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Structured Dismissals

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Definitions

- **Structured Dismissal**
  - Code Sections 1112(b), 305(a), 349(b) and 105(a)
- **Structured Conversion**
  - Less frequent

Increasing Usage

- No assets remaining to reorganize
- Possible administrative insolvency
- Quicker/cheaper than Liquidating Plan or Chapter 7
- Provides “structure” vs. straight dismissal
- May facilitate sale process

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Required

- **Court Order**
- **Need to show**
  - Cause
    - **Not defined in the Code**
    - **16 non-exclusive examples have been noted**
  - Best Interests of Creditors and the Estate
    - **Court not required to dismiss**

US Trustee Position

- **Generally opposed**
  - Class-skipping involved
  - Third-party releases
- **Dismissal seen as**
  - Circumventing the Code
  - Violates Congressional intentions
- **Retention of jurisdiction post-dismissal not proper**
- **Has successfully opposed structured dismissals in cases not following priority rules**

Typical Provisions

- **Issues**
  - Claims administration
  - Distributions
  - Releases
  - Chapter 5 Recovery Waivers
  - Gifting
  - Survival of prior Court orders
  - Retention of jurisdiction
- **Recent examples**
  - Approved Structured Dismissals
  - Rejected Structured Dismissals

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What Did *Jevic* Hold?

- **Facts**
- **Priority rules apply to dismissals**
- **Appellate issues: standing, reliance on pre-Code practices for construction of the Code**
- **Priority shifting acceptable in interim but not in final contexts (e.g., first day orders, critical vendors, rollups)**

What Does *Jevic* Mean?

- In re Iridium Operating LLC, 478 F.3d 452 (2d Cir. 2007) seemingly approved
- Impact on sales
- Impact on gifting
- Impact on settlements
- In re Fryar, 2017 WL 1489822 (Bankr. E.D. Tenn. 4/25/17)

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ALTERNATIVE ENDINGS FOR CHAPTER 11 CASES: STRUCTURED DISMISSALS AND STRUCTURED CONVERSIONS

Eric J. Taube, Joseph M. Coleman, Robert J. Taylor and John J. Kane[1]

A. INTRODUCTION

Over the past decade, debtors have increasingly used the protections of Chapter 11 to sell substantially all of their assets in sales under section 363 of the Bankruptcy Code.[2] As a result, more and more post-sale debtors are left with little to reorganize, and less to liquidate. Historically, post-sale debtors had only three options for wrapping up their bankruptcy cases: (1) confirming a liquidating plan of reorganization; (2) converting to Chapter 7 and liquidating remaining assets; or (3) dismissing the bankruptcy case in strict accordance with section 1112(b) of the Bankruptcy Code.[3]

With few remaining assets and a potentially administratively insolvent estate, these three options are increasingly seen as unappealing and impractical. For example, the costs and delays of filing, confirming, and administering a liquidating plan of reorganization may easily exceed any net proceeds that would otherwise have been available to distribute to unsecured creditors. Likewise, the costs and delays associated with converting a case to Chapter 7 may result in a significant diminution of estate assets previously available to distribute to creditors. Finally, a strict dismissal may result in a disorderly administration of any net proceeds remaining from the debtor's asset sale as creditors scramble to enforce state law rights and remedies against the debtor.

Two increasingly popular alternatives -- a structured dismissal, or a structured conversion to Chapter 7 -- provide pragmatic solutions to the aforementioned problems. Generally speaking, a structured dismissal involves filing a motion to dismiss a debtor's bankruptcy case pursuant to sections 1112(b), 305(a), and 105(a) of the Bankruptcy Code with additional "bells and whistles" that may address, among other things, claims administration, distributions to creditors, releases, waivers of preference actions, and jurisdictional issues. Because structured

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[2] The term Bankruptcy Code refers to Title 11 of the United States Code. Alla Raykin, *Section 363 Sales: Mooting Due Process?*, 29 Emory Bankr. Dev. J. 91, 92 (2012) (noting increasing use of 363 sales in bankruptcy cases over past two decades); and Dennis J. Connolly and Nadia Bailey, *Current Issues Relating to the Use of Structured Dismissal in Bankruptcy Cases*, 2011 Ann. Surv. of Bankr. Law 1, 1 (2011) (addressing heightened use of section 363 sales during past 10 to 15 years).

[3] *See* Eitel, Tinker, and Lambert, *Structured Dismissals, or Cases Dismissed Outside of Code's Structure?*, 30- Mar. Am. Bankr. Inst. J. 20 (March 2011) (arguing that such options are only options provided by code, and noting Pernick and Dean's acknowledgement that such options represent traditional options available to debtors), commenting on Pernick and Dean, *Structured Chapter 11 Dismissals: A Viable and Growing Alternative After Sales*, 29-Jun. Am. Bankr. Inst. J. 1 (June 2010).

dismissals expeditiously terminate a bankruptcy case and provide guidelines for the administration of remaining estate assets, they are frequently a cost-effective and orderly alternative to plans and conversions. As a result, courts are approving structured dismissals with ever-increasing frequency.[4]

Similarly, "Structured Conversions" -- effectively conversions to Chapter 7 which contain various agreements among the pre-conversion participants and "carve outs" for payment of various post-sale expenses in return for cooperation in the post-sale transition of assets or business -- are another less-frequently utilized method of achieving a case resolution without the cost of a plan process, but with a level of predictability that may enhance bidding in a sale process.

B. HOW IT WORKS

To obtain approval of a motion for structured dismissal, movants must generally prove that: (1) the court has the power to enter an order approving a structured dismissal pursuant to section 105(a) of the Bankruptcy Code; (2) "cause" exists to approve the structured dismissal; and (3) the structured dismissal is in the best interest of the debtor's creditors pursuant to section 1112(b) of the Bankruptcy Code.[5] In the alternative, movants may seek approval of structured dismissal motions pursuant to section 305(a) of the Bankruptcy Code, which requires a showing that the interests of the debtor and creditors would be best served by dismissing the bankruptcy case.[6] If the movant satisfies those elements, and does not receive an objection to the motion,

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[4] Currently, very few recorded decisions even reference structured dismissals. Even so, over the past ten years a number of courts, including the Bankruptcy Court for the District of Delaware and the Bankruptcy Court for the Southern District of New York, have approved structured dismissals with increasing frequency. *See, e.g., Cape May Care Center*, *Inc.*, Case No. 00-41945 (NLW) (Bankr. D. N.J. Dec. 23, 2004); *In re Blades Board and Skate, LLC*, Case No. 03-48818 (NLW) (Bankr. D. N.J. June 29, 2004); *In re New Weathervane Retail Corp.*, Case No. 04-11649 (PJW) (Bankr. D. Del. August 4, 2005); *In re CSI Inc.*, Case No. 01-12923 (REG) (Bankr. S.D.N.Y July 24, 2006); *In re Magnolia Energy, L.P.*, Case No. 06-11069 (MFW) (Bankr. D. Del. February 2, 2007); *In re Levitz Home Furnishings, Inc.*, 05-45194 (BRL) (Bankr. S.D.N.Y. Nov. 2, 2007); *In re Dawarhare's of Lexington LLC*, Case No. 08-51381(JMS) (Bankr. E.D. Ky. Dec. 30, 2008); *In re Princeton Ski Shop*, Case No. 07-26206 (MS) (Bankr. D. N.J. Dec. 23, 2008); *In re Harvey Electronics, Inc.*, Case No. 07-14051 (ALG) (Bankr. S.D.N.Y. December 16, 2008); *In re Bag Liquidation, Ltd., et al.*, Case No. 08-32096 (SJ) (Bankr. N.D. Tex. September 8, 2009); *In re CFM U.S. Corp.*, Case No. 08-10668 (KJC) (Bankr. D. Del. June 30, 2009); *In re Wickes Holdings, LLC*, Case No. 08-10212 (KJC) (Bankr. D. Del. May 11, 2009); *In re Foamex Int'l Inc.*, Case No. 09-10560 (KJC) (Bankr. D. Del. Jan. 20, 2010); *In re TLG Liquidation Corp.,* Case No. 10-10206 (MFW) (Bankr. D. Del. May 20, 2010); *Pappas Telecasting Inc.*, Case No. 08-10916 (PJW) (Bankr. D. Del. June 4, 2010); *In re KB Toys, Inc.*, Case No. 08-13269 (KJC) (Bankr. D. Del. Dec. 1, 2009/February 16, 2010); *In re Omaha Standing Bear Pointe, LLC,* Case No. 10-81413 (TJM) (Bankr. D. Neb. March 11, 2011); *In re FPD, LLC*, Case No. 10-30424 (PM) (Bankr. D. Md. November 30, 2011); *In re G.I. Joe's Holding Corp.,* Case No. 09-10713 (KG) (Bankr. D. Del. Mar. 10, 2011, April 29, 2011, and October 4, 2011); *In re Ascendia Brands, Inc.*, Case No. 08-11787 (BLS) (Bankr. D. Del. July 18, 2012); *In re TSIC, Inc.,* Case No. 08-10322 (KG) (Bankr. D. Del. August 13, 2012); *In re Nacirema Industries, Inc.*, Case No. 11-12339 (RG) (Bankr. D. N.J. April 2, 2012); *In re Coach AM Group Holdings Corp., et al.*, Case No. 12-10010 (KG) (Bankr. D. Del. May 31, 2013); *In re 155 Route 10 Associates, Inc.*, Case No. 12-24414 (NLW) (Bankr. D. N.J. July 2, 2013); and *Al Liebers Golf Equipment, Inc.*, Case No. 12-23698 (RDD) (Bankr. S.D.N.Y. August 28, 2013).

[5] *See, e.g., Harvey Electronics*, Case No. 07-14051 [Docket No. 177]; *Princeton Ski Shop*, Case No. 07-26206 [Docket No. 546]; *Blades Board and Skate*, Case No. 03-48818 [Docket No. 126].

courts are increasingly likely to approve the structured dismissal.

(1) Court Authority to Enter Orders Approving Structured Dismissals

To obtain approval of a structured dismissal motion, movants must first establish that the bankruptcy court has authority to enter such an order. In almost every instance, movants cite to section 105(a) of the Bankruptcy Code as the source of the court's authority to approve structured dismissals.[7] Section 105(a) states, in pertinent part, that "the court may issue any order…or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."[8] On its face, section 105(a) appears quite clear; the statute allows the bankruptcy court to enter *any order* it deems necessary to carry out the provisions of the Bankruptcy Code.[9] Further, the United States Supreme Court noted that, as courts of equity, bankruptcy courts are awarded broad discretion under section 105(a) to enter a wide array of orders to effectuate the Bankruptcy Code.[10] Thus, section 105(a) appears to grant bankruptcy courts absolute authority to enter orders approving structured dismissals, because sections 305 and 1112 of the Bankruptcy Code provide means for dismissing cases.[11]

However, while broad in scope, section 105(a) does not entitle a bankruptcy court to enter an order inconsistent with the Bankruptcy Code.[12] According to the Office of the United States Trustee,[13] structured dismissals are inconsistent with sections 1112(b) and 305(a) of the Bankruptcy Code because the "bells and whistles" contained in many structured dismissal motions conflict with other Bankruptcy Code provisions.[14] Because entry of an order approving such bells and whistles would contradict the Bankruptcy Code, the U.S. Trustee argues that section 105(a) is inapplicable.[15]

Despite the U.S. Trustee's arguments—which will be addressed in more detail below—bankruptcy courts appear inclined to enter orders approving structured dismissals pursuant to

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[6] 11 U.S.C. § 305(a); and *see, e.g., CSI Inc.*, Case No. 01-12926 [Docket No. 284] (approving dismissal pursuant to section 305(a)*; Ascendia Brands*, Case No. 08-11787 [Docket No. 1230] (dismissing case pursuant to §§ 305 and 112(b)); *155 Route 10 Associates*, Case No. 12-24414 [Docket No. 627] (approving dismissal pursuant to §§ 1112(b) and 305(a)).

[7] *See, e.g., Coach*, Case No. 12-10010 [Docket No. 1482]; *Ascendia Brands*, Case No. 08-11787 [Docket No. 1199]; and *Foamex*, Case No. 10560 [Docket No. 712].

[8] 11 U.S.C. § 105(a).

[9] *Id.* (emphasis added).

[10] *See, generally, United States v. Energy Resources Co.*, 495 U.S. 545, 549 (1990) (acknowledging broad scope of powers conferred by section 105(a), and reasoning such powers are consistent with equitable nature of courts).

[11] *See* 11 U.S.C. §§ 305(a)(1) and 1112(b).

[12] *In re Gurney*, 192 B.R. 529, 537 (B.A.P. 9th Cir. 1996) (citing *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 199 (1988)).

[13] The Office of the United States Trustee shall hereinafter be referred to as the "U.S. Trustee."

[14] Eitel, Tinker and Lambert, *supra* note 2, at 20.

[15] *Id.*

section 105(a) of the Bankruptcy Code, so long as the movant satisfies the other elements provided above.[16] For example, in *155 Route 10 Associates*, the debtors sought court approval for a structured dismissal that contained, among other things, a waiver of certain causes of action, and a release of the debtors and other related parties.[17] In their motion, the debtors argued that section 105(a) granted the court authority to approve the proposed structured dismissal.[18] The U.S. Trustee objected, and argued that section 105(a) cannot be used to "graft a structured dismissal option onto the Bankruptcy Code" - which provides only for strict dismissals, as opposed to structured dismissals with bells and whistles.[19] The court disagreed, and entered an order pursuant to section 105(a) approving the structured dismissal.[20]

(2) Cause for Mandatory Dismissal of a Bankruptcy Case

In 2005, the United States Congress amended the language of section 1112 of the Bankruptcy Code with respect to the conversion and dismissal of bankruptcy cases.[21] Prior to the 2005 amendments, bankruptcy courts had wide discretion to dismiss cases upon movant's proof that cause for dismissal existed. Following the 2005 amendments, courts *must* enter an order dismissing or converting a bankruptcy case upon a showing of cause, so long as dismissal is in the best interest of creditors.[22] As one court noted, "Congress has purposefully limited the role of [the court] in deciding issues of conversion or dismissal such that [the court] has no choice, and no discretion in that it 'shall' dismiss or convert a case under Chapter 11 of the elements for 'cause' are shown…."[23] As a result, movants seeking the entry of an order approving a structured dismissal argue that a showing of cause necessitates entry of an order dismissing the case, even if it includes certain "bells and whistles."[24]

The term "cause" is not defined in the Bankruptcy Code. Even so, the Bankruptcy Code provides a non-exhaustive list of examples of "cause" for conversion or dismissal.[25] In the context of structured dismissals, debtors have typically sold substantially all of their assets, and therefore lack a reasonable possibility of reorganization.[26] In many circumstances, the debtor is

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[16] *155 Route 10 Associates*, Case No. 12-24414 [Docket No. 627].

[17] *Id.* [Docket No. 609].

[18] *Id.*

[19] *Id.* [Docket No. 625].

[20] *Id.* [Docket No. 627].

[21] *See* H.R. Rep. 109-31 (I), 2005 U.S.C.C.A.N. 88, 94.

[22] *In re Gateway Access Solutions, Inc.*, 374 B.R. 556 (Bankr. M.D. Pa. 2007) (noting prior discretion, and acknowledging amendments' limitations on court's discretion to refuse to dismiss a case upon a showing of cause); and *In re 3 Ram, Inc.*, 343 B.R. 113, 119 (Bankr. E.D. Pa. 2006).

[23] *In re TCR of Denver, LLC*, 338 B.R. 494, 498 (Bankr. D. Colo. 2006).

[24] *See, e.g., Coach*, 12-10010 [Docket No. 1482].

[25] 11 U.S.C. § 1112(b)(4)(A)-(P); *Gateway Access Solutions*, 374 B.R. at 561 (list of examples of "cause" are illustrative rather than exhaustive) (quoting *In re Brown*, 951 F.2d 564, 572 (3d Cir. 1991)); *3 Ram*, 343 B.R. at 117 (noting list not exhaustive); *accord In re Frieouf*, 938 F.2d 1099, 1102 (10th Cir. 1991).

[26] *See, e.g., 155 Route 10 Associates*, Case No. 12-24414 [Docket No. 609] (debtors lacked funds to pay unsecured creditors following sale, had no hope of reorganization).

administratively insolvent following the sale, and lacks sufficient resources to have any hope at even confirming a plan of reorganization.[27] Accordingly, movants typically present two independent arguments in order to establish cause: (1) there is a substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation; and/or (2) the debtor has no possibility of proposing a feasible plan of reorganization.[28]

In order to prove cause pursuant to the two-fold inquiry found in section 1112(b)(4)(A), movants must present evidence of a continuing diminution to the estate.[29] As noted above, structured dismissals are frequently found in cases involving the sale of substantially all of the debtor's assets prior to the plan process. Following the sale of substantially all of the debtor's assets, the amount of funds in the estate is typically fixed. For example, if the debtor liquidated its assets for $500,000, and satisfied $450,000 in secured debt, the debtor's estate is left with $50,000. Aside from potential causes of action, the debtor lacks any additional sources of revenue. As time goes by and professional fees and U.S. Trustee fees accrue, the value of the estate continues to diminish.[30] Because the debtor lacks any remaining sources of revenue, even minor, ordinary expenses are likely to diminish the estate, thereby satisfying the first element of the section 1112(B)(4)(A) test. As a number of courts have noted, "all that need be found is that the estate is suffering some diminution in value."[31]

Next, movants must show that there is no reasonable likelihood of rehabilitation.[32] As used in section 1112 of the Bankruptcy Code, the term "rehabilitation" means "to put back in good condition; re-establish on a firm, sound basis."[33] At least one court has determined that rehabilitation in the context of section 1112(b)(4)(A) does not equate to the likelihood of a successful liquidating plan of reorganization.[34] Thus, a debtor must be able to reorganize into a continuing going concern.[35] Prospects of rehabilitation must be based upon something "more substantial than [the debtor's] boundless confidence."[36] When a debtor no longer owns any assets or sources of revenue, and has few remaining employees if any, there is no real hope of rehabilitation within the meaning of section 1112(b)(4)(A), and the debtor's case is likely to be

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[27] *See, e.g., Al Liebers Golf Equipment*, Case No. 12-23698 [Docket No. 123] (debtor was administratively insolvent following sale of assets and settlement, could not propose feasible plan).

[28] 11 U.S.C. § 1112(b)(4)(A); *In re Citi-Toledo Partners*, 170 B.R. 602, 606 (Bankr. N.D. Ohio 1994) (applying two-fold inquiry into whether there has been a continuing diminution of the estate and absence of a reasonable likelihood of rehabilitation); *3 Ram*, 343 B.R. at 118 (stating case may be dismissed when debtor cannot reorganize within a reasonable time, or when debtor cannot meet the confirmation prerequisites of the Bankruptcy Code).

[29] 11 U.S.C. § 1112(b)(4)(A); and *Citi-Toledo*, 170 B.R. at 606.

[30] *Al Liebers Golf Equipment,* Case No. 12-23698 [Docket No. 123] (successfully arguing that ordinary expenses and accrual of administrative fees resulted in continuing diminution of estate); and *Citi-Toledo*, 170 B.R. at 606 (finding that accrual of taxes on remaining assets satisfied "continuing diminution" element of § 1112(b)(4)(A)).

[31] *Citi-Toledo*, 170 B.R. at 606 (quoting *In re Kanterman*, 88 B.R. 26, 29 (S.D.N.Y. 1988)).

[32] 11 U.S.C. § 1112(b)(4)(A); *Clarkson v. Cooke Sales and Service Co. (In re Clarkson)*, 767 F.2d 417, 420 (8th Cir. 1985).

[33] *In re Wright Air Lines, Inc.*, 51 B.R. 96, 99 (Bankr. N.D. Ohio 1985).

[34] *Citi-Toledo*, 170 B.R. at 607.

[35] *See id.*

[36] *A. Illum Hansen Inv. v. Tiana Queen Motel, Inc. (In re Tiana Queen Motel, Inc.)*, 749 F.2d 146 (2d Cir. 1984).

dismissed.[37]

In addition to the cause for dismissal found in section 1112(b)(4)(A), courts may dismiss a case for cause if a debtor is incapable of proposing a feasible plan of reorganization.[38] As one court noted, "there is no point in expending estate assets on administrative expenses, or delaying creditors in the exercise of their nonbankruptcy law rights" if a debtor has no chance of confirming a plan of reorganization.[39] In administratively insolvent cases, this means of establishing cause is especially applicable. For example, in one recent case,[40] the liquidation of a debtor's assets failed to net sufficient proceeds to pay secured claims in full, let alone to satisfy administrative and priority claimants as required by section 1129 of the Bankruptcy Code. Thus, despite its best efforts, the debtor was incapable of confirming even a liquidating plan of reorganization in accordance with the Bankruptcy Code. As a result, the court found cause for dismissal, and entered an order approving a structured dismissal.[41]

(3) Structured Dismissal – The Best Interest of the Creditors

Once a movant establishes cause pursuant to section 1112(b) of the Bankruptcy Code, the court must dismiss or convert the case, whichever is in the best interest of the debtor's creditors.[42] Accordingly, a movant seeking entry of an order approving a structured dismissal must show that dismissal is in the best interest of the creditors. Thus, a movant may first argue that converting to Chapter 7 would delay distributions to unsecured creditors.[43] Moreover, the Chapter 7 trustee's fees and related professional fees would greatly reduce the pool of funds available for distributions. By contrast, a structured dismissal containing various bells and whistles, such as a carve-out and distribution mechanism, may clearly benefit creditors.

Typically, dismissal is in the best interest of creditors when a debtor demonstrates the ability to oversee its own liquidation.[44] Thus, courts should favor a structured dismissal in which a debtor proposes a mechanism with which to complete its liquidation and distribute proceeds to

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[37] *Citi-Toledo*, 170 B.R. at 607.

[38] *3 Ram*, 343 B.R. at 117-18 (citing *Fossum v. Federal Land Bank (In re Fossum)*, 764 F.2d 520, 521 (8th Cir. 1985); *Michigan National Bank v. Charfoos (in re Charfoos)*, 979 F.2d 390, 395 (6th Cir. 1992); and *In re Brown*, 951 F.2d 564, 572 (3d Cir. 1991) (quoting *United Sav. Assoc. v. Timbers of Inwood Forest, Itd.*, 484 U.S. 365 (1988) for proposition that dismissal is appropriate if debtor cannot propose feasible plan of reorganization within reasonable period of time)).

[39] *3 Ram*, 343 B.R. at 118 (citing *Brown*, 951 F.2d at 572)).

[40] *Al Liebers Golf Equipment,* Case No. 12-23698 [Docket No. 123], order approving same entered August 28, 2013 [Docket No. 135].

[41] *Id.* [Docket No. 135].

[42] 11 U.S.C. § 1112(b)(1), and *see* (b)(2).

[43] *Id.* (noting conversion fraught with delay as a result of Trustee getting up to speed, and potentially delaying distributions while investigating, and possibly pursuing, Chapter 5 causes of action).

[44] *Camden Ordnance Mfg. Co. of Ark., Inc. v. United States Trustee (In re Camden Ordnance)*, 245 B.R. 794, 798 (E.D. Pa. 2000).

creditors of the estate.[45] Moreover, a structured dismissal is in the best interest of creditors when it will maximize the value of the debtor's estate relative to a Chapter 7 liquidation by reducing the potential accrual of additional administrative fees.[46] In addition, gift provisions and carve-outs for distributions to unsecured creditors have also been approved in the best interest of creditors when they would otherwise be unavailable upon conversion.[47] Courts therefore appear inclined to favor structured dismissals that provide equitable distributions to creditors with minimal delay and costs to the debtor's estate.

(4) Section 305(a) – Best Interests of Debtor and Creditors

In addition to section 1112(b), section 305(a) of the Bankruptcy Code may also provide grounds for entry of an order approving a structured dismissal. Section 305(a) states, in pertinent part, that a court "after notice and a hearing, may dismiss a case under this title…at any time if the interests of creditors and the debtor would be better served by such dismissal…."[48] Unlike an order entered pursuant to section 1112(b), an order dismissing a case under section 305 is not subject to appeal.[49] As a result, it is considered an extraordinary remedy requiring "more than a simple balancing of harm to the debtor and its creditors."[50] Indeed, courts typically analyze seven factors when determining whether to abstain by dismissal: (1) the economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far that it would be too costly to re-start using the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought."[51]

In structured dismissal cases, many of the aforementioned factors weigh heavily in favor of dismissal. As noted above, structured dismissals are frequently more efficient, economical, and expedient than converting to Chapter 7 or proceeding with a liquidating plan of reorganization. Moreover, a structured dismissal may provide unsecured creditors with a greater distribution than they would otherwise receive, while still serving the purpose of federal insolvency proceedings, and satisfying the reasons why bankruptcy jurisdiction was originally

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[45] *See, e.g., Al Liebers Golf Equipment*, Case No. 12-23698 [Docket No. 135] (order approving structured dismissal pursuant to section 1112(b) and 305(a) containing provisions for administration of remaining assets).

[46] *In re Fleurantin*, Case No. 09-4376, 420 Fed. Appx. 194 (3rd Cir. March 28, 2011).

[47] *Al Liebers Golf Equipment*, Case No. 12-23698 [Docket No. 135]; *Blades Board and Skate*, Case No. 03-48818 [Docket No. 126] (order approving structured dismissal with carve out for payment of administrative and unsecured claims as in best interest of creditors and debtors' estates).

[48] 11 U.S.C. § 305(a)(1).

[49] 11 U.S.C. § 305(c).

[50] *In re Monitor Single Lift I Ltd.*, 381 B.R. 455, 462 (Bankr. S.D.N.Y. 2008) (citing *In re Eastman*, 188 B.R. 621, 624 (B.A.P. 9th Cir. 1995)).

[51] *Monitor*, 381 B.R. at 464-65 (citing *In re Paper I Partners, L.P.*, 283 B.R. 661, 678 (Bankr. S.D.N.Y. 2002); *In re 801 South Wells Street Ltd. Partnership*, 192 B.R. 718, 723 (Bankr. N.D. Ill. 1996); and *In re Trina Assoc.*, 128 B.R. 858, 867 (Bankr. E.D.N.Y. 1991)).

sought. Numerous courts have agreed, and entered orders approving structured dismissals pursuant to section 305(a) of the Bankruptcy Code.[52]

C. BELLS AND WHISTLES – DISMISSALS WITH BENEFITS

Generally speaking, most structured dismissals contain a number of provisions that affect parties' rights following the entry of the order dismissing the bankruptcy case. Those provisions are frequently referred to as "bells and whistles," and are often subject to scrutiny from the U.S. Trustee. Typically, structured dismissals include one or more of the following bells and whistles: (1) releases of liability; (2) mechanisms for the administration of claims; (3) gifts to classes of creditors; and (4) provisions for the retention of jurisdiction following dismissal.

(1) Releases of Liability

Many structured dismissals contain provisions for the release of parties' liability, including non-consensual third-party releases. While some may grant complete releases, other structured dismissal motions simply seek a release of any causes of action or disputes arising out of the structured dismissal motion and corresponding order. In addition, releases may include waivers of claims and liabilities. For example, the debtor may waive and release all causes of action for preferential transfers and fraudulent conveyances.

(2) Claims Administration

Many structured dismissals contain provisions affecting the administration of claims against the debtor's estate. Generally, those provisions are focused on expediting and minimizing the costs of the claims administration process. For example, certain provisions may fix and allow scheduled claims, or may propose a pro-rata payment of all claims allowed following a post-dismissal claim objection process. Common provisions may also name a claims administration agent, and fix that agent's role in the post-dismissal claims administration process. More controversial provisions may require objecting claimants to incur all costs and professional fees associated with the resolution of claim objections.

(3) Gifts

In many structured dismissal cases, proposed dismissal orders contain carve-outs or gifts for certain classes of creditors. For example, secured and administrative claimants may carve out funds to distribute to unsecured creditors who would otherwise receive nothing in a liquidation. Such provisions may bolster the likelihood of court approval, because they are typically in the best interest of the debtor's creditors.

(4) Retention of Jurisdiction

[52] *See, e.g., CSI Inc.*, Case No. 01-12926 [Docket No. 284] (approving dismissal pursuant to section 305(a)); *Ascendia Brands*, Case No. 08-11787 [Docket No. 1230] (dismissing case pursuant to §§ 305 and 112(b)); *155 Route 10 Associates*, Case No. 12-24414 [Docket No. 627] (dismissing case pursuant to §§ 1112(b) and 305(a)); *G.I. Joe's Holding Corp.*, Case No. 09-10713 [Docket No. 773] (dismissing case pursuant to §§ 1112(b) and 305(a)); and *Al Liebers Golf Equipment*, Case No. 12-23698 [Docket No. 135] (dismissing case pursuant to §§ 1112(b) and 305(a)).

Structured dismissal orders also frequently contain a provision pursuant to which the bankruptcy court retains jurisdiction over post-dismissal issues, such as the distribution of retaining funds, the claims administration process, and any disputes arising from the structured dismissal order. Additionally, movants may seek entry of an order that provides that all pre-existing bankruptcy orders survive dismissal. This retention of jurisdiction and enforcement of orders promotes the orderly administration of remaining assets, and a setting to resolve any remaining issues, should they arise.

D. OPPOSITION TO STRUCTURED DISMISSALS

Despite increasing support for structured dismissals on the part of bankruptcy judges and bankruptcy practitioners, there are those who find grounds to object to structured dismissals. In particular, the Office of the U.S. Trustee has shown itself to be the most frequent, and often the only, opponent to structured dismissals. In that regard, the U.S. Trustee has gone so far as to formally respond to one law review article that recommended consideration of structured dismissal as a cost-effective way to conclude a chapter 11 case.[53]

Objections to Structured Dismissal – In Theory

In the U.S. Trustee's ABI article, the U.S. Trustee argues that structured dismissals make an "end run" around specific provisions of the Bankruptcy Code, and that Congress has established only three paths to conclude a chapter 11 case under the Bankruptcy Code – those being confirmation of a plan, conversion to chapter 7, and dismissal without the "bells and whistles" included in most structured dismissal orders.[54]

The U.S. Trustee further argues that structured dismissals are impermissible for three reasons: (1) they resemble impermissible *sub rosa* plans; (2) they fail to distribute funds in accordance with the Bankruptcy Code's priorities and may fail to account for potential litigation-based assets; and (3) unlike a strict dismissal, they fail to reinstate creditors' state-law remedies. A brief discussion of the primary arguments against structured dismissals made in the U.S. Trustee's article might be helpful, and is set forth below.

(1) Impermissible Sub Rosa Plans

As we know, structured dismissal orders typically contain provisions for the distribution of proceeds, claim releases, and resolution of claims more frequently found in plans of reorganization. When objecting to structured dismissals, U.S. Trustees often argue that a structured dismissal is simply a "new permutation of the *sub rosa* plan" that circumvents the plan confirmation process and, as a result, denies creditors the "safeguards of disclosure, voting, acceptance and confirmation."[55]

In the U.S. Trustee article, it is argued that because structured dismissals are sought separately from asset sales and settlements, the process effectively bifurcates a single *sub rosa*

[53] Eitel, Tinker and Lambert, *supra* note 2, at 20.
[54] Eitel, Tinker and Lambert, *supra* note 2, at p. 20.

[55] *Id.,* citing *PBGC v. Braniff Airways, Inc. (In re Braniff Airways Inc.)*, 700 F.2d 935, 949 (5th Cir. 1983).

plan.[56] The U.S. Trustee suggests that debtors can avoid these *sub rosa* issues when selling over-encumbered property by negotiating benefits for the estate, including (1) a set-aside of sale proceeds to pay administrative expenses so that the case might be administered in accordance with the Bankruptcy Code, and (2) requiring the debtor to either confirm a plan or convert to Chapter 7.

While numerous courts have entered orders approving structured dismissals with the typical provisions,[57] at least one court has acknowledged that structured dismissals closely resemble *sub rosa* plans, and may be subject to denial on that ground.[58]

(2) Omitted Confirmation or Chapter 7 Safeguards

The U.S. Trustee further argues that structured dismissals typically lack chapter 11 safeguards, such as voting, acceptance, disclosure and the "fair and equitable" standards, including the absolute priority rule.[59] Also, structured dismissal orders nearly always provide for how a debtor's assets will be distributed following dismissal, but rarely do so in compliance with specific Bankruptcy Code provisions and protections.[60] For example, the mechanism for dismissal may unilaterally fix claim amounts without accounting for a claim objection process.[61] The U.S. Trustee argues that expedition of claims resolution is not a justification for abandonment of proper standards and the protections afforded by the Bankruptcy Code and Rules.[62]

The U.S. Trustee expresses particular problems with "carve outs" and "gift trusts" that gift certain assets to creditor classes while bypassing others (thereby violating the absolute priority rule).[63] The U.S. Trustee asserts that any such provisions should be adjudicated under the rules governing settlement or plan confirmation.[64]

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[56] *Id.*

[57] *See, e.g., Ascendia Brands,* Case No. 08-11787 [Docket No. 1230]; *G.I. Joe's Holding Corp.*, Case No. 09-10713 [Docket No. 735, 773, 804]; *In re Thompson Prods., Ins.*, Case No. 08-10319 [Docket Nos. 512, 542]; *CFM U.S. Corp.*, Case No. 08-10668 [Docket No. 1282]; *Foamex Int'l Inc.*, Case No. 09-10560 [Docket No. 761].

[58] *In re BT Tires Group Holding, LLC*, Case No. 09-11173 (CSS) (Bankr. D. Del. Oct. 5, 2009) (Court denied "premature" motion for structured dismissal without prejudice, but noted proposed dismissal was quite similar to *sub rosa* plan, and warned of potential lack of Bankruptcy Code authority for relief sought).

[59] Eitel, Tinker and Lambert, *supra* note 2, at p. 20.

[60] *See, e.g., G.I. Joe's Holding Corp.*, Case No. 09-10713; *Coach*, Case No. 12-10010 (numerous, highly-negotiated dismissal provisions); and *Nacirema Industries,* Case No. 11-12339 (authorization to sell and abandon property).

[61] *Nacirema Industries*, Case No. 11-12339, and *Thompson Prods.*, Case No. 08-10319 (waiving certain Rule 3007 requirements).

[62] Eitel, Tinker and Lambert, *supra* note 2, at p. 20.

[63] *See, e.g., Coach*, Case No. 12-10020 (numerous, highly-negotiated dismissal provisions); *G.I. Joe's Holding Corp.*, Case No. 09-10713; and *KB Toys*, Case No. 08-13269.

[64] In fact, it appears that in most cases carve outs and gift trusts actually are the product of a court-approved settlement between secured creditors and other creditors in a case. *See, e.g., G.I. Joe's Holding Corp.*, Case No. 09-10713 [Docket No. 735].

In addition, structured dismissal motions may seek to release or waive the debtor's potential claims against creditors, such as causes of action to recover preferential transfers and fraudulent conveyances.[65] Again, such provisions would appear to be contrary to the requirements of Bankruptcy Rule 9019, yet are sometimes included in structured dismissal orders simply to tie up loose ends and buy peace.

The U.S. Trustee would further argue that structured dismissals wrongly bypass the checks and balances found in a conversion to chapter 7. A chapter 7 trustee must account for all estate assets and make a final report of assets liquidated, claims quantified, and the distribution proposed. In a structured dismissal, such oversight might be lacking, and creditors face the possibility of error or abuse.

(3) Failure to Reinstate State-Law Remedies

Finally, the U.S. Trustee article protests structured dismissals because they circumvent the "unwinding" process generally associated with strict dismissals under Bankruptcy Code section 1112(b). According to the U.S. Trustee article, section 349 of the Bankruptcy Code is intended "to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case."[66] By contrast, many structured dismissals release parties from potential liability, and distribute assets in accordance with a proposed order, as opposed to state law rights and remedies.

Even the U.S. Trustee acknowledges that section 349 of the Bankruptcy Code is not so rigid as to require an absolute reversion to pre-petition status quo.[67] In fact, section 349 of the Bankruptcy Code states that reversion to the status quo ante occurs only if the bankruptcy court does not, with cause, order otherwise. Thus, even the U.S. Trustee acknowledges that a court, having found cause, may enter a dismissal order that avoids reversion to the status quo ante and substantively alters parties' post-dismissal rights. However, the U.S. Trustee further points out that one's desire to make an end run around a statute is not an adequate reason or "cause."[68]

Objections to Structured Dismissal – In Practice

U.S. Trustees in a number of bankruptcy cases have filed and argued detailed objections to proposed structured dismissals – sometimes successfully.[69] The U.S. Trustee's arguments typically include an argument that practitioners have twisted the intent and meanings of Bankruptcy Code sections 105(a), 305(a)(1) and 1112(b), and have done so in a cynical effort to circumvent clear Congressional intent.

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[65] *See, e.g., 155 Route 10 Associates,* Case No 12-24414, and *Al Liebers Golf Equipment*, Case No. 12-23698.

[66] Eitel, Tinker & Lambert at p. 59 (citing H.R. Rep. No. 95-595, at 338 (1977); S. Rep. 95-89, at 48-49 (1978)).

[67] *Id*.

[68] *Id.*

[69] *See, e.g., 155 Route 10 Associates*, Case No 12-24414 [Docket No. 625] (structured dismissal approved); *Coach*, Case No. 12-10020 [Docket No. 1512] (structured dismissal approved); *G.I. Joe's Holding Corp.*, Case No. 09-10713 [Docket No. 743] (structured dismissal approved); *In re NPPI Holdings, Inc., et al.*, Case No. 09-11547 (PJW) (Bankr. D. Del.) [Docket No. 548] (structured dismissal denied); and *BT Tires Group*, Case No. 09-11173 [Docket No. 334] (structured dismissal denied).

For example, in *155 Route 10 Associates, Inc.*, the debtors' plan included broad third-party releases applicable to all creditors, and releases of avoidance actions, as well as other post-dismissal case cleanup provisions, including survival of prior entered orders. In her objection, the U.S. Trustee began by noting that Bankruptcy Code section 1112(b) expressly provides only for either conversion or dismissal, with no "strings attached."[70] The U.S. Trustee acknowledged that even if a structured dismissal would cost less than a chapter 7 dismissal, Bankruptcy Code section 105 could not be utilized purely for equitable reasons, and was not "a roving commission to do equity."

The U.S. Trustee's objection in *155 Route 10 Associates, Inc.* further noted that Congress had provided for only three ways to exit chapter 11: (1) by confirming a plan under section 1129; (2) by converting to another chapter of the Code under section 1112(b); and (3) by dismissing the case under section 1112(b). The U.S. Trustee asserted that "if section 105(a) could be used to get around any problems observed with sections 1112(b) and 1129 in certain situations, then those statutes "might as well not exist." As in the U.S. Trustee article discussed above, the U.S. Trustee argued in *155 Route 10 Associates, Inc.* that the proposed structured dismissal was essentially the second half of a bifurcated *sub rosa* plan, such that the proposed structured dismissal should not be approved.

The U.S. Trustee expressed similar objections in *In re Coach AM Group Holdings Corp., et al.*[71] The proposed structured dismissal in that case provided for extensive non-consensual releases of third parties, post-dismissal retention of jurisdiction to resolve claims objections, and approval of a lender trust agreement providing for a "gift" to unsecured creditors.

As in *155 Route 10 Associates*, the U.S. Trustee in *Coach* cited to Bankruptcy Code sections 1112 and 105, and asserted those provisions do not provide for a structured dismissal. The U.S. Trustee further argued that section 1125(e) and 1141 preclude the release and exculpation provisions requested by the debtors in their dismissal motion, and that such releases violated the five-part test adopted by the court in *In re Zenith Electronics*, 241 B.R. 92, 111 (Bankr. D. Del. 1999).

Finally, the U.S. Trustee objected to that provision of the debtor's motion providing that the bankruptcy court would retain jurisdiction of matters related to implementation of the proposed dismissal. The U.S. Trustee argued that a dismissal order cannot expand the post-dismissal jurisdiction of a bankruptcy court, and that if a court lacks jurisdiction over a dispute, it cannot create that jurisdiction by simply stating it has jurisdiction in a confirmation or other order.

A carve out provision in a proposed structured dismissal motion was the focus of the U.S. Trustee's objection in *G.I. Joe's Holding Corp*.[72] The debtors in that case proposed distributing a carved out portion of sale proceeds to both unsecured priority claims and general unsecured claims on a *pari passu* basis. The U.S. Trustee objected.

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[70] *155 Route 10 Associates*, Case No 12-24414 [Docket No. 625].

[71] *Coach*, Case No. 12-10020 [Docket No. 1512].

[72] *G.I. Joe's Holding Corp.*, Case No. 09-10713 [Docket No. 743].

In his objection, the U.S. Trustee argued the proposed distribution provisions violated the "absolute priority rule" set forth in Bankruptcy Code section 1129(b)(2)(B)(ii), which ensures that the holder of any claim or interest that is junior to the claims of an impaired dissenting class will not receive or retain under the plan on account of such junior claim or interest any property. The U.S. Trustee asserted in his objection that absent convincing evidence of some contrary Congressional intent, the statute "must be applied as written."[73] Nevertheless, the court approved the structured dismissal as requested.

Despite suffering frequent losses in the structured dismissals game, the U.S. Trustee has had some limited success.[74] At issue in *NPPI Holdings* was a proposed structured dismissal motion calling for a claims resolution process, "gift" distributions to unsecured creditors, releases (including non-consensual third party releases), and conversion.

The U.S. Trustee began her objection by noting her "overarching responsibility to enforce the laws as written by Congress and interpreted by the courts." The U.S. Trustee then noted that the proposed creation of a trust to pay unsecured creditors violated the specific provisions of sections 1121 through 1142 of the Bankruptcy Code. Moving on, the U.S. Trustee asserted (1) that non-payment of administrative expense and priority claims violated the "absolute priority rule;" (2) that distributions to a specific class without acceptance of a plan violates Bankruptcy Code sections 1123(a)(3) and 1142(a); (3) that sections 1125(e) and 1141 preclude releases and exculpations of various parties without the consent or agreement of affected persons; and (4) that there was no authority to appoint a trustee to implement the proposed structured dismissal provisions outside a confirmed plan under section 1123(b)(3)(B).

As with other objections to structured dismissal motions filed by U.S. Trustees, the U.S. Trustee in *NPPI Holdings* argued that section 105 can only be used to carry out the provisions of the Bankruptcy Code, but cannot be used to graft new provisions onto the statute that Congress neither enacted nor intended. In the balance of his objection, the U.S. Trustee discussed the history of the absolute priority rule, and concluded that creditors are not free to use their own property in contravention of the rule. The court in *NPPI Holdings* apparently agreed with some of the U.S. Trustee's arguments, and converted the case to one under Chapter 7.[75]

The U.S. Trustee was similarly successful in *BT Tires Group Holding, LLC*.[76] At issue was a proposed structured dismissal calling for a claims resolution process, "gift" distributions to unsecured creditors, releases (including non-consensual third party releases), and substantive consolidation.

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[73] Despite arguing against structured dismissal, the U.S. Trustee appeared to be willing to consider the need for accommodation of structured dismissals. In footnote 3 of the U.S. Trustee's objection, the U.S. Trustee notes, "If there was no Section 1112 and Chapter 7, then perhaps a pre-confirmation-wind-down-with-no-hope-of-a-Chapter-11-plan-and-pending-conversion-or-dismissal might be a viable option. But since Congress addressed the issue of liquidations without plans of reorganization, bankruptcy courts cannot ignore Section 1112 and Chapter 7."

[74] *See, e.g., NPPI Holdings,* Case No. 09-11547 [Docket No. 548] (structured dismissal later denied); and *BT Tires Group*, Case No. 09-11173 [Docket No. 334] (structured dismissal later denied).

[75] *NPPI Holdings,* Case No. 09-11547 [Docket No. 612].

[76] *BT Tires Group*, Case No. 09-11173 [Docket No. 334].

In her objection, the U.S. Trustee again noted her "overarching responsibility" to enforce the bankruptcy laws as written by Congress and interpreted by the Courts. And as in *NPPI Holdings*, the U.S. Trustee argued that structured dismissal flies in the face of Bankruptcy Code sections 1121 through 1142, among others. Further, the U.S. Trustee asserted that the relief requested in the motion was "nothing more than a bare bones chapter 11 liquidating plan designed to get these cases closed without following the requirement of the Code."

In concluding her objection, the U.S. Trustee noted that while the debtors cited extensive case law in support of their motion, none of the authority cited was published case law for the propositions at issue. The court appears to have agreed with the U.S. Trustee, and the debtors' motion for a structured dismissal was denied, without prejudice.[77]

Other Objections to Structured Dismissals

The U.S. Trustee is not the only entity that might oppose a structured dismissal, as seen from the *Strategic Labor* case discussed immediately below.[78] Disaffected creditors are also likely to object to a structured dismissal in the event they themselves are carved out of benefits provided others in a structured dismissal.

In addition, one ethical consideration facing bankruptcy professionals is worthy of mention. It has been noted that the structured dismissal process may give chapter 11 estate professionals the appearance of impropriety.[79] The clear ethical problem here is that because chapter 11 administrative expenses are subordinated to those of a chapter 7 trustee, a professional may be more inclined to recommend a structured dismissal (with payment of administrative expenses) over conversion to chapter 7.[80]

E. SURVEY OF STRUCTURED DISMISSAL CASE "BELLS AND WHISTLES."

The number of published cases discussing structured dismissals can probably be counted on one hand, although what we could find can be counted on one finger – that case being *In re Strategic Labor, Inc.*[81] Even there, the rejection of the debtor's proposed structured dismissal was merely noted in passing by the Court, as was (in a footnote) the U.S. Trustee's ABI article and the Pernick and Dean ABI article.[82] The *Strategic Labor* Court noted that Strategic Labor's motion to dismiss caught the attention of a "sleeping giant" – the Internal Revenue Service. The debtor's dismissal motion had been denied after it was determined the debtor never sought authority to use the IRS's cash collateral, including sale proceeds, and had burned through a great

[77] *BT Tires Group*, Case No. 09-11173 [Docket No. 350].

[78] *In re Strategic Labor, Inc.*, 467 B.R. 11, 18 (Bankr. D. Mass. 2012) (IRS objecting to structured dismissal for failing to deal with administrative and other claims against debtor).

[79] American Bankruptcy Institute, *Bankruptcy 2011 Views from the Bench* (September 16, 2011).

[80] *Id.*

[81] *In re Strategic Labor, Inc.*, 467 B.R. 11, 18 (Bankr. D. Mass. 2012).

[82] *Id.* at 18, n.10.

deal of the IRS's cash collateral during the case.[83]

Unfortunately then, the great majority of structured dismissal cases are unpublished. Nevertheless, our own investigation and review of structured dismissal orders reveals a broad geographical scope of successful structured dismissals, as well as a variety of provisions typically approved in structured dismissal orders.[84] A representative sample of those cases is as follows:

[83] *Id.* at 18.

[84] Every effort has been made to accurately present the scope of terms approved by individual structured dismissal orders. However, given the circumstances of individual cases, and the frequent use of separate settlement agreements that result in a structured dismissal, we may have overlooked dismissal provisions that weren't evident from the dismissal motions and orders themselves. We would certainly appreciate any constructive comments correcting the contents of our table.

Case Name (other, non-standard dismissal provisions)	Release and Exculpation Provisions	Claims Reconciliation Process and Distribution Procedures	Carve outs and "gift" trusts	Survival of prior orders entered	Retention of Court's Jurisdiction	Conditions to Dismissal	Waiver of Debtor Claims/Causes of Action	Continued existence of specified contested matters/adversary cases
In re Coach AM Group Holdings Corp., et al., Case No. 12-10020 (KG) (Bankr. D. Del.) [Docket No. 1568] (numerous, highly-negotiated dismissal provisions)	X	X	X	X	X	X		X
In re TSIC, Inc., Case No. 08-10322 (KG) (Bankr. D. Del.) [Docket No. 2475]		X			X	X		
In re Ascendia Brands, Inc., Case No. 08-11787 (BLS) (Bankr. D. Del.) [Docket No. 1230] (all unliquidated property abandoned)	X	X	X	X	X			
In re G.I. Joe's Holding Corp., Case No. 09-10713 (KG) (Bankr. D. Del.) [Docket No. 804]	X	X	X	X	X	X		
In re Thompson Prods., Inc., Case No. 08-10319 (PJW) (Bankr. D. Del.) [Docket No. 542] (waiver of certain Rule 3007 requirements)	X	X		X	X	X		
Pappas Telecasting Inc., Case No. 08-10916 (PJW) (Bankr. D. Del.) [Docket No. 2132]	X	X	X	X	X			
In re TLG Liquidation Corp., Case No. 10-10206 (MFW) (Bankr. D. Del.) [Docket No. 314]	X	X	X	X	X			
In re KB Toys, Inc., Case No. 08-13269 (KJC) (Bankr. D. Del.) [Docket No. 993]	X	X	X	X	X			
In re Foamex Int'l Inc., Case No. 09-10560 (KJC) (Bankr. D. Del.) [Docket No. 761] (funds set aside to pay wind-wind expenses, including preparation of tax returns)				X	X			
In re CFM U.S. Corp., Case No. 08-10668 (KJC) (Bankr. D. Del.) [Docket No. 1282]	X	X	X	X	X	X		
In re Wickes Holdings, LLC, Case No. 08-10212 (KJC) (Bankr. D. Del.) [Docket No. 1418]	X	X	X	X	X			X
In re Magnolia Energy, L.P., Case No. 06-11069 (MFW) (Bankr. D. Del.) [Docket No. 196]		X	X	X	X	X		
In re New Weathervane Retail Corporation, Case No. 04-11649 (PJW) (Bankr. D. Del.) [Docket No. 566] (contested claims objections go to binding arbitration)	X	X	X	X	X			
In re Dawarhare's of Lexington LLC, Case No. 08-51381(JMS) Bankr. E.D. Ky.) [Docket No. 316]	X	X	X	X	X			
In re FPD, LLC, Case No. 10-30424 (PM) (Bankr. D. Md.) [Docket No. 498] (Debtors authorized to sell remaining property)		X		X	X			

Case Name (other, non-standard dismissal provisions)	Release and Exculpation Provisions	Claims Reconciliation Process and Distribution Procedures	Carve outs and "gift" trusts	Survival of prior orders entered	Retention of Court's Jurisdiction	Conditions to Dismissal	Waiver of Debtor Claims/Causes of Action	Continued existence of specified contested matters/adversary cases
In re Omaha Standing Bear Pointe, LLC, Case No. 10-81413 (TJM) (Bankr. D. Neb.) [Docket No. 52]				X	X			
In re 155 Route 10 Associates, Inc., Case No 12-24414 (NLW) (Bankr. D. N.J.) [Docket No. 627]	X			X	X		X	
In re Nacirema Industries, Inc., Case No. 11-12339 (RG) (Bankr. D. N.J.) [Docket No. 464] (authorization to sell and abandon property)	X	X	X		X			X
In re Princeton Ski Shop, Inc., Case No. 07-26206 (MS) (Bankr. D. N.J.) [Docket No. 546] (also authorizes abandonment of property)		X		X	X			
Cape May Care Center, *Inc.*, Case No. 00-41945 (NLW) (Bankr. D. N.J.) [Docket No. 318]	X	X	X		X			
In re Blades Board and Skate, LLC, Case No. 03-48818 (Bankr. D. N.J.) [Docket No. 126]	X	X	X	X				
In re Bag Liquidation, Ltd., et al., Case No. 08-32096 (SJ) (Bankr. N.D. Tex.) [Docket No. 683]		X						
Al Liebers Golf Equipment, Inc., Case No. 12-23698 (RDD) (Bankr. S.D.N.Y.) [Docket No. 135]	X	X	X	X	X		X	
In re Harvey Electronics, Inc., Case No. 07-14051 (ALG) (Bankr. S.D.N.Y.) [Docket No. 177]	X	X	X	X	X			
In re Levitz Home Furnishings, Inc., 05-45194 (BRL) (Bankr. S.D.N.Y.) [Docket No. 5]	X	X	X	X	X			X
In re CSI Inc., Case No. 01-12923 (REG) (Bankr. S.D.N.Y) [Docket No. 284]		X						

F. STRUCTURED CONVERSIONS

Structured conversions represent an alternative method to structured dismissals in bringing about the resolution of a Chapter 11 case. In circumstances where assets exist that are unrelated to a sale (e.g., significant preference claims, which might cease to exist in the context of a dismissal) a structured conversion can provide a mechanism to achieve a similar certainty of result. The structured conversion can often involve the "carve out" of cash collateral or sales proceeds, which are then used to pay certain obligations that a secured creditor or purchaser wants to satisfy as part of the post-sale disposition, and which might not get paid, or for which payment may be delayed in a Chapter 7. Such obligations might include employee

administrative claims which have accrued post-petition but pre-sale, and which are not directly satisfied out of the sale proceeds. A buyer may not be willing to directly assume responsibility for such expenses as part of a sale closing. However, the ability to retain employees of the debtor in the post-sale business operation may be important to maximize value.

A secured creditor seeking to enhance a sales process may be willing to carve out certain funds from sale proceeds or cash collateral and "gift," or set aside, such amounts for the payment of certain administrative claims. A structured conversion order containing such "gift" directives will bind the subsequently-appointed Chapter 7 trustee to use such funds for that express purpose once the conversion occurs. The argument is that such funds are not "property of the estate" under 11 U.S.C § 541, but are rather the secured creditor's money that has been designated for use in a particular purpose. The conversion order would theoretically bind the subsequently-appointed trustee to disburse such funds in conformity with the stipulated use of non-estate assets.

Sometimes, a debtor may have certain "sole source" or other "critical vendor" suppliers who are not parties to executory contracts, but who are nevertheless essential to the operation of a business being purchased from the debtor. While unable to effectuate a "cure" of amounts owed because there is no contract and no contractual obligation to cure, a buyer (with the cooperation of any secured creditor who desires to maximize the sales price) may require that certain sale proceeds be used to satisfy "preferred" claims that might otherwise be treated with other unsecured claims. Again, the Chapter 7 trustee would be obligated to use these non-estate assets in a particular manner as part of the conversion order.

Some bankruptcy judges are reluctant to favor a section 363 sales process when the sale in Chapter 11 is destined to benefit only secured creditors. A secured creditor may sometimes be unwilling to foreclose on its collateral due to potential exposure from sale or ownership of the assets[85] but believes that the value of the assets in a 363 sale is enhanced by marketing the assets as part of a going concern. The bankruptcy court's valid concern in such situations is that the Chapter 11 bankruptcy estate is, or will become, administratively insolvent during or after the sale process.

In these circumstances, the concerns of the bankruptcy court can be remedied through a structured conversion. The conversion order would include a carve out procedure that provides for the payment of administrative expenses that accrue during the pre-sale process, but which may not be payable out of cash collateral without a surcharge motion under 11 U.S.C. § 506. In many instances this right of surcharge has been waived or eliminated in an early cash collateral agreement and order. Through a structured conversion, funds necessary to satisfy debtor's counsel fees, committee fees and expenses, U.S. Trustee's fees and expenses and other administrative costs can be carved out of sale proceeds and applied to pay specified administrative expenses pursuant to a structured conversion order.

In specific circumstances, such as where a debtor has an obligation to maintain certain records (e.g. medical or financial records) funds can be carved out of sale proceeds so that these

[85] E.g. plugging and abandonment responsibilities due to ownership of oil and gas wells, environmental liability through the ownership of real estate which may have been subject to toxic exposure, ownership of health care-related facilities due to assumption of patient records or patient care responsibilities.

administrative burdens can be satisfied. By doing so, a Chapter 7 trustee might obtain sufficient funds to satisfy such obligations. At the same time, the secured creditor will be able to provide necessary funding without being placed in the line of direct responsibility for such funding.

Objections to Structured Conversions

The usual objections to structured conversions are often the same as the standard objections to structured dismissals – particularly that they function as a *sub rosa* plan, without the protections and voting rights that are part of a Chapter 11. Additionally, the U.S. Trustee has expressed significant objections to binding a Chapter 7 trustee to perform functions that are not part of the administrative requirements of the Bankruptcy Code and Rules. Specifically, if funds that have been carved out of sales proceeds are to be used for stipulated purposes enumerated in a structured conversion order, but are not "estate assets," there is a question whether a Chapter 7 trustee has the ability to administer and account for those funds. Further, a Chapter 7 trustee might be "bound" by a conversion order that requires the Chapter 7 trustee to perform specific functions with respect to non-estate funds. The trustee's compensation for administering these assets raises an additional issue to resolve.

A structured conversion may resolve some of the objections raised to a structured dismissal, such as claims administration, preservation of specific bankruptcy assets for the benefit of unsecured creditors (actions under sections 544 and 547 of the Code, which have little or no state law corollary counterparts) and the reinstatement of state law rights. Nevertheless, structured conversions raise procedural and practical issues that are not associated with structured dismissals – specifically the binding of a Chapter 7 trustee to perform non-Code based functions and administrative duties.

G. CONCLUSION

The sale of assets through a section 363 sale process has become an increasingly attractive alternative to a secured creditor's foreclosure and disposition of collateral. Secured creditors seeking to maintain going concern value to maximize returns seem to be increasingly looking to a section 363 sale process, particularly when the secured creditor has neither the desire nor ability to step into the chain of title or operate the assets. However, bankruptcy courts are increasingly concerned about what happens to the debtor and its other creditors post-sale. Courts continue to focus on the costs of administration and protecting the claims of parties that may have little to gain from a section 363 sale.

Structured dismissals and structured conversions provide a pragmatic, expeditious, and cost-effective alternative to traditional methods of exiting a bankruptcy case. Despite the U.S. Trustee's frequent objections, bankruptcy courts are, with increasing frequency, entering orders approving structured dismissals, and to a lesser extent, structured conversions. Those orders frequently approve "bells and whistles" in the form of: mechanisms for claims administration; individual releases of liability; waivers of claims and causes of action; gifts; and provisions for the bankruptcy court's retention of jurisdiction over post-dismissal issues. Practitioners and credit professionals should consider structured dismissals and structured conversions as viable alternatives to less cost-effective bankruptcy exit strategies.

By Anna Haugen, Courtney A. McCormick and Kathryn Z. Keane

Re-"Structuring" Dismissal Flexibility

An Analysis of the Supreme Court's Jevic *Decision*

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Editor's Note: *ABI held a media webinar in March 2017 examining the Supreme Court's ruling in* Jevic. *Experts included Prof.* ***Jonathan C. Lipson*** *of Temple University School of Law, who was counsel of record for an* amicus *brief from law professors in favor of the petitioner;* ***David R. Kuney*** *of Whiteford Taylor Preston, LLP, who was the counsel of record for an* amicus *brief by another set of law professors in support of the respondents; and ABI's Spring 2017 Resident Scholar Prof.* ***Andrew Dawson*** *of the University of Miami School of Law. ABI Editor-at-Large* ***Bill Rochelle*** *moderated the webinar. For a replay, visit abi.org/educational-brief/examining-the-supreme-courts-ruling-in-czyzewski-v-jevic-holding-corp.*

A chapter 11 case generally ends in one of three ways: (1) the debtor confirms a plan; (2) the case is converted to chapter 7; or (3) the court dismisses the case. Under the last option, the dismissal restores the parties to the status quo ante (*i.e.*, the positions held before bankruptcy) unless the bankruptcy court orders otherwise for cause.[1] With this perceived flexibility, some debtors have turned to "structured dismissals" as a less-onerous alternative to the traditional plan process.

Structured dismissals are a hybrid of a standard dismissal and a confirmation order. They end a bankruptcy case on certain conditions and with bargained-for protections (such as releases, distributions and the continued vitality of bankruptcy court orders) rather than simply restoring the status quo.[2] From start to finish, a structured dismissal is faster and requires less resources than a typical plan process. Therefore, structured dismissals have become an acceptable alternative for chapter 11 debtors that are unable to satisfy — or face significant hurdles in trying to satisfy — the requirements of plan confirmation.[3] In short, they represent a pragmatic resolution to difficult cases. In the much-awaited decision in *Czyzewski v. Jevic Holding Corp.*,[4] the U.S. Supreme Court dealt a blow to debtors hoping to use structured dismissals as a cost-saving alternative to the complex and expensive issues that accompany plan confirmation.

1 *Lawson v. Tilem (In re Lawson)*, 156 B.R. 43, 45 (B.A.P. 9th Cir. 1993) (citing 11 U.S.C. § 349).
2 *Czyzewski v. Jevic Holding Corp.*, No. 15-649, 2017 WL 1066259, at *5 (March 22, 2017) (citing ABI Commission to Study the Reform of Chapter 11, 2012-2014 Final Report and Recommendations 270 (2014), *available at* commission.abi.org/full-report).
3 Patrick R. Mohan, "How 'Absolute' Is the Absolute Priority Rule: Structured Dismissals Following *Jevic Holding Corp.*," 25 No. 1 *J. Bankr. L. & Prac. NL* Art. 3 (2016).
4 No. 15-649, 2017 WL 1066259 (March 22, 2017).

The Facts

The circumstances leading to the *Jevic* opinion emanate from a leveraged buyout (LBO). Specifically, in 2006, Sun Capital Partners purchased the stock of Jevic Transportation Corp. with funds that Sun Capital borrowed from CIT Group.[5] Sun Capital then granted CIT Group a security interest in Jevic's assets, thereby elevating CIT Group's interests above Jevic's general unsecured creditors.[6] Within two years of the LBO, Jevic sought chapter 11 relief.

As is typical following failed LBO transactions, litigation ensued in the bankruptcy case as creditors sought to vindicate their rights. In the first case, a group of former truck drivers sued Jevic and Sun Capital for failing to comply with state and federal Worker Adjustment and Retraining Notification (WARN) Acts, which require 60 days' advance notice before termination. While Sun Capital eventually prevailed on its appeal to the Third Circuit Court of Appeals, the bankruptcy court granted partial summary judgment against Jevic in favor of the drivers, a judgment purportedly worth $12.4 million.[7] Of that total, approximately $8.3 million constituted priority wage claims under § 507(a)(4) of the Bankruptcy Code and qualified for payment ahead of general unsecured creditors.[8]

In the second lawsuit, Jevic's official committee of unsecured creditors sued Sun Capital and CIT Group, alleging that both entities hastened Jevic's bankruptcy filing by allowing Jevic to incur debt that it could not service.[9] In 2011, the bankruptcy court held that the committee's complaint adequately pled claims for the avoidance of preferential and fraudulent transfers. At that juncture, Jevic's only assets included the committee's claims and $1.7 million in cash subject to Sun Capital's lien.[10]

The committee, Sun Capital, Jevic and CIT Group ultimately reached a settlement of the fraudulent transfer lawsuit, which provided for (among other things) an assignment of Sun Capital's lien on Jevic's cash to a trust, which would distribute those funds to certain creditors in exchange for a dismissal of the bankruptcy case.[11]

5 *Jevic*, 2017 WL 1066259 at *6.
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.* at *7.
10 *Id.*
11 *Id.* The settlement also required CIT Group to deposit $2 million into a designated account for the payment of the committee's legal fees and administrative expenses. *Id.*

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Notably, the settlement did not provide for any distribution on the WARN claimants' priority-wage claims. Instead, it provided for a *pro rata* distribution to Jevic's general unsecured creditors in contravention of the Bankruptcy Code's payment hierarchy.[12]

Nevertheless, the bankruptcy court approved the structured dismissal in light of the dire circumstances facing the estate.[13] Specifically, the bankruptcy court found that confirmation of a chapter 11 plan was unattainable. The court further found that the alternative (conversion to chapter 7) was not feasible because the estate lacked the funds that were necessary to wind down the estate.[14] The WARN claimants, who received nothing on account of their priority claims, appealed.

On appeal, the district court affirmed the bankruptcy court's decision. It recognized that the distribution scheme violated the Bankruptcy Code's priority rules applicable to plans, but noted that the settlement was not a plan.[15] Similarly, the Third Circuit Court of Appeals affirmed, reasoning that Congress codified the absolute priority rule in the *specific* context of plan confirmation.[16] As such, the Third Circuit concluded that structured dismissals that deviate from the Bankruptcy Code's priority scheme might be appropriate in "rare" instances.[17]

Undeterred, the WARN Act claimants sought *certiorari*, which the Supreme Court granted. On March 22, 2017, amid buzz regarding the potential ramifications of a broad opinion, the Supreme Court reversed, holding that a bankruptcy court may not approve a structured dismissal that deviates from traditional priority principles absent consent from the affected creditors.

The Ruling[18]

The Majority Decision

The majority opinion by Justice Stephen Breyer began its analysis by emphasizing the importance of the Bankruptcy Code's priority system as a fundamental underpinning of business bankruptcy law.[19] While stressing that a distribution of estate assets through a chapter 7 liquidation or pursuant to a chapter 11 plan must comply with the Bankruptcy Code's priority rules, the Supreme Court recognized the differences between the two chapters.[20] In chapter 7, distributions must adhere to strict priority rules; lower-priority creditors cannot receive anything until higher-priority creditors have been paid in full.[21] While chapter 11 plans are more flexible, the Bankruptcy Code similarly forbids confirmation of a priority-violating plan over the objection of an impaired class of creditors.[22] Had Congress intended to depart from these fundamental constructs, it would have done so through more than mere silence.[23] In other words, structured dismissals cannot circumvent otherwise-applicable priority rules.

While the Supreme Court declined to adopt a *per se* rule, the functional effect of its ruling might make structured dismissals prohibitively expensive.

The majority then examined § 349(b) of the Bankruptcy Code, which codifies the principle that a dismissal generally should restore the status quo.[24] While § 349 permits a bankruptcy judge to alter the status quo "for cause," the Supreme Court reasoned that this flexibility was designed *only* to protect rights acquired in reliance on the bankruptcy case.[25] Accordingly, the Court found that the cause standard is "too weak" to authorize a structured dismissal that violates otherwise-applicable priority rules without the consent of impaired creditors.[26]

Further, the Supreme Court acknowledged that lower courts have approved interim distributions that violate ordinary priority rules, such as pre-petition employee-wage orders, critical-vendor orders and debtor-in-possession (DIP) financing "roll-ups."[27] While the Court did not address the legality of these distribution mechanisms, it recognized that interim payments in those circumstances can serve important bankruptcy objectives, such as the preservation of the debtor's going-concern value.[28] In contrast, the structured dismissal in *Jevic* did not serve any "significant offsetting bankruptcy-related justification."[29] It did not preserve the debtor as a going concern, improve the position of disfavored creditors, restore the status quo or promote the possibility of a confirmable plan.[30]

Finally, the Supreme Court rejected any attempt to limit nonconsensual priority-violating structured dismissals to "rare" cases,[31] reasoning that even a narrow exception untethered to precise guidelines threatens to swallow the rule.[32] With no guideposts to determine a "rare case," the Court argued that such an exception results in uncertainty and potentially grave consequences in the bankruptcy process, such as collusion and changes in bargaining power.[33]

12 *Id.*
13 *Id.* at *8.
14 *Id.*
15 *Id.* (citing *In re Jevic Holding Corp.*, Civ. Nos. 13-104-SLR and 13-105-SLR, 2014 WL 268613, at *3 (D. Del. Jan. 24, 2014)).
16 *Id.* at *8.
17 *Id.*; *Official Comm. of Unsecured Creditors v. CIT Grp./Bus. Credit Inc. (In re Jevic Holding Corp.)*, 787 F.3d 173, 185-86 (3d Cir. 2015).
18 In addition to the ruling described below, the Supreme Court found that the petitioners had Article III standing because they had suffered a compensable loss. *Jevic*, 2017 WL 1066259, at *8.
19 *Id.* at *10.
20 *Id.*
21 *Id.* (citing 11 U.S.C. §§ 725 and 726).
22 *Id.* (citing 11 U.S.C. § 1129(b)).
23 *Id.*
24 *Id.* at *11.
25 *Id.*
26 *Id.*
27 *Id.* at 12 (citations omitted).
28 *Id.*
29 *Id.*
30 *See id.* at *13 (citing *In re Braniff Airways Inc.*, 700 F.2d 935 (5th Cir. 1983); *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983); *In re Biolitec Inc.*, 528 B.R. 261 (Bankr. D.N.J. 2014)).
31 *Id.* at *13-14.
32 *Id.* at *13.
33 *Id.* at *14.

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Therefore, in an effort to achieve predictability, the Court declined to adopt a "rare case" exception.

The Dissent

In an ironic twist, the dissent departed from the majority on the basis that the issuance of the opinion itself violated the Supreme Court's procedural requirements.[34] More particularly, the Court granted *certiorari* to determine whether a bankruptcy court could authorize the distribution of settlement proceeds in a manner that violates the Bankruptcy Code's statutory priority scheme.[35] Petitioners later narrowed this issue, questioning "[w]hether a Chapter 11 case [might] be terminated by a 'structured dismissal' that distributes estate property in violation of the Bankruptcy Code's priority scheme."[36] The dissent reasoned that this new question was narrower in scope than its predecessor and was not the subject of a circuit split.[37] Therefore, Justices Clarence Thomas and Samuel Alito asserted that it was unwise to address a novel issue in the rapidly developing field of structured dismissals without the benefit of additional insight from the courts of appeals and without the benefit of a full briefing.[38] They further asserted that deciding the reframed issue rewarded petitioners' "bait-and-switch" maneuver — a potentially problematic precedent.[39] However, the dissent did not hint at how they might have otherwise decided the original issue.

Conclusion: What Is In, What Is Out and What Is Uncertain

Before the *Jevic* decision, certain bankruptcy commentators feared the worst. A broad opinion that invalidated structured dismissals generally on the basis of a lack of specific statutory authority could have significantly impaired the ability of practitioners to adapt to difficult situations. The Supreme Court did not go that far. Aside from its specific holding, the *dicta* and legal reasoning in *Jevic* might nonetheless impact a variety of chapter 11 issues moving forward.

First, the decision might be seen as impliedly condoning the continued use of interim-distribution mechanisms (such as pre-petition employee-wage and critical-vendor orders and DIP financing "roll-ups") under certain circumstances — *e.g.*, so long as they foster a potential for a successful reorganization. *Jevic* will likely be cited in support of these common requests and potentially as a basis for other creative forms of interim relief.

Practitioners should also expect additional scrutiny of any priority-violating gifts as lower courts grapple with the bounds of *Jevic*, especially in the face of creditor dissent. However, to the extent that these "gifts" consist of *non-estate* assets or *interim* settlement distributions,[40] *Jevic*'s rationale might carry less weight.

Moreover, the Supreme Court's analysis of the strength of the "cause" language in § 349(b) may shape the lower courts' interpretation of discretionary standards throughout the Bankruptcy Code.[41] At a minimum, in light of *Jevic*, practitioners should consider providing courts with detailed evidence when requesting relief that is not specifically authorized by the Code.[42]

Finally, the future viability of structured dismissals as a cost-saving exit strategy remains unclear. While the Supreme Court declined to adopt a *per se* rule, the functional effect of its ruling might make structured dismissals prohibitively expensive. Moreover, the opinion leaves open the question of what type of consent is sufficient to depart from the Bankruptcy Code's priority scheme. Will lower courts require some form of solicitation and voting, which could eviscerate the very cost and time savings that structured dismissals are designed to achieve? Will courts impute consent following the expiration of a notice and objection period?[43] Or will cash-strapped debtors find it easier to simply convert to chapter 7 rather than risk prolonged and uncertain litigation over these issues? While *Jevic* limits a debtor's ability to propose flexible alternatives to exit bankruptcy, it remains to be seen how far the decision can and will be stretched. abi

34 *Id.* at *15.
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*

40 *See id.* at *12 (distinguishing *In re Iridium Operating LLC*, 478 F.3d 452 (2d Cir. 2007), on basis that *Iridium* approved interim, not final, distributions).
41 *See, e.g.*, 11 U.S.C. §§ 105(a), 362(d)(1), 363(c), 930(a), 1104(a)(1) and 1304(b).
42 For example, such evidence might include testimony regarding how the requested relief furthers the estate's prospects for rehabilitation, preserves going-concern value, fosters settlements, preserves bargaining power or otherwise tracks the articulated rationales that distinguish potentially permissible interim relief from an impermissible structured dismissal.
43 The unanswered-consent question opens the door to a follow-on opinion similar to the Supreme Court's decision in *Wellness Int'l Network Ltd. v. Sharif*, 135 S. Ct. 1932 (2015), which clarified the consent questions raised in the wake of *Stern v. Marshall*, 564 U.S. 462 (2011).