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Introduction

Recently, courts have been confronted with issues concerning the permissibility of structured dismissals and bankruptcy sales in a way they had not before. In general, a successful case under Chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”) culminates in a confirmation of a plan of reorganization, pursuant to which the debtor’s liabilities will be addressed. In certain instances, confirmation of a plan may be impossible or cost-prohibitive, but the debtor and its creditors have achieved a consensus regarding the treatment of the debtor’s liabilities. There, the debtor and its creditors may agree to the treatment of claims, following which the case will be dismissed through a structured dismissal. While there are “*magic words*” in the Bankruptcy Code that allow for structured dismissals, “[n]ot much law, statutory or otherwise, exists regarding structured dismissals.”¹

The Supreme Court addressed structured dismissals in the first instance in *Czyzewski v. Jevic Holding Corp.*² The Court held that a structured dismissal is a permissible means to resolve a Chapter 11 case so long as it does not violate the priority scheme set out in the Bankruptcy

¹ *In re Buffet Partners, L.P.*, 2014 WL 3735804 *2 (Bankr. N.D. Tex. July 28, 2014).

² *In re Jevic Holding Corp.*, 137 S. Ct. 973 (2017).

Code.³ Post-*Jevic*, courts have had to evaluate whether proposed structured dismissals violate the priority scheme in a way that they had not before. Moreover, courts have confronted suggestions to expand *Jevic*'s limitation on structured dismissals to bankruptcy sales and even beyond conflicts with the priority scheme. However, courts have been reluctant to expand *Jevic* beyond its core holding.

Discussion

A. Legal Basis for Structured Dismissals

First, section 349(b) of the Bankruptcy Code prescribes the effect of the dismissal of a case, “[u]nless the court, *for cause*, orders otherwise...”⁴ Second, “11 U.S.C § 1112 (b) certainly contemplates that a dismissal may be granted when it is in the interests of creditors.”⁵ Thirdly, section 305(a)(1) highlights a court’s discretion to “dismiss a case... if the interests of creditors and the debtor would be better served” by a dismissal.⁶ Courts exercise broad discretion as granted in sections 349(b), 1112(b), and 305(a)(1) of the Bankruptcy Code to approve structured dismissals despite seeming to violate the rules and structure of chapter 11. Notably each of these provisions of the Bankruptcy Code grant courts discretion where it is in the best interest of the creditors, and the debtor, to deviate from the general rules prescribed. Undeniably, this is to maximize the value of the bankruptcy estate – one of the maxims of bankruptcy. However, expanding the value of the estate to the extent possible is not the only maxim of bankruptcy. Maintaining the structure of the distribution priority scheme is another bankruptcy maxim which, at times, exists as a competing goal that may not allow for maximization of the value of the

³ *Id.* at 978.

⁴ 11 U.S.C. § 349(b) (2018) (emphasis added).

⁵ *Buffet*, 2014 WL 3735804 at *2 (“...the court shall convert a case under this chapter to a case under 7 or dismiss a case under this chapter, *whichever is in the best interests of creditors and the estate...*”). 11 U.S.C. § 1112(b)(1) (emphasis added).

⁶ *Id.* at § 305(a)(1).

estate. This inevitably raises the question – where maxims of bankruptcy are competing in a single instance, which one rules?

In 2017, the United States Supreme Court confronted this issue in *In re Jevic Holding Corp.*⁷ Post-*Jevic*, courts are reluctant to limit their discretion to balance contradicting interests in maxims of bankruptcy beyond *Jevic*'s holding.

B. *Jevic*'s Holding

In 2017, *Jevic* presented the Supreme Court with two novel issues: first, the permissibility of structured dismissals under the Bankruptcy Code; and second, if permissible, whether, when in contrast, the absolute priority rule, or the discretion of the court acting in the best interest of the debtor and its creditors to approve structures dismissals, reigned supreme.⁸ Ultimately, the Court held that structured dismissals that do not violate the “basic priority rules” are permissible.⁹

In the wake of *Jevic*, courts have been forced to take a closer look at structured dismissals beyond the best interest of the debtor and its creditors. Although *Jevic* established that courts may not approve structured dismissals where they violate the priority rules of the Bankruptcy Code, the decision opened the door to a host of new arguments against structured dismissals. In fact, courts have even been confronted with questions about extending *Jevic* beyond structured dismissals to section 363 sales.

C. Arguments Against Chapter 11 Sales and Structured Dismissals Pre-*Jevic*

Structured dismissals largely came into existence because they were favored to maximize value of the estate more efficiently than a chapter 11 plan. Courts have also permitted structured

⁷ 137 S. Ct. 973.

⁸ *See id.* at 978.

⁹ *Id.* at 978.

dismissals as evidenced by reading their practice of approving structured dismissals into the Bankruptcy Code where the words “structured dismissal” do not appear. However, even before *Jevic*, there were arguments against the permissibility of structured dismissals in some or even all circumstances.

i. Structured Dismissals as Sub Rosa Plans

Proposed plans or sales may be objectionable as *sub rosa* “when aspects of the transaction dictate the terms of the ensuring plan or constrain parties. . . by [restricting] creditors’ rights to vote on a plan.”¹⁰ Sales may be objectionable as *sub rosa* if they “ha[ve] the practical effect of dictating some of the terms of any future reorganization plan.”¹¹ In addition to implementing voting restrictions, this could include “provid[ing] for the release of claims by *all parties* against [the debtor], its secured creditors, and its officers and directors” leaving “little prospect or occasion for further reorganization.”¹² *Sub rosa* plans are prohibited based on the belief that “[t]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11.”¹³ “It is well-established that courts may not approve settlements that have the effect of a *sub rosa* plan and accomplish an ‘end run around the protection granted [to] creditors in Chapter 11 of the Bankruptcy Code.’”¹⁴ Structured dismissals are frequently used as the debtor’s “exit-strategy” post-363 sale which has its own procedural safeguards, including notice and an opportunity for creditors to be heard, to ensure that the sale itself does not contain secret elements, although a sale could nonetheless become *sub rosa* on other grounds.¹⁵

ii. Section 349 of the Bankruptcy Code Should not be Read Broadly

¹⁰ *In re* General Motors Corp., 407 B.R. 463, 495 (Bankr. S.D.N.Y. 2009).

¹¹ *In re* Braniff Airways, Inc., 700 F.2d 935, 940 (5th Cir. 1983).

¹² *Id.* (emphasis in original).

¹³ *In re* Iridium Operating LLC, 478 F.3d 452, 466 (2d Cir. 2007); *Braniff*, 700 F.2d at 940.

¹⁴ *In re* Biolitec, Inc., 528 B.R. 261, 272 (Bankr. D.N.J. 2014) (quoting *In re* Cont’t Air Lines, Inc., 780 F.2d 1223, 1224 (5th Cir. 1986)).

¹⁵ *See* 11 U.S.C. § 363(b)(1) (2018).

The introductory language of section 349 (a) of the Bankruptcy Code provides that “[u]nless the court, for cause, orders otherwise, the dismissal of a case under [title 11] does not bar [] discharge.” Contradictory interpretations of this section have impacted the perceived permissibility of structured dismissals. Broad interpretations of section 349 allow courts to consider a structured dismissal as an “appropriate resolution” to a case although “not expressly provided for in the code.”¹⁶ Those who object to structure dismissals submit that a broad interpretation of section 349’s introductory language allows the exception to swallow the rule. However, the objectors’ approach looks only to the textual implication of reading section 349(b) to permit structured dismissals and does not give thought to the practical implications.¹⁷ Furthermore, this textual argument is undermined by an analysis of the legislative history.¹⁸

In addition, other sections of the Bankruptcy Code, which courts rely on to justify their discretion to approve structured dismissals, echo this same legislative intent. First, section 305 (a) provides courts with the discretion to “dismiss a case...if the interests of creditors and the debtor would be better served” by a dismissal.¹⁹ Second, section 1112 (b)(1) also allows a court the choice to “convert or dismiss a chapter 11 case,” “whichever is in the best interests of creditors and the estate.”²⁰ This broad reading of the Bankruptcy Code not only aligns with the legislative intent of the drafters, but also grants bankruptcy judges broad discretion to accomplish

¹⁶ See *Biolitec*, 528 B.R. 269.

¹⁷ See e.g., *In re KG Winddown, LLC*, 638 B.R. 739, 748 (Bankr. S.D.N.Y. 2021) (finding cause for dismissal where the debtor sold substantially all of its assets, ceased operations, and had insufficient resources to fund a plan and alternatives explicitly permitted in the Bankruptcy Code are not in the best interest of creditors and the estate).

¹⁸ See H.R. REP. NO. 595, 95th Cong., 1st Sess. 338 (1977) (suggesting that the purpose of the language in section 349(b) was to give courts discretion over the scope of dismissal “to protect rights acquired in reliance on the bankruptcy case” for example, in a sale).

¹⁹ 11 U.S.C. § 305(a).

²⁰ 11 U.S.C. § 1112(b)(1).

the goals of the bankruptcy — to best meet the interests of the debtor and its creditors by maximizing value — through structured dismissals.²¹

iii. Structured Dismissals Were a Permissible Means to Resolve a Chapter 11 Bankruptcy Before the Rise of “Free and Clear” Sales

Longstanding belief told us that there were only three ways in which a chapter 11 bankruptcy could exit: “(1) confirmation of a plan (...includ[ing] a liquidating plan); (2) conversion to chapter 7; or (3) dismissal.²² However, the rise of “free and clear” sales of substantially all of a business’s assets” under section 363 (f) of the Bankruptcy Code changed this and made structure dismissals a new norm.²³ Bankruptcy sales under section 363 (f) of the Bankruptcy Code are sometimes pursued in a chapter 11 case in lieu of a plan of reorganization or in conjunction with a plan.²⁴ A sale’s approval is not akin to plan’s confirmation, because sales and plans are inherently different under title 11 of the Bankruptcy Code. Thus, structured dismissals are often useful to facilitate the final stage of the sale process under section 363 after closing but could also be used in other instances including when parties are unable to confirm a chapter 11 plan.²⁵

“Traditional dismissal” is not a viable end to a 363 sale because “pursuant to [section] 349 (b), dismissal generally returns the debtor to the *status quo ante*, as if the bankruptcy case had not been filed.”²⁶ Section 349 (b)’s requirements for dismissal are averse to the sale process because after a sale closes, the sale is final.²⁷ While this “hybrid dismissal and confirmation order” is not explicitly authorized in the Bankruptcy Code, they are “an increasingly common approach to concluding a chapter 11 case in which parties are unable to confirm a plan” because

²¹ See H.R. REP. NO. 595.

²² *In re Jevic Holding Corp.*, 137 S. Ct. 979 (2017) (“chapter 11 foresees three possible outcomes.”).

²³ See 11 U.S.C. § 363(f).

²⁴ See, e.g., *In re Lionel Corp.*, 722 F.2d 1063, 1065 (2d Cir. 1983).

²⁵ See *ABI Commission to Study the Reform of Chapter 11*, 2012-2104, Final Report and Recommendations, n.973 (2014), available at commission.abi.org/full-report.

²⁶ See 11 U.S.C. § 349(b).

²⁷ See 11 U.S.C. § 363(m).

they resolve the case using the tools provided in bankruptcy — namely free and clear sales.²⁸

These new-age chapter 11 resolutions evolved to maximize value and minimize cost which gets at the heart of what a chapter 11 reorganization is under the Bankruptcy Code. The value that free and clear sales, and accordingly structured dismissals, present in chapter 11 cases, along with their respective textual hooks in the Bankruptcy Code, solidified their permissibility in *Jevic*.²⁹

D. Circuit Courts' Reluctance to Extend *Jevic*

Both the First and Eighth Circuits have refused to extend the Supreme Court's holding in *Jevic* to section 363 sales.³⁰ The First Circuit Court of Appeals, in *In re Old Cold, LLC*, addressed the extent to which the *Jevic* rule, disallowing structured dismissals that violate the priority scheme, acted as an exception to the equitable mootness doctrine codified in section 363 (m).³¹ There, the First Circuit held that the appeal at issue, which was governed by section 363 (m) of the Bankruptcy Code, did not stem from the sale and subsequent structured dismissal, and thus *Jevic* was inapplicable.³² While the First Circuit did not have to get to the issue of whether it could delineate between the sale itself and the structured dismissals because the appeal in this case did not stem from either the sale or the structured dismissal, other courts have decided the issue.

In 2019, two years after *Jevic*, and just one year after *Old Cold*, the Eighth Circuit explicitly refused to extend *Jevic*'s heightened importance of the absolute priority rule.³³ In *In re Veg Liquidation, Inc.*, the court took the step that the First Circuit could not in *Old Cold*, by

²⁸ See *In re Jevic Holding Corp.*, 137 S. Ct. 973, 979 (2017).

²⁹ *Id.* at 978.

³⁰ See *Mission Product Holdings, Inc. v. Old Cold, LLC (In re Old Cold, LLC)*, 879 F.3d 376 (1st Cir. 2018); *All Veg, LLC v. Fifth Third Equipment Finance Co. (In re Veg Liquidation, Inc.)*, 931 F.3d 730 (8th Cir. 2019).

³¹ *In re Old Cold, LLC*, 879 F.3d at 388.

³² *Id.* (“Since this case does not arise from an appeal of the Sale Order, *Jevic* has no application.”).

³³ See *In re Veg Liquidation, Inc.*, 931 F.3d at 739.

differentiating between the sale and the structured dismissal for purposes of the applicability of *Jevic*.³⁴ The First Circuit refused to set the precedent that free and clear sales, while often associated with structured dismissals at their close, are governed equally by *Jevic* to prohibit the approval of sales that do not conform to the basic priority rules.³⁵ The Eighth Circuit, in *In re Veg Liquidation*, demonstrated its reluctance to limit bankruptcy tools which maximize value, even in the wake of the Supreme Court's treatment of the absolute priority rule as somewhat of a "super-maxim" of bankruptcy.

While courts are forced to live with the *Jevic* decision, they are reluctant to extend the Supreme Court's holding and further limit their own discretion. Specifically, courts are unwilling to give the absolute priority rule heightened credence in the bankruptcy sales context, despite being closely tied to structured dismissals. After *Jevic*, courts have tried to maintain the broad discretion various sections of the Bankruptcy Code bestow on them and are unlikely to change any time soon.

Conclusion

Generally, Courts have accepted structured dismissals as a means to an efficient end where it was in the best interest of the debtor and its creditors long before the Supreme Court considered the permissibility of structured dismissals in 2017. Accordingly, courts have largely refused to extend *Jevic*'s limiting principles beyond the absolute priority rule as prescribed by the Supreme Court. Within the written Bankruptcy Code, and general practices in chapter 11, there are competing goals and rules which seem to limit the means to an end that satisfies these

³⁴ *Id.* ("For one thing, *Jevic* involved a structured dismissal and did not hold that § 363 sales must conform to normal priority rules.").

³⁵ *See, e.g., id.* ("In fact, the Court noted that some courts in other contexts have approved priority-violating distributions where they serve 'significant Code-related objectives,' such as maximizing the value of the bankruptcy estate."). *Id.* (quoting *Jevic*, 137 S. Ct. at 985).

bankruptcy maxims. At this point, despite the lower courts' disagreement, the Supreme Court has rendered the absolute priority rule a super-maxim. However, lower courts have and will likely continue to limit the reach of *Jevic*'s holding to the absolute priority rule where it could stand to inhibit opportunities to maximize value in the chapter 11 process through free and clear sales followed by a structured dismissal of the case.