for its own, and the familiar tension between efficiency and fairness central to bankruptcy law has resurfaced in briefs and courtrooms. ¹⁵ With the advent of the structured dismissal, then, an historical accord has been disturbed as statutes and policies have dueled.

On May 21, 2015, a split panel of the United States Court of Appeals for the Third Circuit waded into this maelstrom in Official Committee of Unsecured Creditors v. CIT Group/Business Credit Inc. (In re Jevic Holding Corp.) ¹⁶ (“Jevic”). As the first published opinion by an appellate court to authorize a structured dismissal that deviated from the absolute priority rule, the majority joined a growing chorus of lower federal tribunals. ¹⁷ Nonetheless, the dissenting judge could find succor in the disapproval of this phenomenon evinced by the Office of the United States Trustee (“UST”) and the American Bankruptcy Institute Commission to the Study the Reform of Chapter 11 (“Commission”), among others, including his own colleagues. ¹⁸ Indeed, the Jevic majority gave no full-throated endorsement to this innovation, its approval fraught with nebulous conditions. Simply put, the law has become no clearer, the operative standard no easier to apply, by this latest entry into an incipient and unstructured body of law.
II. Background

A. A Working Definition
At their geneses, the new structured dismissal cases closely resemble the typical Chapter 11 cases. Usually, (1) one or more under-secured creditors hold the majority of the estate’s claims and the debtor’s obligations; (2) estate funds are likely insufficient to cover administrative expenses (i.e. is administratively insolvent); and (3) the estate is destined to be reduced to cash and subsequently distributed. As the case moves forward, the odds of plan confirmation plummet; by any reasonable measure, conversion or dismissal becomes the likelier possibility. Again, as in many Chapter 11 cases, one of two events first transpires: a sale of substantially all of the debtor’s assets pursuant to § 363(b), or the striking of a settlement agreement, submitted to the bankruptcy court under Rule 9019(a), between the debtor and key stakeholders disposing of significant legal and financial issues. Only from this point forward do the structured dismissal cases diverge, as the proceeds of any sale or settlement are invariably transferred from the estate to one or more under-secured lenders. The telltale order follows, exhibiting peculiarities alien to the more common dismissals. From the existing cases, five such special attributes can be catalogued: (1) specification of procedures for reconciling claims, adjudicating objections and making distribution to holders of allowed claims; (2) the “gifting” of funds, gleaned from the secured creditor’s recovery, to pay administrative and priority claims and, most controversially, unsecured and junior claims ahead of more senior obligations; (3) various cross-releases and exculpatory provisions; (4) retention of jurisdiction by the bankruptcy court over certain post-dismissal matters; and (5) conditions upon which formal dismissal of the case is explicitly predicated. By design, a structured dismissal nearly always avoids many requirements explicit in the Code, including the absolute priority rule, and accords permanence to the rights and assets gained by selected parties in the course of a debtor’s failed reorganization effort.

B. Statutory Framework & Debate

1. Straightforward Routes
The Code paves three paths by which a debtor normally exits Chapter 11: confirmation (of a plan of reorganization), conversion (to Chapter 7) by debtor or court, or dismissal (most commonly to the pre-filing status quo). Although a plan represents no more than “a reasonable probability of success” and can lead to a debtor’s effective liquidation, confirmation stands forth as Chapter 11’s favored outcome, “preserving going concerns and maximizing property available to satisfy creditors.” No simple task, many have bemoaned. To win confirmation—by “the affirmative vote of all impaired classes” or “over the vote of dissenting classes of claims” — the Code’s manifold requirements must be satisfied, including the absolute priority rule. Presently “a component” of the “fair and equitable” standard in § 1129(b)(2)(B)(ii), this statutory command applies whenever “the proponent of … [a] plan seeks to ‘cramdown’ the plan … on a class that is impaired and has rejected the plan.” Per this now statutory rule, senior interests are entitled to full priority over junior ones, the hierarchy set forth in the Code.

In contrast to the Code’s detailed confirmation process, no “bright-line test for determining whether dismissal or conversion is more appropriate” under § 1112 or § 305(a)(1) has yet been hewn. Instead, § 1112(b) conditions dismissal on “the best interests of creditors and the estate” and a finding of “cause” not credibly justified by a proponent of a plan for which a reasonable likelihood of confirmation can still be conjectured. While § 1112(b)(4) identifies sixteen examples of “cause,” this list is “not exhaustive,” courts empowered “to consider other factors as they arise, and use its equitable powers to reach an appropriate result in individual cases.” Echoing § 1112(b), § 305(a)(1) prescribes a “concept of abstention,” permitting a court either “to dismiss” or “suspend all proceedings in a [bankruptcy] case” so long as “the interests of creditors and the debtor would be better served by such dismissal or suspension.” Axiomatically, neither dismissal nor conversion is considered a success,
as the latter leads to a debtor’s liquidation under Chapter 7, an end distinguishable from a “liquidation … proposed in … [a confirmed] plan,” and the former usually restores a debtor to its prepetition state per § 349(b). Still, when no confirmation looks probable, the Code has long been construed as countenancing these two types of egress alone.

2. Law of Structured Dismissals: § 105, § 305, § 349 & § 1112
Unsurprisingly, the proponents of structured dismissals have mined these same sections for support. At first observation, § 1112(b) and § 305(a)(1) invite bankruptcy courts and parties to mold a case’s denouement to realize “the best interests of all parties,” an objective consistent with Chapter 11’s known ends. Sometimes, however, a standard dismissal may not serve these purposes, ones which all courts must honor in dispelling ambiguity or bridging the Code’s gaps. Meanwhile, § 349(a) and (b) allows a court to alter the presumptive effect of dismissal for “cause,” and Congress highlighted § 349(b)’s discretionary character and advised courts to “appropriately” modify the “scope” of § 349(b) so as “to protect rights acquired in reliance on the bankruptcy case.” Read together, these sections prompt one conclusion: when a novel type of end, i.e., a structured dismissal, better serves the Code’s overarching goals, as lodged in § 1112 and § 305, § 349(b) should be read to allow a court to approve such an individually tailored windup. Thus, in the few structured dismissal cases readily accessible, two events—either (1) the certain or probable inability to confirm a plan and the estate’s certain or probable administrative insolvency, or (2) the likely dissipation of assets that funding a liquidation plan will ensure—have repeatedly given rise to “cause” for purposes of § 1112(b)(4) and § 349, while § 305 has been invoked when a workout has been achieved. Regardless, to buttress the case for tinkering with dismissal’s typical consequences under § 349(b) in the name of “cause” and for the “best interest” of most parties-in-interest, § 105(a) has been invoked, as it may still be utilized so to assure the orderly conduct of the reorganization proceedings. To its champions, § 349’s “for cause” standard, when coupled with the (limited) judicial license afforded by § 105 for court to construe the Code so as to realize objectives—the best interest of the creditors as a body and the debtor as an entity, above all—encoded in § 1112 and § 305, provide sufficient statutory authority for a court to order a case’s structured dismissal.

Laying much upon the Code’s silence as to such a custom-made finale, opponents regard these interpretations of § 349(b), § 305(a) and § 105(a) as unpersuasive. Despite its “cause” safety valve, § 349’s “basic purpose” is crystal clear: “[T]o undo the bankruptcy case, as far as practicable, and restore all property rights to the position in which they were found at the commencement of the case.” By definition, a structured dismissal does not vacate all orders or unwind all transactions undertaken during a bankruptcy case. Accordingly, whatever “cause” may mean, such a dismissal does not cohere with the obvious and well-known purpose of the very section upon which its adherent rely, the structured dismissal hence seemingly barred by modern principles of statutory interpretation. Courts’ reliance on § 305(a) has induced distaste for similar reasons. Pursuant to its prevailing construction, “this section should be used sparingly and not as a substitute for a motion to dismiss under … § 1112(b),” as § 305(c) forbids appellate review of an order predicated on § 305(a). In essence, when predicated on § 305(a), the structured dismissal aggressively exploits a section intended to be very rarely invoked and does so with the purpose of evading § 1112 and Chapter 7; according to many, § 305(a) was not conceived with such maneuvering in mind. Finally, § 105 currently grants courts no more than “the power to exercise equity in carrying out the provisions of the Bankruptcy Code, rather than to further the purposes of the Code generally, or otherwise to do the right thing.” Consequently, § 105 cannot allow for a dismissal order not authorized by § 349’s ascertainment purpose and § 305’s tapered breadth.

3. Law of Structured Dismissals Continued: § 363 and Rule 9019
Because either a settlement or a sale often precedes structured dismissal, two other laws factor in the relevant jurisprudence. Per § 363(b), a debtor or trustee may “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” Although courts generally evaluate the so-called “Lionel factors,” the case law’s tenor
is unambiguous, and courts routinely allow a debtor “to sell all or substantially all of its assets pursuant to § 363(b) prior to confirmation … when the court finds a good business reason for doing so,”70 “other than appeasement of major creditors.”71 A potential buyer, in turn, is subject to a separate “good faith” requirement,72 construed to be “shown by the integrity of … [the buyer’s] conduct during the course of the sale proceedings” and lost by either any hint of “fraud, collusion between the purchaser and other bidders or the trustee” or “an attempt to take grossly unfair advantage of other bidders.”73

If the debtor opts for a global settlement instead of an asset sale, a rule rather than a statute controls.74 “On motion by the trustee and after notice and a hearing,” the first paragraph of Rule 9019(a) declares, “the court may approve a compromise or settlement.”75 On its face, Rule 9019(a) decrees no adjudicative touchstone for a settlement’s approval, and bankruptcy courts have naturally turned to history for guidance. As such, the “fair and equitable” criterion used for purposes of § 1123(b)(3)(A) and § 1129(b)(2)(A) is employed, courts tending to “consistently follow the settlement precedents established under the Bankruptcy Act decisions”:76 “The settlement must be fair and equitable and in the best interests of the estate.”77 In this analysis, one maxim has proven potent: “To minimize litigation and expedite the administration of a bankruptcy estate, compromises are favored in bankruptcy.”78 More mechanically, four elements (“Martin Factors”) are often considered: “(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.”79 Courts occasionally weigh four related others: (5) “[t]he competency and experience of counsel who support the settlement”; (6) “[t]he relative benefits to be received by individuals or groups within the class”; (7) “[t]he nature and breadth of releases[,] if any[,] to be obtained by officers and directors”; and (8) “[t]he extent to which settlement is the product of arm’s length bargaining.”80 Customarily, so long as a settlement does not “fall below the lowest point in the range of reasonableness,”81 judicial approval follows.82 The modern application of these factors for the evaluation of asset sales and of settlements has not been without controversy, implicating the same arguments articulated in the ongoing debate over structured dismissals. Traceable to the Bankruptcy Act of 1867, “which permitted a sale of a debtor’s assets when the estate or any part thereof was of a perishable nature or liable to deteriorate in value,” § 363(b) was rendered more permissive via judicial construction after the Code’s enactment.83 In the process, § 363(b)’s “good business reason” standard has provoked a critique now voiced by the opponents of structured dismissals: “[F]ear that one class of creditors may strong-arm the debtor-in-possession, and bypass the requirements of Chapter 11 to cash out quickly at the expense of other stakeholders, in a proceeding that amounts to a reorganization in all but name, achieved by stealth and momentum.”84 Though thusly criticized, the liberalization of § 363 has earned much judicial approbation.85 Conversely, the “fair and equitable” standard imputed into Rule 9019(a) has always elicited discordant interpretations. In United States v. AWECO, Inc. (In re AWECO, Inc.), the Fifth Circuit affirmed that this standard possessed a certain meaning as “a term of art”: even in a settlement, the absolute priority rule governed, and senior interests remained “entitled to full priority over junior ones.”86 Decades later, the Second Circuit rejected this “too rigid a test” in Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC). Instead, while “whether a pre-plan settlement’s distribution plan complies with the … Code’s priority scheme” was deemed to “be the most important factor for a bankruptcy court to consider in approving a settlement” under Rule 9019(a), a settlement “that does not comply in some minor respects with the priority rule” could still be ratified “where the remaining factors weigh heavily in [its] favor.”87 In Iridium, the absolute priority rule remained vital, as its existence minimized the “risk,” newly “heightened” by its more protean approach, “that the parties to a settlement may engage in improper collusion.”88 Governing the structured dismissal’s penultimate event,89 these challenged standards have factored into the debate over the structured dismissal’s statutory legitimacy.

C. Policies Cited
As in much of bankruptcy law, policies tangle too.

Opponents, including the UST, have advanced five common objections. “[S]trongly” resembling “impermissible sub rosa plans,” a structured dismissal often predetermines the terms of a Chapter 11 plan, especially when combined with an asset sale or settlement. In the negotiation and consummation of a structured dismissal, “important [C]hapter 11 safeguards” are routinely “ignore[d],” including voting, acceptance, disclosure, and the Code’s “fair and equitable” standards, in the interest of efficiency. The final order often includes release provisions otherwise barred by § 1141(d)(3) (as to non-individual debtor discharges) or § 524(e) (as to non-debtor obligations). Consciously flouting the Code, the parties to a structured dismissal’s preceding sale or compromise often alter and revise the claim resolution process envisioned by the Code and the Rules; in so doing, they consistently foist extra burdens on creditors holding claims otherwise entitled to prima facie validity. Lastly, in structuring the transfer of assets from the debtor’s one or more under-secured creditors, these orders typically allocate funds directly to junior creditors, violating the absolute priority rule, and often do so without providing disclosure sufficient to allow creditors to reasonably evaluate the proposed distribution. For these same reasons, after recommending “principles for [S]ection 363 sales” that “should render the use of structured dismissals unnecessary,” the Commission damned them as “particularly troubling.” In its view, structured dismissal cases too often fail to “afford[] parties in interest the protections of a plan, disclosure statement[,] and the confirmation solicitation process;” sacrificing “the rights of, and key protections for, creditors” guaranteed by the Code and the Rules. As structured dismissals are calculated “to avoid being subject to § 1129,” this result is inevitable and insupportable under the Code.

Proponents, on the other hand, see structured dismissals as “a cheaper and quicker alternative to a liquidating Chapter 11 plan.” As the Commission itself conceded, “the actual or perceived costs and delays associated with the plan-confirmation process or a conversion to Chapter 7” have driven many parties to request structured dismissals. Conversions have been resisted precisely “because of the automatic appointment of a trustee and the subordination of unpaid administrative claims in the [C]hapter 11 case to the administrative claims incurred by the [C]hapter 7 trustee.” Believing a structured dismissal to be one of “the quickest and most cost-effective ways to conclude … [a] [C]hapter 11 case,” companies and debtors have grown to like this newest exit route. Perhaps most importantly, when the facts are suitably dismal and confirmation is most unlikely, a structured dismissal holds forth the prospect of some meaningful return to the creditors as a whole. Not inconsistent with specific provisions of the Code yet consonant with its aims, the structured dismissal is thereby defended.

III. Jevic: Facts And Opinions

A. Relevant Facts
It began with a humdrum acquisition.

On June 30, 2006, Saia, Inc., sold Jevic Transportation, Inc. (“Jevic”), a trucking business, to an affiliate of Sun Capital Partners (“Sun”), a private investment firm based in Boca Raton, Florida. Commercial Investment Trust Group, Inc., (“CIT”), provided Sun with financing, and CIT simultaneously extended to Jevic an $85 million revolving credit facility. By May 2008, Jevic had fruitlessly labored to surmount a nationwide decline in freight volumes for more than a year, leading it to cease operations and send notice of impending termination to 90% of its 1,500 employees on May 19, 2008. The next day, Sun and Jevic filed for Chapter 11. Pre-petition, Jevic had arranged a $60 million debtor-in-possession financing package from CIT to help in its reorganization efforts. Post-petition, owing CIT and Sun, its first-priority secured creditors, roughly $53 million, Jevic began liquidating its assets and used the proceeds to partially repay these outstanding obligations.
On May 21, 2008, a group of Jevic’s terminated trucker drivers (“Truckers”) filed a class action against their former employer for violating the federal and state Worker Adjustment and Retraining Notification Acts (“WARN Acts”). In June 2008, an Official Committee of Unsecured Creditors (“Committee”) was appointed to represent Jevic’s unsecured creditors, who then held claims totaling more than $20 million. Subsequently, the Committee brought a fraudulent conveyance action against CIT and Sun, “alleging that Sun, with CIT’s assistance, acquired Jevic with virtually none of its own money on baseless projections of almost immediate growth and increasing profitability.” By March 2012, Jevic’s assets numbered only two: $1.7 million, every cent subject to Sun’s lien, and the hypothetical value of the Committee’s suit.

The estate so bereft, representatives of the Committee, Sun, CIT, the Truckers, and “what was left of Jevic” commenced negotiations. Eventually, Sun, CIT, the Committee, and Jevic’s shadow struck a settlement in which these parties would exchange releases, CIT would pay $2 million into an account marked for legal fees and administrative expenses, Jevic’s bankruptcy case would be dismissed, and Sun would assign its residual assets to a trust that would “pay tax and administrative creditors first and then the general unsecured creditors on a pro rata basis.” Procedurally, Sun, CIT, and the Committee would seek approval of this settlement (“Jevic Settlement”) under Rule 9019 and then ask the bankruptcy court for a structured dismissal pursuant to § 305(a)(1), § 349(b) and § 105(a).

By May 21, 2015, the Jevic Settlement had netted Jevic’s general unsecured creditors a return of almost four percent. One hurdle, however, had never been cleared. Although they held higher priority claims than the tax and trade creditors destined to be paid, one party had been left out of the settlement’s proposed distribution: the Truckers, holders of still-uncontested WARN Act claims. For reasons never expressly disclosed, they had not become part of the settlement proposed and had been skipped in the distribution devised by Sun and CIT. Their claims, which they “estimated … to have been worth $12,400,000, of which $8,300,000 was a priority wage claim” and which formed the bulk of Jevic’s unsecured debt, had been totally ignored.

B. Lower Courts’ Rulings

Ruling from the bench and overruling the opposition of the Truckers and the UST, the bankruptcy court approved the Jevic Settlement under the Martin Factors on November 28, 2012. Specifically, it held the absolute priority rule was a statutory requirement inapplicable to a compromise under Rule 9019(a) and issued the structured dismissal envisaged by Sun, CIT, and Jevic’s remnant. In elucidating its reasoning, the bankruptcy court emphasized that “dire [factual] circumstances” warranted this relief. The absence of any reasonable prospect of plan confirmation and the unlikelihood of any meaningful distribution to anyone but the secured creditors without the Jevic Settlement proved crucial. Additionally, the estate’s administrative insolvency and the secured creditors’ confessed unwillingness to agree to a similar deal in a prospective Chapter 7 case rendered conversion “impracticable.” The bankruptcy court made two further remarks: first, the Truckers had never been “barred from participating in settlement negotiations,” and second, “their omission from the settlement distribution” effected no prejudice due to the estate’s lack of unencumbered funds. With the Jevic Settlement offering a “meaningful return” to most creditors, “the paramount interest of the creditors,” judged to be the most important factor under Rule 9019 by the bankruptcy court, “mandate[d] approval.”

Acknowledging, like the bankruptcy court, that the settlement did not follow the absolute priority rule, but holding that “this is not a bar to the approval of the settlement as it is not a reorganization plan,” the district court affirmed. Furthermore, it accepted a new argument offered up by CIT and Sun: that the appeal had become equitably moot. The Jevic Settlement had been “substantially consummated” after the bankruptcy court’s ruling, it found, and a successful appeal would lead to its “irreversibl[e] scrambl[ing]” for the sake of a “speculative recovery” and on behalf of appellants who had “chose[n] not to substantively participate in the negotiation and subsequent settlement.” Concluding so, it would not “unwound” it.
C. Majority Speaks

Authored by Judge Thomas Hardiman, the Third Circuit majority opinion began with two observations: “[T]he Code does not expressly authorize structured dismissals,” and the Truckers had “mount[ed] no real challenge to the Bankruptcy Court’s findings that there was no prospect of a confirmable plan in this case and that conversion … was a bridge to nowhere.” 137 Offering up a tentative definition of the structured dismissals—“As we understand them … [they] are simply dismissal that are preceded by other orders of the bankruptcy court … that remain in effect after dismissal” 138 —the majority turned to § 349(b). Concededly, the Code “contemplates that dismissal will typically reinstate the pre-petition state of affair,” but this subsection also “authorizes the bankruptcy court to alter the effect of dismissal for cause,” a most malleable term, 139 and therefore “does not strictly require dismissal of a Chapter 11 case to be a hard reset.” 140 Even so, the Third Circuit discerned cogent merit in the Truckers’ “forceful[ ]” argument that “[n]either ‘dire circumstances’ … nor § 105(a) ” allowed courts and parties to employ Rule 9019(a) to effectuate “an end run around the procedures that govern plan confirmation and conversion to Chapter 7.” 141 Congress, after all, does not “hide elephants in mouseholes,” 142 and rule interpretations inconsistent with the Code cannot be countenanced, 143 a statutory imperative imbued with greater urgency than many due to Congress’ sporadic review of the rulemaking process. 144 Nevertheless, with the Code lacking any explicit prohibition on structured dismissals and with the language of § 349(b) sufficiently flexible to accommodate it, the Third Circuit chose to craft a standard and impose no prohibition: “[A]bsent a showing that a structured dismissal had 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.” 145 This power accepted, the majority then confronted the issue raised by the Jevic Settlement’s “skip[ping] [of] a class of objecting creditors in favor of more junior creditors,” a setup barred explicitly from all plans by the Code’s absolute priority rule (§ 1129) and implicitly from settlements by virtue of Rule 9019(a)’s common construction. 146 Once more, the majority acknowledged the “force” of the Truckers’ argument, for some case law had read § 103 to “require[ ] settlements in Chapter 11 cases to strictly comply with the § 507 priorities.” 147 Yet, two facts undercut the Truckers’ position. First, as a matter of statutory construction, if § 103(a) compelled all distributions to comply with § 507, “there would have been no need for Congress to codify the absolute priority rule” in § 1129(b)(2)(B). 148 In accordance with two different canons, 149 the choice to do so was treated as deliberate and significant and read to imply an intent to limit the reach of the absolute priority rule’s codified iteration to plans alone. Second, the few contrary cases “spoke in the context of plans of reorganization, not settlements,” as the Truckers themselves recognized. 150 In the Third Circuit’s reckoning, neither Congress nor the Court had extended the absolute priority rule to settlements in bankruptcy after the Code’s enactment and Rule 9019’s adoption. 151 It would not do so either.

Still, in a nod to its pre-Code roots and Rule 9019(a)’s longstanding construal, the majority saw its underlying principles of fairness and equity as applicable to a settlement’s appraisal, leading it to reject the Fifth Circuit’s “per se rule” in AWECO and embrace the “more flexible approach” enunciated in Iridium. 152 Hence, the policy animating the absolute priority rule —“ensuring the evenhanded and predictable treatment of creditors” so as to minimize the probability of “collusion among debtors, creditors, and their attorneys and other professionals,” the same “justifiable concerns” raised about the prevalence of settlements and sales in the modern era 153 —would continue to carry much weight in the settlement context. 154 “[U]sually,” therefore, “compliance with the Code priorities” would “be dispositive of whether a proposed settlement is fair and equitable” for purposes of Rule 9019(a), and bankruptcy courts were forbidden from “approv[ing] settlements and structured dismissals devised by certain creditors in order to increase their shares of the estate at the expense of other creditors.” 155 However, on rare occasions, “specific and credible grounds,” such as “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,” would justify deviation from Rule 9019(a)’s implicit absolute priority rule. 156 Presented with “dire” facts so evidencing, the bankruptcy court
had acted in a proper biblical fashion, “reluctantly approving the only course” that, though “economically ugly,” “resulted in some payment to creditors other than CIT and Sun.” 157

D. One Concurs and Dissents

To Judge Anthony Joseph Scirica, Jevic was “a difficult case.” 158 He concurred in two parts of the majority’s decision. First, he agreed with its backing and characterization of *Iridium*: “[A]bsent extraordinary circumstances,” settlements should comply with “the Code’s essential priority scheme.” 159 Second, he too raised no question about the bankruptcy court’s factual findings and branded its set of alternatives “unpalatable.” 160 But he dissented because he could find no special circumstances in the bankruptcy court’s litany of “dire” facts that justified approval of the Jevic Settlement by *Iridium*’s extension. 161

His reasons were twofold. First, he accorded little weight to Sun and CIT’s declared refusal to strike such a settlement upon conversion. 162 As this situation was “a product” of their “own making,” liquidation did not seem to be “the only alternative” to the settlement reached by the Committee, CIT, and Sun, and their protestations could not therefore serve as decisive evidence. 163 Otherwise, claimed recalcitrance would grant similarly placed creditors a leverage that could not but disturb the delicate balance essential to Chapter 11’s operation. 164 Moving beyond this objection, Judge Scirica articulated many of the same concerns raised to the recent spate of structured dismissals. 165 Not directed at “estate-value maximization,” the common reason invoked under Rule 9019(a), the Jevic Settlement deviated from the Code’s scheme “so as to maximize the recovery that certain creditors would receive.” 166 Very much akin to a *sub rosa* plan, the agreement “reallocated assets of the estate in a way that would not have been possible” outside of Chapter 11 without observing its “safeguards of disclosure, voting, acceptance, and confirmation,” “an impermissible end-run around the carefully designed routes by which a debtor may emerge from Chapter 11 proceedings.” 167 Many Chapter 11 cases star debtors similar to Jevic and creditors as secured as CIT and Sun, and approval of the Jevic Settlement invited other secured creditors “who want[] to avoid providing funds to priority unsecured creditors” to make much of the majority’s rationcination in future cases. 168

A critical assumption and a subtle distinction with *Iridium* girded this attack. To Judge Scirica, the trust provision in the Jevic Settlement was more akin to a § 363 asset sale than the gifting of non-estate property. 169 So “distinguishable from the so-called ‘gifting’ cases,” the funds transferred by Sun and CIT to Jevic’s junior creditors as part of the settlement and in violation of the absolute priority rule could not be defined as anything but property of the estate under § 1115(a) and § 541(a). 170 So classified, they rightly belonged to the creditor body as a whole, not just “certain creditors,” which was how the settlement effectively treated Sun’s $1.7 million. 171 Thereupon, Judge Scirica questioned the majority’s reliance on *Iridium*, adducing two reasons for its inapplicability. First, it was unclear “whether the Second Circuit saw the settlement’s initial distribution of funds to the litigation trust as a deviation from the Code’s priority scheme,” as, seemingly, “the majority of the funds” in *Iridium* were set to “actually flow back to the estate” and be distributed in accordance with the absolute priority rule. 172 Second, the Second Circuit had not approved a settlement in contravention of the absolute priority rule; rather, it had remanded to the bankruptcy court for further consideration of the justification proposed for the “possible” deviation accepted by the bankruptcy court in Jevic: “[the] skip[ping] over [of] an entire class of creditors.” 173 In other words, the Second Circuit had never signed off on a Jevic-style settlement inconsistent with § 1129(b)(2)(B), as his two colleagues had just done.

E. Unity of Mootness

Diverging from the district court, the entire panel agreed that the judge-made doctrine of equitable mootness 174 bore no relevance to the matter at hand. 175 As generally construed, dismissal of an appeal on this ground requires assessment of five interlinked “prudential factors”: “(1) whether the reorganization plan has been substantially consummated, (2) whether a stay has been obtained, (3) whether the relief requested would affect the rights of parties not before the court, (4) whether the relief
requested would affect the success of the plan, and (5) the public policy of affording finality to bankruptcy judgments.”

This assessment normally proceeds “in two analytical steps: (1) whether a confirmed plan has been substantially consummated; and (2) if so, whether granting the relief requested in the appeal will (a) fatally scramble the plan and/or (b) significantly harm third parties who have justifiably relied on plan confirmation.”

Essentially, for this narrowly circumscribed doctrine to apply, the plan’s implementation must have “progressed to the point that turning back may be imprudent.” For the same reason the Code’s priority system did not govern this dispute—in Jevic, there was no confirmed plan of reorganization—the entire panel found this doctrine inapplicable. Interestingly, CIT and Sun had insisted that it did, a position incompatible with their argument regarding the inappositeness of the absolute priority rule to any settlement’s adjudication.

IV. Left In Jevic’s Wake

A. Majority Opinion’s Limited Reach

Though it constitutes the first appellate decision approving a structured dismissal, many caveats pepper Jevic, its precedential effect sharply limited by its peculiar facts and wary dicta. Most obviously, having emphasized the Truckers’ failure to undermine the bankruptcy court’s factual findings of “dire circumstances,” the Third Circuit chose not to resolve the question whether structured dismissals are permissible when a confirmable plan remains possible or conversion to Chapter 7 may prove worthwhile. In fact, the majority okayed the structured dismissal in Jevic precisely because the bankruptcy court had found no plan was likely and conversion was certain to result in the secured creditors taking all that remained of a puny estate. Even the dissent broadly accepted these two conclusions and, though it would not have affirmed, would have unwound the settlement only in part. Just as emphatically, the majority and dissent did not hide their distaste for structured dismissal as a standard exit strategy, striving to depict it as nothing less than an ugly swan. Deeming such dismissals proper only in “rare cases” and “rare instances,” the majority characterized the Truckers’ exclusion from the final settlement as “unfair[]” and considered the question in Jevic “a close call” in spite of the lower courts’ uncontested factual findings.

A cacophony of baleful facts had positioned the proffered settlement as the least bad option, with Rule 9019(a)’s reasonableness bar rather low. Less well noticed, the majority rested purely on § 349’s broad “cause,” engaging in no detailed dissection of history’s contrary input and laying no map to aid courts and parties in the construction of this inherently discretionary term in cases less self-evidently dire. In point of fact, after perusing Jevic, one is tempted to ask: what if the Truckers had raised a more active challenge to the bankruptcy court’s factual findings?

B. Other Cases’ Intimations

Compounding the dilemma posed by Jevic, the extant lower court opinions, few of them published, offer only vague hints about the kind of structured dismissal likely to secure a judge’s acceptance.

Seemingly preponderant, the pro-side illuminates the barest of paths. In overruling the UST’s objections and approving a structured dismissal, one court constrained by AWECO succinctly stated: “[I]f appropriate notice is given and the process is fair and does not illegally or unfairly trample on the rights of the parties, the proposal should be approved.”

It proceeded to emphasize three factors weighing in favor of a structured dismissal: (1) no party with an economic stake in the case objected, with “no non-consenting creditors” present; (2) with “most” administrative claims having been satisfied by a § 363 sale, fee applications and unsecured claims “basically” remained; and (3) the post-sale settlement had been found “fair and equitable” by virtue of not resembling a sub rosa plan and not violating the absolute priority rule. Another bankruptcy court concluded that “the economy and efficiency of administration would be better served through a structured dismissal,” enumerating a lengthy litany of justifying features: (1) the debtor had sold substantially all of its assets; (2) a dismissal would not occur until the debtor submitted certification that (a) the claims reconciliation process had been completed; (b) all proceeds from the sales had been transferred to the estate; and (c) it had given at least fourteen days’ notice to all creditors of its estimated distribution funds and that any objections to the proposed distribution have been resolved; (3) the trustee’s fees would be paid in full; and (4) orders
with respect to final fee applications had already been entered.\textsuperscript{189} The assets “finite,” it was “clear” and “undisputed” that “the proposed structured dismissal is the most efficient and economic way to administer the case.”\textsuperscript{190} In a third case, the bankruptcy court waived the presumptive effect of § 349 after (1) the debtor presented convincing evidence that the plan confirmation process would dissipate any unsecured creditors’ possible recovery, and (2) the UST made no formal objection.\textsuperscript{191} Notably, in these and similar cases, the debtor first obtained judicial approval for a global settlement,\textsuperscript{192} then notice and an opportunity to object was imparted to all parties-in-interest in a manner reminiscent of Chapter 11 plan confirmation.\textsuperscript{193} In others, no senior class had been skipped in violation of the absolute priority rule.\textsuperscript{194} In many, consensus among major stakeholders has been underscored,\textsuperscript{195} as has a debtor’s unquestioned good-faith administration of the estate and treatment of its creditors.\textsuperscript{196} In this fact-intensive exercise, when such circumstances have been in evidence, some structured dismissals have been ordered.

Other fact patterns have consistently engendered resistance. Whenever the proposed settlement “alter[ed] parties’ rights without their consent” and “lack[ed] many of the Code’s most important safeguards,” rebuff has followed.\textsuperscript{197} As one bankruptcy court explained, “[e]ven if a structured dismissal would result in more assets being made available to the creditor body, such relief may not be approved without assurances that creditor protections provided by confirmation or liquidation pursuant to § 1129 or dismissal or conversion pursuant to § 1112(b) are either present or waived by all parties.”\textsuperscript{198} Another refused to dismiss when the proposed settlement contained no process for claims reconciliation, no claims bar date, and no procedures for the adjudication of disputed claims.\textsuperscript{199} In these hostile cases, a trend can be detected: a request for a structured dismissal will often fail “if the rights of others who are not parties to the settlement will be unduly prejudiced”\textsuperscript{200} and the debtor has mismanaged its case and estate.\textsuperscript{201}

V. Conclusion
For nearly a century, the common law’s absolute priority rule had bound both plans and compromises. Since its adoption, the Code had seemed to recognize no more than three means of ending a Chapter 11 case. As parties have increasingly attempted to effectuate stumbling reorganizations’ structured dismissals, these old patterns have been interrupted, with statute and rule nimble enough to motivate exponents and detractors alike. In \textit{Jevic}, in divining a principle to aid courts in navigating this reality, the Third Circuit rejected a mechanical rule and endorsed a more limber standard. Per its logic, so long as no evasion of the Code’s procedural protections and safeguards is apparent, a bankruptcy court may order a structured dismissal. And so long as “special circumstances” can be demonstrated, the absolute priority rule may be discarded in the rarest of cases. Tentative at best, what facts are sufficiently dismal to justify deviation \textit{Jevic} left to others’ musing—or, perchance, a higher court’s explication\textsuperscript{202} and a legislature’s determination.\textsuperscript{203}

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Footnotes

Rethinking Absolute Priority, 87 Mich. L. Rev. at 969.


In legal parlance, the term “law” encompasses all rules and statutes.


See infra Part II.B-C.


See infra Part IV.B.

See infra Part II.C.

In “gifting” cases, a secured creditor usually give up a portion of their demarcated proceeds under a reorganization plan to holders of unsecured and subordinated claims. In re Armstrong World Indus., 320 B.R. 523, 538-39 (D. Del.), aff’d, 432 F.3d 507 (3d Cir.
2005). Arguably, “[s]uch a carve out does not offend the absolute priority rule or the Bankruptcy Code’s distribution scheme because the property belongs to the secured creditor—not the estate.” In re World Health Alternatives, Inc., 344 B.R. 291, 299 (Bankr. D. Del. 2006). According to one source, the majority view rejects gifting’s statutory permissibility. A Priority is a Priority, 34 Am. Bankr. Inst. J. at 79.

Whether such jurisdiction can be retained is debatable. See generally Outer Limits of Jurisdiction, 31 Am. Bankr. Inst. J. at 46-47, 91.

In re Strategic Labor, Inc., 467 B.R. 11, 18 n.10 (Bankr. D. Mass. 2012) (summarizing some common provisions and stereotypical cases); Structured Chapter 11 Dismissals, 29 Am. Bankr. Inst. J. at 56 & 58 (same); ABI Report, at 270-71 (same); see also In re Pilgrim’s Pride Corp., No. 08-45664-DML-11, 2010 WL 200000, at *5 n.14 (Bankr. N.D. Tex. Jan. 14, 2010) (concluding that Bank of New York Trust Co. v. Official Unsecured Creditors’ Committee (In re Pacific Lumber Co.), 584 F.3d 229 (5th Cir. 2009), was not “meant to prevent bankruptcy courts from retaining jurisdiction as the exclusive forum for deciding cases raising issues pertaining to the performance by a debtor in possession”). More examples appear throughout this article. See cases cited infra nn. 52-54, and discussion infra Part IV.B.


11 U.S.C.A. § 1112(b)(1)-(2); see, e.g., Barron & Newburger, P.C. v. Tex. Skyline, Ltd. (In re Woerner), 783 F.3d 266, 269 (5th Cir. 2015); Anderson v. West (In re Anderson), 604 F. App’x 735, 737 (10th Cir. 2015).

11 U.S.C.A. §§ 305(a), 349(b) & 1112(b)(1); In re Edwards, 538 B.R. 536, 541 (Bankr. S.D. Ill. 2015).


In re Bus. Info. Co., 81 B.R. 382, 384 (Bankr. W.D. Pa. 1988); see also, e.g., In re Trina Assocs., 128 B.R. 858, 870 (Bankr. E.D.N.Y. 1991) (“[Section] 305 expressly requires a determination that not only will the interests of creditors be better served by a dismissal or suspension, but also that the interests of the debtor be served by such dismissal.” (internal quotation marks omitted).


See, e.g., Debtors’ Motion to Approve, In re BT Holding III, LLC, No. 09-bk-11173 (CSS) (Bankr. D. Del. July 23, 2009), ECF No. 268; Debtor’s Motion to Dismiss, In re Dawahare’s of Lexington, LLC, No. 08-bk-51381 (Bankr. E.D. Ky. Dec. 10, 2008), ECF No. 304). In In re BT Holding III, LLC, the bankruptcy court denied the debtors’ and creditors’ committee joint motion for a structured dismissal.


*Structured Chapter 11 Dismissals*, 29 Am. Bankr. Inst. at 56; see also In re Fleurantin, 420 F. App’x 194, 197 (3d Cir. 2011).

Cf. In re OptinRealBig.com, LLC, 345 B.R. 277, 290 (Bankr. D. Colo. 2006) (“When a court determines that a debtor’s economic value is likely to be greater by dismissing the case rather than converting it, the court maximizes the opportunity of individual creditors to recover their claims.”).


H.R. Rep. No. 95-595, at 338; see also, e.g., In re Edwards, 538 B.R. 536, 541 (Bankr. S.D. Ill. 2015) (Repeating that “[t]he scope of § 349(b) is broad, and serves to undo the bankruptcy case to the extent possible.”) (citation and internal quotations omitted); In re Sanitate, 415 B.R. 98, 105 (E.D. Pa. 2009) (“Courts have interpreted this section as having the general effect of restoring the status quo ante.”).


11 U.S.C.A. § 305(c).


11 U.S.C.A. § 363(b)(1); Fla. Dep’t of Revenue, 554 U.S. at 36.

Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionell Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983); see also, e.g., In re Med. Software Solutions, 286 B.R. 431, 440-41 (Bankr. D. Utah 2002) (citing Lionel and applying its test). The original list was “not intended to be exclusive, but merely to provide guidance.” In re Lionel Corp., 722 F.2d at 1071; accord In re GSC, Inc., 453 B.R. 132, 156 (Bankr. S.D.N.Y. 2011). At least four more factors have been concocted since 1983. In re General Motors Corp., 407 B.R. 463, 490 (Bankr. S.D.N.Y. 2009); accord In re CPJFK, LLC, 496 B.R. 290, 304 (Bankr. E.D.N.Y. 2011).

In re General Motors Corp., 407 B.R. at 491; see also, e.g., In re Boston Generating, LLC, 440 B.R. 302, 321-22 (Bankr. S.D.N.Y. 2010).

In re Lionel Corp., 722 F.2d at 1070.


In re City of Stockton, 486 B.R. 194, 197 (Bankr. E.D. Cal. 2013); see also Cecelia H. Goetz & Richard Stern, Bankruptcy—Commentary, 47 Brook. L. Rev. 691, 701-04 (1981) (discussing history behind bankruptcy court approval of compromises amongst interested parties).


In re Martin, 91 F.3d at 393; accord, e.g., In re Derivium Capital, LLC, 380 B.R. 392, 405 (Bankr. D.S.C. 2007); Hicks, Muse & Co. v. Brandt (In re Healthco Int’l Inc.), 136 F.3d 45, 50 (1st Cir. 1998) (citing TMT Trailer Ferry, 390 U.S. at 424-25).


Republic Credit Corp. I v. Boyer (In re Boyer), 328 F. App’x 711, 713-14 (2d Cir. 2009).


In re Chrysler LLC, 576 F.3d at 116.


United States v. AWECO, Inc. (In re AWECO, Inc.), 725 F.2d 293, 298 (5th Cir. 1984); see also In re Treats Invs., LLC, Nos. 02-40131-DML-11 & 02-40132-DML-1, 2002 Bankr. LEXIS 1950, at *9 (Bankr. N.D. Tex. July 31, 2002) (“[S]ettlement of a claim must conform to the absolute priority rule in order for the settlement to be approved before the filing of a plan.”).


In re Iridium Operating LLC, 478 F.3d at 464. This reference to “collusion” echoes the courts’ interpretation of § 363(m). See supra text accompanying note 74.

See supra Part II.A.


The concept of the sub rosa (“below the line”) plan dates to In re BraniffAirways, Inc. 700 F.2d 935 (5th Cir. 1983); see also In re Torch Offshore, Inc., 327 B.R. 254, 256-57 (E.D. La. 2005). In this seminal case, an appellate court concluded: “The debtor and the bankruptcy court should not be able to short circuit 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[.]” pursuant to § 363. In re Braniff Airways, Inc., 700 F.2d at 940. Whether this once potent aversion remains as strong in Chrysler’s aftermath is an open question.


ABI Report, at 272.

Motion to Approve Compromise under Rule 9019, In re TLG Liquidation LLC, No. 10-10206 (MFW) (Bankr. D. Del. Apr. 30, 2010), ECF No. 275.


ABI Report, at 271.


*In re Jevic Holding Corp.*, 787 F.3d at 179; see also Anne Lawton, *The Individual Chapter 11 Debtor Pre-and Post-BAPCPA*, 89 Am. Bankr. L.J. 455, 481 & n.119 (2015) (Summarizing the views of structured dismissals proponents in these terms: “[I]f some creditors are better off due to a settlement and none are worse off … then the insistence on a confirmed plan elevates form over substance.”).

See, e.g., Scrivner v. Mashburn (*In re Scrivner*), 535 F.3d 1258, 1263 (10th Cir. 2008) (stating the general rule that a court may not employ § 105 “in a manner that is inconsistent with the other, more specific provisions of the [Bankruptcy] Code”) (citations and internal quotations omitted); Amir Shachmurove, *Sherlock’s Admonition: Vindicatory Contempts as Criminal Actions for Purposes of Bankruptcy Code § 362, 13 DePaul Bus. & Com. L.J. 67, 74-77 (2014) (outlining the Supreme Court’s modified plan meaning approach to the Code).


*In re Jevic Holding Corp.*, 787 F.3d at 175.

*In re Jevic Holding Corp.*, 787 F.3d at 175-76.


In re Jevic Holding Corp., 787 F.3d at 176.

In re Jevic Holding Corp., 787 F.3d at 176.

In re Jevic Holding Corp., 787 F.3d at 176.

In re Jevic Holding Corp., 787 F.3d at 176.

In re Jevic Holding Corp., 787 F.3d at 177.


In re Jevic Holding Corp., 787 F.3d at 177 n.1.

In re Jevic Holding Corp., 787 F.3d at 177.


In re Jevic Holding Corp., 787 F.3d at 177.


In re Jevic Holding Corp., 787 F.3d at 179; Czyzewski, 2014 WL 268613, at *3.

Czyzewski, 2014 WL 268613, at *4. For more on this doctrine, see infra Part III.E.


In re Jevic Holding Corp., 787 F.3d at 181.

In re Jevic Holding Corp., 787 F.3d at 181.

See, e.g., In re J.C. Householder Land Trust #1, 502 B.R. 602, 606 (Bankr. M.D. Fla. 2013) (citing Black’s Law Dictionary 213 (7th ed. 1999)); In re Sadler, 935 F.2d 918, 921 (7th Cir. 1991) (“‘Cause’ under § 349(b) means an acceptable reason.”), cited in In re Jevic Holding Corp., 787 F.3d at 181.

In re Jevic Holding Corp., 787 F.3d at 181 (internal quotation marks omitted) (citing § 349(b) and H.R. Rep. No. 95-595, at 338); see also, e.g., In re Lewis, 346 B.R. 89, 104 (Bankr. E.D. Pa. 2006) (concluding that § 349(b) does not require a “precise restoration of position”) (citation and internal quotations omitted).

In re Jevic Holding Corp., 787 F.3d at 181.


For a discussion of one such example, see Amir Shachmurove, Bankruptcy Rule 7004(h) after Espinosa: A Timely Distinction between Constitutional and Statutory Service, 6 Norton Bankr. L. Adviser 1, 4-5 (June 2014).

In re Jevic Holding Corp., 787 F.3d at 182; see also supra Part II.B.

In re Jevic Holding Corp., 787 F.3d at 182; see also supra Part II.B.

In re Jevic Holding Corp., 787 F.3d at 182.

In re Jevic Holding Corp., 787 F.3d at 182 n.7.


In re Jevic Holding Corp., 787 F.3d at 183.

In re Jevic Holding Corp., 787 F.3d at 183-84.

See supra Part II.B.

In re Jevic Holding Corp., 787 F.3d at 184 (citing Motorola, Inc. v. Official Comm. of Unsecured Creditors (In re Iridium Operating LLC), 478 F.3d 452, 464 (2d Cir. 2007) (citing United States v. AWECO, Inc. (In re AWECO, Inc.), 725 F.2d 293, 298 (5th Cir. 1984))); see also Thomas H. Jackson, The Logic and Limits of Bankruptcy Law 213 (Beard Books 2001) (1986) (examining the rationale behind “the original absolute priority rule”).

In re Jevic Holding Corp., 787 F.3d at 184; see also Iridium, 478 F.3d at 466.

In re Jevic Holding Corp., 787 F.3d at 184, 186.

In re Jevic Holding Corp., 787 F.3d at 185.
In re Jevic Holding Corp., 787 F.3d at 186 (Scirica, J., concurring and dissenting in part).

In re Jevic Holding Corp., 787 F.3d at 186.

In re Jevic Holding Corp., 787 F.3d at 189.

In re Jevic Holding Corp., 787 F.3d at 186.

In re Jevic Holding Corp., 787 F.3d at 186.

In re Jevic Holding Corp., 787 F.3d at 186.

In re Jevic Holding Corp., 787 F.3d at 186.


See supra Part II.C.

In re Jevic Holding Corp., 787 F.3d at 187.

In re Jevic Holding Corp., 787 F.3d at 188 (quoting, among others, Lionel, 722 F.2d at 1071); accord Cases Dismissed Outside of Code’s Structure?, 30 Am. Bankr. Inst. J. at 20; see also In re Biolitec, Inc., 528 B.R. 261, 269 (Bankr. D.N.J. 2014) (denying structured dismissal because the proposed dismissal sought to “alter parties’ rights without their consent and lack[ed] many of the Code’s most important safeguards.”).

In re Jevic Holding Corp., 787 F.3d at 189-90.

In re Jevic Holding Corp., 787 F.3d at 188.

In re Jevic Holding Corp., 787 F.3d at 188; see also supra n.23.

In re Jevic Holding Corp., 787 F.3d at 189.

In re Jevic Holding Corp., 787 F.3d at 189.

In re Jevic Holding Corp., 787 F.3d at 189.


Though he rejected the doctrine’s application, Judge Scirica recognized the dangers of unwinding the settlement and therefore proposed a modified concord in his dissent. In re Jevic Holding Corp., 787 F.3d at 190. The majority, meanwhile, did not mention it, though it necessarily rejected it.


In re SemCrude, L.P., 728 F.3d at 321; see also, e.g., In re One2One Commc’ns, LLC, 805 F.3d 428, 435 (3d Cir. 2015); In re Phila. Newspapers, LLC, 690 F.3d 161, 170 (3d Cir. 2012).

In re Jevic Holdings Corp., 787 F.3d at 186.


In re Jevic Holding Corp., 787 F.3d at 181-82; see also Alix S. Brozman, Alan N. Resnick & Brad Eric Scheler, Third Circuit Permits the Use of Structured Dismissals that Deviate from the Bankruptcy Code’s Priority Scheme, Pratt’s J. Bankr. L. 372 (Oct. 2015) (highlighting this point).
In re Jevic Holding Corp., 787 F.3d at 185; see also In re Petersburg Regency LLC, No. 15-17169 VFP, 2015 WL 6692110, at *17 (Bankr. D.N.J. Nov. 2, 2015) (distinguishing Jevic Holding Corp. in a case in which the settlement included all non-insider creditors and involved no class-skipping).

In re Jevic Holding Corp., 787 F.3d at 189-90 (Scirica, J., concurring in part and dissenting in part).

In re Jevic Holding Corp., 787 F.3d at 175, 180, 185 & 186.

In re Jevic Holding Corp., 787 F.3d at 180; see also In re NII Holdings, 536 B.R. 61, 99-100 (Bankr. S.D.N.Y. 2015) (citing Jevic Holding Corp. as a classic example of this approach).

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For an example of an approach more consistent with modern jurisprudence, see Amir Shachmurove, Purchasing Claims and Changing Votes: Establishing “Cause” under Rule 3018(a), 89 Am. Bankr. L.J. 511, 546 (2015).


In re Buffet Partners, L.P., 2014 WL 3735804, at *3-4; see also, e.g., In re Petersburg Regency LLC, 2015 WL 6692110, at *17 (finding a structured dismissal appropriate in light of a settlement in which “no classes are being skipped and the long and tortured history of this case and its predecessor litigation provides an even stronger basis for approving the Settlement now, before many more months or years of continuing and expensive litigation”).


In re Naartjie Custom Kids, Inc., 534 B.R. at 426 (emphasis added).


In re Biolitec, 528 B.R. at 269.

In re Biolitec, 528 B.R. at 269.


See, e.g., Layng v. Miller (In re Miller), No. 12-32487, 2014 WL 2547729, at *5 (Bankr. E.D. Wis. July 5, 2014) (summarizing the court’s conclusions at the end of a hearing on debtor’s motion to dismiss and UST’s motion to convert to Chapter 7); In re Strategic Labor, Inc., 467 B.R. at 13, 25-26.
On November 16, 2015, the appellants in Jevic Holding Corp. filed a petition for a writ of certiorari with the United States Supreme Court. Petition for a Writ of Certiorari, Czyzewski v. Jevic Holding Corp., No. 15-649 (U.S. Nov. 16, 2015).