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## Dismissals

### High Court Restricts Ch. 11 'Structured Dismissals'

**B**ankruptcy courts don't have the power to order a priority-skipping distribution scheme in connection with the dismissal of a Chapter 11 business bankruptcy case, the U.S. Supreme Court ruled March 22 (*Czyzewski v. Jevic Holding Corp.*, 2017 BL 89680, U.S., No. 15-649, *reversed and remanded* 3/22/17).

A distribution scheme can't, without the consent of the affected parties, "deviate from the basic priority rules that apply under the primary mechanisms" the Bankruptcy Code establishes for final distributions in business bankruptcy proceedings, the court said in a 6-2 ruling by Justice Stephen G. Breyer.

The decision is important because of the growing number of cases trying to resolve themselves using structured dismissals to short-circuit the otherwise lengthy and expensive Chapter 11 process, Howard Weg, a partner with Robins Kaplan LLP in Los Angeles, told Bloomberg BNA March 22.

**A Holistic Interpretation.** Rather than examining the language of just one particular statute, the court considered the larger context of the Bankruptcy Code as a whole, with its overarching principles.

Among these is the priority scheme for paying creditors in a Chapter 11 plan or a Chapter 7 liquidation. "The Code's priority system constitutes a basic underpinning of business bankruptcy law," the court said.

The priority system is so important that "we would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Code prohibits in Chapter 7 liquidations and Chapter 11 plans," the court said.

"It appears that the majority understands the bankruptcy process and what was at stake, a very gratifying result," Professor Jonathan Lipson of Temple University-Beasley School of Law, Philadelphia, told Bloomberg BNA March 22. Lipson authored an amicus brief in the case on behalf of a group of bankruptcy academics supporting the result here.

The court's holding reinforces that "the priority rules are guard rails to protect both priority claimants designated by Congress and the efficiency of the bankruptcy process," Lipson said.

An attorney who filed an amicus brief for a group of academics favoring the respondents was unavailable to comment on the decision.

Breyer's opinion "hearkens back perhaps decades," Weg said, to a time when the Bankruptcy Code was interpreted by the Court holistically, utilizing a broad context of the Code as a whole and distinct from the more recent trend of parsing language in a particular section without consideration of the broader context.

Chief Justice John G. Roberts Jr. and Justices Anthony M. Kennedy, Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan joined the majority opinion.

**Dissent Complains of Bait-and-Switch.** Justice Clarence Thomas dissented, joined by Justice Samuel A. Alito Jr. Rather than disagreeing with the logic and conclusions set forth in the majority, the dissent focused on what it believes to be an improper bait-and-switch by the petitioners.

The question argued by the petitioners before the court was different from the question presented when they asked the court to take the case, they argued.

**Looking Forward.** The ruling should change the way senior and junior creditors will negotiate in contested cases, Weg said. "Now priority creditors will have to be included in the dynamic" of the negotiating parties, with perhaps unsecured creditors suffering as a result, he said.

Not everyone thinks the ruling bodes well for the future of bankruptcy jurisprudence. "The court's broad opinion has curtailed a cost-effective and practical means to resolve certain bankruptcy cases," Steven N. Berger of Engelman Berger, P.C., Phoenix, Ariz. told Bloomberg BNA in a March 22 email. Berger sits on the Advisory Board of Bloomberg BNA's Bankruptcy Law Reporter.

Berger suggested that perhaps Congress may look at "providing allowable parameters for structured dismissals to facilitate more economical, prompt and effective resolution of certain Chapter 11 cases."

On the other hand, "it's not an earth-shattering decision," Weg told Bloomberg BNA. "People can still make deals to prevent lawsuits from dragging on endlessly to the benefit of only the biggest creditors and firms" which can afford protracted litigation, he said.

"I see the court saying that professionals and judges need to buckle down and find a way to make the bankruptcy process work better, more responsive and less expensive," Weg said.

**Third Circuit Reversed.** The U.S. Court of Appeals for the Third Circuit had ruled that bankruptcy courts have the discretion in "rare cases" to approve settlements—followed by the dismissal of the bankruptcy case—which provide for payment to creditors that are not in

accordance with the payment priorities set forth in the bankruptcy code.

Here, general unsecured creditors shared in the settlement distribution, even though a group of truckers with higher-priority wage claims received nothing.

BY DANIEL GILL

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*Full text at [http://www.bloomberglaw.com/public/document/Czyzewski\\_v\\_Jevic\\_Holding\\_Corp\\_No\\_15649\\_2017\\_BL\\_89680\\_US\\_Mar\\_22\\_2](http://www.bloomberglaw.com/public/document/Czyzewski_v_Jevic_Holding_Corp_No_15649_2017_BL_89680_US_Mar_22_2).*