



ROCHELLE'S DAILY WIRE

Abundant Splits and Other Significant Bankruptcy Decisions

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Table of Contents

Supreme Court	4
Decided This Term	5
Supreme Court Reverses <i>Jevic</i> , Bars Structured Dismissals that Violate Priority Rules	6
Supreme Court Allows Debt Collectors to File Time-Barred Proofs of Claim	9
A Debt Purchaser Is <i>Not</i> a 'Debt Collector' Regulated by the FDCPA, Supreme Court Holds..	12
Did the Supreme Court Hint that Bankruptcy Venue Is Too Broad?	14
Next Term	18
Supreme Court Grants ' <i>Cert</i> ' on Appellate Standards for Non-Statutory Insider Status	19
Supreme Court to Decide Whether Using a 'Mere Conduit' Invokes the 546(e) 'Safe Harbor'.	22
Supreme Court Will Not Resolve Circuit Split on Recharacterization.....	24
Reorganization	26
Sales	27
Ninth Circuit Joins Minority in Allowing Sales Free & Clear of Leases	28
Sixth Circuit Widens Split on Mooting Appeals from Sale Orders.....	30
Estate Property	32
Circuit Says a Perfected Assignment of Rents Takes Property Out of the Estate	33
Jurisdiction & Power	35
Seventh Circuit Requires <i>Stern</i> Consent from Unserved Defendants in Non-Core Suits.....	36
Retention of Jurisdiction by Itself Does Not Confer Subject Matter Jurisdiction, Circuit Holds	39
Delaware District Judge Issues Important Opinion on Third-Party Releases.....	41
Bankruptcy Court Finds Constitutional Power to Grant Releases in Confirmation Orders	45
Refinancing & Tender Offers	49
Third Circuit Splits with New York by Allowing Make-Whole Premiums in Chapter 11.....	50
Second Circuit Blesses a Nonconsensual Out-of-Court Restructuring.....	53
Plans & Confirmation	56
Second Circuit Splits with Third on Makewholes Occasioned by Bankruptcy	57
Cramdown Value Is <i>Not</i> the Higher of Foreclosure or Replacement Value, Ninth Circuit Says	63
To Establish Record Dates, the Plan Applies, Not Securities Regulations.....	67
Committees	69
Delaware Judge Narrows <i>Jevic</i> to Prohibit Only End-of-Case Priority Skipping	70
First Circuit Widens a Circuit Split on a Committee's Intervention Rights	72
Split Sixth Circuit Bars Litigation Trustees from Suing on D&O Policies	74
Existence of a Committee Precludes Tolling the Statute for Adverse Domination.....	77
New York Judge Requires Hedge Funds to Disclose Their Investors.....	79
Stays & Injunctions	81
Circuit Split Widens on Stay Violation for Failure to Turn Over Repossessed Collateral.....	82
State Law Determines Whether Post-Filing Mechanic's Liens Are Voidable	85
Executory Contracts & Leases	87
Lease Rejection Cap Doesn't Apply to Past-Due Rent Accrued Before Rejection.....	88
Compensation	90
Retention Agreements Allowing Defense Fees Ok in New Mexico, but Not in Delaware	91
<i>ASARCO</i> Read to Bar Fee-Defense Costs Even with a Fee-Shifting Agreement.....	93



ROCHELLE'S DAILY WIRE

Delaware Judge Disregards Committee Fee Cap if a Chapter 11 Plan Is Confirmed	95
<i>Baker Botts</i> Read Narrowly on Compensation for Defending Fee Application	97
Fraudulent Transfers	99
Ninth Circuit Splits with Seventh on Sovereign Immunity and Derivative Suits by a Trustee.	100
In a Circuit Split, Ninth Circuit Tags Innocent Sellers with Fraudulent Transfer Liability	103
Circuits Split on Objective vs. Subjective Value for Fraudulent Transfer Consideration	106
New York District Judges Are Split on Drawing Inferences of Fraud from Executives.....	108
Sixth Circuit Pens Major Decision on Duty to Investigate Suspicions of Fraud.....	111
Judge Bonapfel Sides with Fifth Circuit on ‘Equivalent Value’ in Ponzi Schemes	114
Preferences & Claims	118
Receipt under Section 503(b)(9) Occurs on Physical Possession, Third Circuit Holds	119
Preference Analysis Permits ‘Hypothetical-Within-a-Hypothetical’ on Chapter 7 Recovery... ..	121
Allowing WARN Claims in Liquidating Chapter 11s, Chicago Judge Splits with 3d Circuit.. ..	125
Courts Divided on Electric Service as ‘Goods’ Under Section 503(b)(9).....	128
Subordination & Dismissal	130
No Subordination in Ninth Circuit for a Stock Conversion Claim.....	131
Judge Punts on How the Rule of Explicitness Survived Adoption of the Code	133
Consumer Bankruptcy	135
Fair Debt Collection Practices Act	136
Eighth Circuit Broadly Interprets the FDCPA to Protect Consumers	137
Lawyers Violate FDCPA with Factually Inaccurate Allegations in Bankruptcy Pleadings.....	140
Courts Can’t Sanction Debt Collectors for Filing Stale Claims after <i>Midland Funding</i>	142
Discharge/Dischargeability	144
Co-Conspirator’s Intent Is Enough for Nondischargeability, Fifth Circuit Holds.....	145
Circuits Now Split on Dischargeability for Third Party’s Violation of Securities Laws	147
Falsely Misrepresenting One Asset Isn’t Grounds for Nondischargeability, Circuit Holds.....	149
Undervaluing One Asset Can Result in Denial of Discharge, Fourth Circuit Holds.....	151
Subjective Feeling of Coercion Doesn’t State a Claim for Discharge Violation.....	153
No Contempt on Discharge Violation of Nondischargeable Debt, Circuit Says	155
Wages & Dismissal	157
Wages Garnished Before Bankruptcy Are Voidable Preferences, Circuit Rules	158
Ninth Circuit Creates Split on Appellate Standard for ‘Consumer Debt’ Determination.....	160
On the Means Test, Fourth Circuit Allows Chapter 7 Debtors the Best of Both Worlds.....	163
Courts Split on Allowing Credit Counseling on the Same Day but After Filing.....	165
A ‘Loan’ Is Not an ‘Educational Benefit,’ Ninth Circuit BAP Holds	167
Student Loans to Advance a Career Are Classified as Non-Consumer	169
No Statutory Fees for Standing Chapter 13 Trustees if Dismissal Precedes Confirmation.....	171
Plans	173
Interest on Unsecured Claims Not Required in 100% Chapter 13 Plan	174
Third Circuit Permits Last Chapter 13 Plan Payment Beyond 60 Months	176
Ninth Circuit Demands Amended Schedules to Avoid Judicial Estoppel	178
<i>En Banc</i> , Eleventh Circuit Narrows Applicability of Judicial Estoppel in Bankruptcy	180
‘Deemed Allowed’ Claims	184
Chapter 13 Plan Confirmation Doesn’t Bar Later Claim Objections, Circuit Holds.....	185
No <i>Res Judicata</i> Effect for ‘Deemed Allowed’ Claims in ‘No Asset’ Cases.....	187
Surrender & Forced Vesting	190



ROCHELLE'S DAILY WIRE

Election to 'Surrender' Property Bars Opposition to Foreclosure, Eleventh Circuit Holds	191
Judge Farris Disagrees with 11th Circuit on 'Surrender' as Waiver of Foreclosure Defenses..	193
Massachusetts District Judge Nixes Notion of Forced Vesting in Chapter 13	195
Exemptions	197
Reversing Itself, Fifth Circuit Panel Reinstates Finality to Exemptions in Chapter 7.....	198
Fourth Circuit Conflicts on Loss of Chapter 7 Exemptions after Filing.....	202
Fifth Circuit Denies Exemption to Nonfiling Spouse for Home Owned Under 1,215 Days.....	204
Trustee Can't Evict Debtors in Advance of Selling Their Home, Sixth Circuit Rules.....	208
Debtor Has Valid Homestead Exemptions Even Without Equity in the Property.....	210
Late-Filed Tax Returns	214
Third Circuit Joins the Majority in the Split Over Late-Filed Tax Returns.....	215
Automatic Stay	217
Willful Stay Violation Can Justify Damages for Emotional Distress, Third Circuit Says	218
Monetary Sanctions Are Available to Remedy Violations of the Co-Debtor Stay.....	221
New York Judge Takes Different Approach to Repeat-Filer Automatic Stay Termination.....	223
Arbitration.....	225
Florida Judge Plunges into the Split on Enforcing Arbitration Agreements	226
Municipal Debt Adjustment & Puerto Rico	228
PROMESA Is No Clone of the Bankruptcy Code, First Circuit Says	229
First Circuit Interprets PROMESA's Automatic Stay Broadly, Reverses District Court.....	232
Ninth Circuit Prohibition on Third-Party Injunctions Is Inapplicable in Chapter 9	235
Cross-Border	237
Second Circuit Discusses Role of Chapter 15 in Cross-Border Litigation.....	238



Supreme Court



ROCHELLE'S DAILY WIRE

Decided This Term



Jevic opinion continues to permit first-day wage and critical vendor orders, although its effect on gift plans is debatable.

Supreme Court Reverses *Jevic*, Bars Structured Dismissals that Violate Priority Rules

Reversing the Third Circuit in *Czyzewski v. Jevic Holding Corp.*, the Supreme Court ruled 6/2 today in an opinion by Justice Stephen G. Breyer that the bankruptcy court, without consent from affected parties, cannot approve so-called structured dismissals that “deviate from the basic priority rules,” not even in rare cases.

Justice Breyer was careful to narrow the Court’s holding so the opinion would not be interpreted to preclude first-day wage or critical vendor orders.

Joined by Justice Samuel A. Alito, Jr., Justice Clarence Thomas dissented, saying that the writ of *certiorari* should have been dismissed as improvidently granted.

The Facts

In the unsuccessful reorganization of Jevic Holding Corp., the official unsecured creditors’ committee had sued the secured lender for receipt of a fraudulent transfer. The committee and the lender negotiated a settlement calling for the lender to set aside some money for distribution to general unsecured creditors following dismissal in a scheme that did not follow the ordinary priority rules contained in Section 507.

Since it would give them nothing on their \$8.3 million in wage priority claims, workers objected to the settlement because some settlement proceeds were to be held in a trust exclusively for lower-ranked general unsecured creditors.

The bankruptcy court in Delaware approved the settlement and structured dismissal and was upheld in district court. The Third Circuit, in a 2-1 opinion, upheld the structured dismissal, eliminating any chance of recovery by priority wage claimants through the bankruptcy. Although the dissenter in the Third Circuit concurred that structured dismissals could be approved on occasion, he did not believe *Jevic* was a proper case.

The Supreme Court granted *certiorari* in June 2016 to resolve a split of circuits. Before granting *certiorari*, the Supreme Court sought comment from the Solicitor General, who subsequently urged granting the petition and reversing the court of appeals.



Justice Breyer's Opinion

Justice Breyer cited the American Bankruptcy Institute Commission report's definition of structured dismissals. He went on to say that the ABI report referred to structured dismissals as "increasingly common."

Justice Breyer observed that the Bankruptcy Code "does not explicitly state what priority rules – if any – apply to a distribution" when a chapter 11 case is dismissed. He noted, however, that a chapter 11 plan cannot violate rules of priority over objection from an impaired creditor class.

Since Section 349(b) does not say when there is "cause" to depart from the ordinary rules governing the effects of dismissal, he said the propriety of structured dismissals was a "complicated question." Nonetheless, he said, the answer is "simple": Structured dismissals are not permissible.

The Bankruptcy Code's "priority system constitutes a basic underpinning of business bankruptcy law," the opinion says. Justice Breyer said the Court "would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the [Bankruptcy] Code prohibits in chapter 7 liquidations and chapter 11 plans."

Justice Breyer was careful to ensure that the opinion is not read broadly to prohibit common practices in chapter 11 cases that depart from the rules and timing of distributions, such as first day orders allowing payment of pre-petition wages and claims of so-called critical vendors. Those practices, he said, are designed to enhance the chance for a successful reorganization.

On the other hand, Justice Breyer said, a "priority-violating" distribution in a structured dismissal "is attached to a final disposition; it does not preserve the debtor as a going concern."

He left the door open to other priority-defying practices if there is a "significant offsetting bankruptcy-related justification."

Justice Breyer ended his discussion of the merits by saying that a structured dismissal is not permissible even in a "rare case." He said that allowing them sometimes would result in "similar claims being made in many, not just a few, cases." He concluded that "Congress did not authorize a 'rare case' exception."

The Standing Question

Justice Breyer's majority opinion had a three-page discussion of standing that may be pertinent if the question avoided in *Spokeo Inc. v. Robbins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (Sup. Ct. May 16, 2016), comes back to the Supreme Court.

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