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# turnarounds & workouts

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## Jevic

### The Most Important Chapter 11 Decision in Years?

by Julie Schaeffer

The U.S. Supreme Court will hear the case of *Czyzewski v. Jevic Holding Corp.* during its current term, and the outcome could have “as significant an impact on Chapter 11 bankruptcy practice as any case that the Court has decided in decades,” according to Ben Feder, special counsel at Kelley Drye & Warren.

In May of 2008, Jevic Transportation, a New Jersey trucking company, filed for Chapter 11 in Delaware following a failed leveraged buyout (LBO).

At the time, Jevic owed approximately \$53 million to its first-priority secured creditors – certain entities affiliated with CIT Group and Sun Capital Partners – and more than \$20 million to its tax and general unsecured creditors.

But Jevic didn't try to reorganize; it ceased operations immediately prior to its bankruptcy filing and terminated almost all of its driver employees.

During the bankruptcy, two relevant lawsuits were filed. First, the terminated drivers filed a class action suit for unpaid wages. They alleged violations of the federal and state Worker Adjustment and Retraining Notification (WARN) Act, which requires most employers with 100 or more employees to provide a 60 calendar-day notice of closings and layoffs.

Second, the unsecured creditors' committee filed a fraudulent conveyance action against CIT and Sun Capital in connection with Sun Capital's LBO of Jevic prior to its bankruptcy filing. The LBO was financed by a group of lenders led by CIT.

Three years later, all assets had been sold, with the proceeds distributed to the secured creditors. All that remained of the bankruptcy estate was \$1.7 million in cash subject to the secured lenders' lien and the fraudulent conveyance claims against CIT and Sun.

“The case was effectively at an impasse,” says Feder. “A plan could not be confirmed because there were insufficient funds to pay all of the expenses of administration of the Chapter 11 case, such as the fees of professionals for Jevic and the creditors' committee.”

Given that the only other options under the Bankruptcy Code were conversion to a liquidation under Chapter 7 or a dismissal of the case under Section 349 – both of which would have left professional fees unpaid and no recovery to creditors other than CIT and Sun – Jevic, CIT, Sun, and the creditors' committee reached a settlement agreement.

“Such ‘structured dismissals’ have become increasingly common over the past several years,” says Feder. “As a proliferation of secured financing has resulted in more cases lacking sufficient unencumbered assets to finance an exit from Chapter 11 through plans of reorganization or liquidation, structured dismissals have been utilized by creative practitioners to wind down what would otherwise be irresolvable morasses.”

Under the parties' agreement, CIT and Sun agreed, in exchange for release of the litigation, to allow the \$1.7 million in cash plus another \$2 million they contributed to be used to pay administrative expenses and provide a small distribution for general unsecured creditors.

The settlement did not include the drivers, however, even though they had an uncontested WARN Act claim against Jevic, and their claims for unpaid wages against

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the Jevic estate were entitled to priority treatment ahead of general unsecured creditors' claims.

Despite that, the bankruptcy court approved the settlement and the structured dismissal on the grounds that there was "no realistic prospect" of a recovery to any parties but CIT and Sun. The drivers appealed to the district court and then to the Third Circuit, both of which affirmed.

The Supreme Court granted certiorari to determine if a structured dismissal in a Chapter 11 case can incorporate a settlement that diverges from the Bankruptcy Code's priority scheme, which holds that creditors with claims that would be entitled to seniority in the event of a liquidation must be paid before creditors with more junior claims. The issue in *Czyzewski v. Jevic Holding Corp.* was that, under the structured dismissal, unsecured creditors would receive payment while drivers with higher priority claims would be paid nothing.

"A ruling in favor of structured dismissals would serve to channel cases away from Chapter 11 plans and toward consensual settlements," says Douglas S.

Mintz, a partner at Orrick. "This could reduce administrative costs and facilitate quicker bankruptcy resolutions. However, this could also lead to settlements that run counter to the expected results under the absolute priority rule."

But, Feder says the court may also look at whether a structured dismissal is even permissible to resolve a Chapter 11 case. If the court does so, it will be delving into a topic that has divided bankruptcy practitioners for years. "It's a debate between lawyers and judges who take a pragmatic view of the Bankruptcy Code, versus those who adhere strongly to the 'plain meaning' rule of statutory interpretation," says Feder.

Practitioners who take a pragmatic view of the Bankruptcy Code believe it was designed to be flexible, so parties can develop solutions that don't fit into the statute's strict parameters.

Practitioners who adhere strongly to the "plain meaning" rule of statutory interpretation do not believe judges can approve solutions, such as a structured dismissals, that go beyond those specifically provided for in the statute.

The drivers in *Czyzewski* fall into the second camp. They believe that because

there is no express authority for structured dismissals under the Bankruptcy Code, the deal must fail.

Feder believes the Supreme Court leans strongly toward the "plain meaning" rule of statutory interpretation in bankruptcy cases (as evidenced by its decision in *Baker Botts v. Asarco*), and could reverse the Third Circuit. And if the Court invalidates structured dismissals given that the Bankruptcy Code provides no specific authority for them, it "could markedly alter the Chapter 11 landscape."

Czyzewski is represented by Danielle Spinelli and Craig Goldblatt of Wilmer Cutler Pickering Hale and Dorr LLP. Jevic is represented by Christopher Landau of Kirkland & Ellis LLP. They were not available for comment. □

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