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LOOKING THE CHAPTER 11 GIFT HORSE IN THE MOUTH AFTER *JEVIC*

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INTRODUCTION

The Supreme Court ruled last spring in a 6-2 decision in *Czyzewski v. Jevic Holding Corp.*¹ that a court could not approve a priority-skipping structured dismissal of a Chapter 11 case. In so holding, the Court carefully navigated difficult issues to render a narrow ruling that leaves many unanswered questions. One of the major unanswered questions is whether the ruling can be circumvented by what is known as the gifting exception to the Code's priority scheme or the absolute priority rule. A second question is the extent to which the ruling can be circumvented with first day orders. This brief summary takes a first look at those questions.

To examine these issues, we will first look at the use of structured dismissals before the Court's *Jevic* decision. We will then examine the *Jevic* decision. We will then discuss *Jevic*'s possible effect on gifting plans in liquidating Chapter 11 cases.

STRUCTURED DISMISSALS

Jevic involved what is known in the trade as a "structured dismissal": a dismissal of a Chapter 11 case that involves more than a plain vanilla dismissal order.² In a typical structured dismissal, the secured creditor is undersecured, its collateral is liquidated in Chapter 11, and the case is dismissed.³ The "structure" comes from provisions in the dismissal order that can be

¹ 137 S. Ct. 973 (2017).

² Articles on structured dismissals that pre-date the Supreme Court's *Jevic* holding include Bruce Grohsgal, *How Absolute is the Absolute Priority Rule in Bankruptcy? The Case for Structured Dismissals*, 8 Wm. & Mary Bus. L. Rev. 439 (2017); Bethany K. Smith, *Up the Chute, Down the Ladder: Shifting Priorities Through Structured Dismissals in Bankruptcy*, 84 Fordham L. Rev. 2989 (2016); Kayalynn Webb, *Utilizing the Fourth Option: Examining the Permissibility of Structured Dismissals That Do Not Deviate from the Bankruptcy Code's Priority Scheme*, 33 Emory Bankr. Dev. J. 355 (2016); Brent Weisenberg, *Expediting Chapter 11 Liquidating Debtor's Distributions to Creditors*, 31-3 Am. Bankr. Inst. J. 36 (2012). Nan Roberts Eitel, et al., *Structured Dismissal or Cases Dismissed Outside of Code's Structure?*, 30-3 Am. Bankr. Inst. J. 20 (2011) (article written by employees of the Office of the United States Trustee criticizing structured dismissals); Norman L. Pernick & G. David Dean, *Structured Chapter 11 Dismissals: A Viable and Growing Alternative After Asset Sales*, 29-6 Am. Bankr. Inst. J. 1 (2010).

³ Cases that have been dismissed under what may be described as a "structured dismissal" under Code section 1112 in the United States Bankruptcy Court in the District of Delaware include *In re G.I. Joe's Holding Corp.*, No. 09-10713 (KG) (Bankr. D. Del. Mar. 10, 2011), ECF No. 753; *In re Distributed Energy*

much more complicated than simply dismissing the case: the dismissal order can provide for distributions to creditors other than the secured creditor. Indeed, some dismissal orders have been relatively complicated, providing for the creation of a liquidating trust and the liquidation, in bankruptcy, of claims that will be paid. Many structured dismissal orders provide for exculpation provisions, barring certain lawsuits related to the Chapter 11 case against a limited number of parties-in-interest.⁴ The statutory hooks for this are Code sections 1112⁵ and 349.⁶ Some cases have even been dismissed under Code section 305, which limits review by the Courts of Appeal and the Supreme Court.⁷

THE JEVIC DECISION

Systems Corp., No. 08-11101 (KG) (Bankr. D. Del. Sept. 24, 2010); *In re CFM US Corp.*, No. 08-10668 (KJC) (Bankr. D. Del. Feb. 1, 2010), ECF 1282; *In re Foamex Int'l Inc.*, No. 09-10560 (KJC) (Bankr. D. Del. Jan. 20, 2010), ECF No. 761, *In re Alternative Distribution Systems, Inc.*, No. 09-13099 (PJW) (BNKR. D. Del. Dec. 1, 2009), ECF 213, *In re KB Toys, Inc.*, No. 08-13269 (KJC) (Bankr. D. Del. Dec. 1, 2009), ECF 914, *In re Wickes Holdings, LLC*, Case No. 08-10212 (KJC) (Bankr. D. Del. May 11, 2009). Delaware Bankruptcy courts have also dismissed cases under Code section 305(a), which provides it is not subject to review by the Court of Appeals of the Supreme Court. Those cases include *In re Coach Am. Group Holdings Corp.*, No. 12-10010 (KG)(Bankr. D. Del. May 31, 2013), ECF No. 1568, and *In re TSIC, Inc., f/k/a/ Sharper Image Corporation*, No. 08-10322 (KG)(Bankr. D. Del. December 27, 2012), ECF No. 2541.

⁴ For example, the dismissal order in *In re Naartjie Custom Kids, Inc.*, 534 B. R. 416, 420 (Bankr. D. Utah 2015) provided:

- (1) [A]ll of the Court's orders will remain in full force and effect upon dismissal; (2) the Court shall retain jurisdiction to review and approve professional fees of the Debtor and the Committee; (3) the Court shall retain jurisdiction over any dispute that arises from the interpretation or implementation of the proposed dismissal order; (4) exculpation clauses and general releases shall be included in the dismissal order as contemplated in the Settlement Agreement; and (5) the Debtor and the Committee shall be authorized to make distributions pursuant to the Settlement Agreement.

Other cases have provided for exculpation or release provisions as part of the dismissal order. *See, e.g., In re Coach Am Group Holdings Corp.*, No. 12-10010 (KG), (Bankr. D. Del. May 31, 2013).

⁵ Code section 1112(b) provides that "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 interest of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee of an examiner is in the best interests of creditors and the estate."

⁶ Code section 349(b) provides "Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 792 of this title—

(1) reinstates—

- (A) any proceeding or custodianship superseded under section 543 of this title;
- (B) any transfer avoided under section 522, 544, 545 547, 548, 549 or 724(a) of this title, or preserved under section 510(d) of this title; and
- (C) any lien voided under section 506(d) of this title;

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

(3) reverts property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

⁷ 11 U.S.C. § 305(c).

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