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Corporate Bankruptcy Panel—Unpacking Jevic: An Attempt to Put the 'Structure' Back in Structured Dismissals

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CORPORATE BANKRUPTCY PANEL

UNPACKING JEVIC: AN ATTEMPT TO PUT THE "STRUCTURE" BACK IN STRUCTURED DISMISSALS

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MR. MAHER: Hello, everyone. My name is Patrick Maher. I'm the Executive Symposium Editor for the EBDJ. I have the distinct pleasure of introducing today's Corporate Panel. First, I have a couple of administrative things.

Number one, parking vouchers. On your way out at the tables that you checked in at, we have parking vouchers, so if you drove here today and parked we have a voucher for you. We also have an EBDJ commemorative tote bag for our guests. Please look to the right when you go out the doors. These are for our esteemed guests today.

Without further ado, I will present our second topic. The topic is *Jevic.* The Supreme Court's ruling last year that raises as many questions as it answers, continues to be batted about in the lower courts and deals with a lot of topics: structured dismissals, critical vendor theory, DIP rollups, absolute priority, and a lot of other matters that run the gamut of chapter 11.

To my right is Leah Fiorenza McNeill. She is an associate in Bryan Cave's Bankruptcy, Restructuring, and Creditors' Rights Group. She graduated from Mercer University School of Law in 2009 and the University of Georgia in 2006. Her restructuring and bankruptcy experience includes representation of distressed companies, chapter 7 trustees, chapter 11 trustees, creditors' committees, and secured and unsecured creditors. She also represents lenders, financial institutions, and businesses in complex finance disputes including loan defaults, real estate transactions, and breach of contract claims. Leah is also a contributing editor to *Norton's Bankruptcy Law and Practice,* the leading treatise in her field, and she contributed a new chapter entitled Depositions.

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To her right is Katie Good. Katie Good is a partner at Whiteford Taylor and Preston's, Wilmington, Delaware office. She is an Emory Law alum and EBDJ alum. She also graduated from the University of North Carolina Chapel Hill in 2003. She regularly represents debtors, secured lenders, committees, asset purchasers, liquidation trusts, and other parties in chapter 11 cases as well as foreign representatives and other parties in chapter 13 ancillary proceedings. Katie regularly litigates in bankruptcy court as well as in appeals courts, before federal district courts and courts of appeals. She has also represented companies in successful out-of-court restructuring and prepackaged and prearranged bankruptcy cases. In addition, Katie has substantial experience with substantive non-consolidation options for structured finance transactions.

To her right is Monique Hayes. Monique is a partner at Goldstein & McClintock in Miami, Florida. She focuses her areas of practice on business transactions, commercial litigation, and corporate restructuring. She has extensive experience advising fiduciaries, corporate and nonprofit board members, entrepreneurs and small businesses. Monique has successfully represented clients in a broad range of matters including asset sales and acquisitions, finance transactions, bankruptcy plan confirmation, avoidance actions, directors and officer claim litigation, Ponzi scheme and other fraud litigation. She has substantial experience representing franchisors in franchise bankruptcy proceedings, and in the innovation and technology sector Monique has represented startups, entrepreneurs and founders of separate foundation and restructuring due diligence and related transactional matters. She received her JD from the University of Miami School of Law, and her undergraduate degree from the University of South Florida.

To her right is Alex Dugan. Alex is an associate at Bradley Arant Boult Cummings in Nashville, Tennessee. She is also an Emory Law and EBDJ alum, so we welcome her back to campus today as well. She graduated from Emory Law in 2011 and from Vanderbilt with her BA in 2008. Alex regularly represents financial services and mortgage company clients with compliance matters. Her practice focuses on the bankruptcy compliance and regulatory concerns that her clients face. Her practice also includes representation of debtors and creditors in chapter 11 cases, out-of-court workouts, reorganizations, restructurings and liquidations. She wrote the first substantive piece on *Jevic* in the nation which was then picked up and cited by the Loan Syndication and Trading Association, which is a leading trade group. She is also a regular monthly contributor to the *Norton Bankruptcy Law Advisor*. Please join me in welcoming the Corporate Panel.

MS. FIORENZA: Thank you, Patrick, and thank you all for being here. I'd also like to thank Emory and the *Emory Bankruptcy Developments Journal* for allowing us to speak today on this issue. We will be discussing *Jevic*, which is a Supreme Court case decision that happened almost a year ago, and its effects on chapter 11 practice already, and its effects on chapter 11 practice in the future.

I will first provide a very brief summary of *Jevic*, a summary of *Jevic* that should help whether you've read *Jevic* ten times or if you've never read it, which I will say if you haven't read *Jevic*, I would highly recommend you do so. Then we will open up the panel and we will discuss a number of topics today, and we'll discuss the issues that these practitioners, my co-panelists, have experienced in their districts, and then also what we expect will change in chapter 11 practice coming in the future.

So now for the brief summary of *Jevic*. So, for me to make *Jevic* incredibly simple, although it's not a simple case and it's certainly not a simple opinion, but to make it simple for me, I focus on the parties and the parties' roles. There are five relevant parties of *Jevic*. There's the debtor and the debtor affiliates, and that's what I'll call Jevic, and then there is the Sun Capital which is the equity holder and junior lender of Jevic. This is important because not only was Sun Capital the equity holder due to a leveraged buyout that occurred about two years before Jevic filed for bankruptcy, but it also had a junior lien which was fully secured by $1.7 million of the estate's assets. So we'll talk about the estate's assets in a minute. But it's important to know that they were equity holder and were fully secured in this $1.7 million.

The third party is CIT Group, and they were the secured lender. The fourth party was the group of truck drivers. So the truck drivers were Jevic's employees, and these employees were laid off when the company was wound down, right around the time the company filed for chapter 11. They filed a WARN Act violation claim against the Jevic estates and also against Sun Capital, the equity holder. The truck driver employees got an $8.3 million judgment against the Jevic estate, as such, these truck driver employees had a priority wage claim in this bankruptcy. Something that we'll also discuss later is the truck driver employees also had an approximately $3.1 million general unsecured claim as well.

The fifth and final party is the unsecured creditors committee. An unsecured creditors committee in this case was given the right to file a fraudulent transfer claim action on behalf of the estate against Sun Capital, the equity holder, and CIT which was the secured lender. The reason for bringing the fraudulent transfer action was because of the LBO that occurred in 2006. And the theory is that the LBO rendered the company insolvent.

Back to the $1.3 million. Once Jevic's chapter 11 was filed and the liquidation was ongoing, the estate essentially had two assets. It had the fraudulent transfer claim which the committee was bringing, and then it also had the $1.7 million in cash. But remember the cash was encumbered by the equity holder, Sun Capital's, lien. At that point there was no argument whether Jevic was administratively insolvent or not. Jevic had professional fees, it had administrative expense claims, it had the Jevic employee wage priority claim, and then it also had some priority tax claims, and then the general unsecured creditors pool. Not enough money to go around by any means.

About three years after Jevic filed its chapter 11, four out of the five parties got creative. Those four parties are Jevic the debtor, the equity holder Sun Capital, CIT which is the secured creditor, and the committee. They came to an agreement, a structured dismissal and settlement agreement, that allowed for payment. It's much more complicated than this, but for today what essentially happened was CIT, the secured lender, agreed to put $2 million in, Sun Capital agreed to waive its liens on the $1.7 million of the estate cash, and they agreed that the professionals, some of the administrative expenses, the tax priority tax claims, and then the general unsecured creditors pool would get paid out. And it would filter down, skip over the truck driver employee wage claims, and go to the general unsecured pool. I think there was a 4 cents on the dollar distribution.

The interesting thing here as well, remember the truck drivers not only had the employee wage claim but they also had the general unsecured claim. But the structured dismissal settlement agreement required that not only the employee truck drivers not get paid on their $8.3 million priority wage claim, but they also were carved out of the unsecured creditors' distribution. So they literally were carved out of this deal 100%.

Obviously it goes in front of the bankruptcy court, the bankruptcy court approves it over the objection of the truckers employees and also the U.S. Trustee. It was appealed, went to district court and the Third Circuit, and they both upheld the bankruptcy court's decision. Then in front of the Supreme Court it was overruled. The Supreme Court's ruling is narrow, although it has had effects, as you will hear later today, a lot more effects than we would have expected since it is so narrow.

the holding essentially says a bankruptcy court cannot approve a structured dismissal that provides for distributions that do not follow ordinary priority rules without consent when a structured dismissal is an end-of-case distribution. So the important things to remember here are priority skipping and end-of-case distribution.

So on that note, I'm actually going to start our first question for today, and Alex, I'm going to have you kick this off. Is there any further guidance we can glean from the dissent in the Supreme Court's opinion?

MS. DUGAN: So I think there is, and before I jump into that, if you all will just indulge me for a minute down memory lane. It was in this auditorium several years ago when I started Emory where we had kind of like a kickoff to the classes, and we sat in here and I think we'd read some tort case. The whole purpose of the session was to talk about the importance of holdings and whether they were narrow or broad, and in fact even if they were narrow, how much you could extend them. So I remember this one specifically was like a tort case and the question was, what is the holding? Is it an eight-year-old boy who gets a head injury at a train track? Is that all this case stand for? Or is it any person in the continental U.S. who gets any injury? How far or how narrow do they extend?

I think that there are many things about *Jevic* that are very interesting and you could have a very long conversation about, but I think the that is the one that's very applicable here and I think that's a theme that will keep coming up in our discussions today. But to actually go back and answer your question, Leah, yes, there was a dissent in *Jevic*. Justices Alito and Thomas did dissent, they went back and they said, look, the thing is—what e granted *cert* on—was this specific question: Whether the bankruptcy court may authorize distributions of settlement proceeds in a manner that violates the statutory priority scheme.

So that was the question that was before the Supreme Court. However, when the truckers filed their opening brief, they were presented with a much more narrow and specific question, and that one was whether a chapter 11 case may be terminated by a structured dismissal that distributes estate property in violation of the Bankruptcy Code's priority scheme. So I think the two major differences and narrowing here are the inclusion of structured dismissal as well as a specific focus on estate property.

Those are two main things that Justices Alito and Thomas talked about in their dissent, and they called this an impermissible bait and switch, which I thought was an interesting choice of terms. But the first was they said, look, this is essentially not something we want to encourage future litigants to take this kind of path where you present one question but then at the end of the day you try and push another question through. Then the second piece was that they said this really is a novel area of law. There's a lot of case law percolating in the lower courts and appellate courts on structured dismissals, and since this is a relatively new concept with a lot of activity going on, it's probably one that may have warranted further activity before we took it up.

MS. FIORENZA: Maybe it would help actually if we could just talk briefly about the benefits of structured dismissal before jumping into all the topics. Katie, I was hoping that maybe you could kick this one off.

MS. GOOD: Absolutely. So what is a structured dismissal and why would someone take this avenue rather than the other avenues out of chapter 11? Those other avenues out of chapter 11 would be confirming through chapter 11 plan, converting your case to chapter 7, or going with a straightforward plain vanilla dismissal of the case. The structured dismissal is a construct that came about, I think, starting in the mid-2000s, mid to late 2000s. It was presented as a cheaper and more efficient alternative than either a chapter 11 liquidating plan or a chapter 7 conversion.

It usually provides for distribution of estate assets. The idea is that if you converted the case to chapter 7, a chapter 7 trustee would have to come in, they'd have to get up to speed. That would take additional time. They would have to do their own investigation. That would take more time and cost more money, and it would just be more efficient to distribute funds directly. But at the same time the tension that was coming up in these cases is quite often there just wasn't the time or the money to confirm a chapter 11 plan. In a traditional chapter 11 plan, you've got to file your plan, you've got a minimum of 28 days until your disclosure statement hearing, and usually that ends up being a little bit more like 35 by the time you build in time for objection deadlines and service. Then you have your disclosure statement approval hearing and you're looking at what's really a minimum of 28 but, in reality, another 35 to 40 days to get to your confirmation hearing before you can start the distribution process, and all the while you're incurring U.S. Trustee fees—which have now recently gone up under the new laws—and those aren't cheap. You're incurring fees for your professionals and just the everyday burn of keeping a liquidating debtor alive.

So structured dismissals were presented as this way that was sort of cheap and easy and quick. They sometimes, but not always, were utilized as a mechanism to achieve class skipping, which is what was happening in the *Jevic* structured dismissal. They also included other bells and whistles that you wouldn't see in a normal chapter 11 dismissal such as release and exculpation provisions, a claims process and distribution process, carve-outs or gift trusts, conditions on the dismissal, and provisions regarding the enforceability of prior orders that would run afoul of the standard of returning to the status quo entity in a basic dismissal.

MS. FIORENZA: So I hear two things. I hear that bankruptcy is expensive, and that structured dismissals were almost like a mini-plan. So, Monique, could you tell us what is it that makes bankruptcy so expensive?

MS. HAYES: Well, when I think of all the time and money that I spent becoming a bankruptcy professional, I don't think it's unwarranted in terms of the costs associated to the practice, but there is this narrative in the industry that bankruptcy is unduly expensive. But I would push back on that narrative, and I think it's important for the professionals in our industry to take people to task when they're making this assertion because not only does it do injustice to our practice, but it also affects the constituents, the businesses and the consumers that we seek to serve in this industry. This is because inside the bankruptcy process there is a lot of leverage and opportunities under the law that are not otherwise available for resolving financial difficulties.

So in the short answer I would say that bankruptcy is as expensive as it needs to be to get to a necessary resolution. However, the alternative is much more expensive for all parties involved, the debtor that may be saddled with debt, the creditors that may be unable to otherwise recover on that debt, and then the administrative process that's overburdened when it's not an orderly administration of a debt process. So I would push back on the sense and the narrative that bankruptcy is too expensive.

But as it relates to *Jevic*, I think that we need to be cognizant of the fact that with respect to structured dismissals, there were very savvy professionals that do what bankruptcy lawyers do all of the time, and what they do is come into a difficult situation and craft a creative solution that gets to a result that is acceptable to most parties, all the while bearing equity at the forefront. So that's generally the context within which we see plans, and then outside of plans, where they are not feasible for whatever the circumstances would be, you have structures created in order to give effect to a resolution. And so that's what happens.

In the *Jevic* case, the issue came up that, there's a phrase that if you're not at the table you're on the menu. And that's kind of what played out in the *Jevic* case. The whole point in bankruptcy is to get as many people at the table as possible so that you can have an equitable resolution, and leverages are tilted and shifted throughout a bankruptcy case in order to get to that point. In *Jevic*, the truck drivers who in all other circumstances would have been the 100-pound elephant in the room understanding what the WARN Act is. When I clerked for a bankruptcy judge it was in the early 2000s, and that was right after a great mass of WARN Act litigation.

Just to bring it to the forefront to make sure that everyone understands what the WARN Act is, it's another federal statute. So anytime you have any federal law, it could be the Internal Revenue Code, it could be just general frauds that we heard about in the prior panel under the CFPB, or any another federal statute. Anytime there's a juxtaposition of the Bankruptcy Code versus another federal statute, you want to pay particular attention. With respect to the WARN Act, the rule is that for general employers, it could be a small business or it could be a large business, if you have in excess of 50 employees, you have the obligation to warn them in advance if they're going to be fired and give them a certain amount of notice. And that law is a federal statute, and when you're in the bankruptcy context, it's almost sacrosanct. So when you're at the table, when you're cutting up the pie or distributing the pot you want to have in the forefront of your mind who you're going to distribute to, and you don't want to run afoul of another federal statute.

In the *Jevic* case, they ran afoul of that federal statute, the federal statute being the WARN Act. The debtor had not warned its employees about them being fired with sufficient notice. As a result of their failure to warn, these truck drivers had a huge claim that they stood to recover on in the bankruptcy process. But rather than pay out on those claims, the deal was cut that left these truck drivers out. And so we came to a point where you have to deal with the consequences of that deal that was struck without the truck drivers at the table.

MS. GOOD: I think it's important to note for those who may have not read *Jevic*, the reason that they were left out is they brought those WARN Act claims not only against the debtor but also against their equity holder, Sun Capital who has a lien on all of the debtor's assets. So the reason that a chapter 7 conversion wasn't going to produce a result here, and I think part of the reason that the lower courts approved the structured dismissal and affirmed that decision all the way up through the Third Circuit is that because the WARN Act suit was against not only the debtor but also Sun Capital, and Sun

Capital now has a lien on all of the remaining assets, Sun Capital was unwilling to reach a settlement that would provide funds to the WARN claimants that they could continue to pursue their litigation against Sun Capital.

So if the case were to have just converted, a chapter 7 trustee would've been left with litigation that Sun's liens could have potentially attached to any remaining assets, and so they wouldn't have had necessarily the pot of funds to go after the litigation that they settled with the creditors committee. So that's why the bankruptcy court and the district court and Third Circuit looking at this, I think, said, okay, the structured dismissal isn't ideal but it's making the best of a bad situation because if this case converts it's very possible, almost certain that no one gets anything else.

MS. FIORENZA: And just as a quick side note, the WARN Act litigation against Sun Capital was concluded in the recent past, and Sun Capital actually won that litigation. So that's kind of interesting.

So is *Jevic* a victory for the small guys or the lenders?

MS. HAYES: I think on its face, the *Jevic* Supreme Court decision was a victory for the small guys, meaning the truck drivers took the matter all the way up to the Supreme Court. They were left out of the deal. The Supreme Court declared that that was not proper because it ran afoul of the statutory priority system that the Code sets forth, and because they had not been granted consent, they did not give consent for this treatment of their claims under the deal structure. And so the deal had to be undone essentially. So they won in that sense. But it's possible to win the battle and then lose the war. And in this case that is what happened to the truck drivers. Not ultimately because the litigation is still going to play on, and there are various avenues that are yet to be determined in the case, but overall where we find ourselves is that the funds that were currently available to make distributions to creditors are gone because the asset was controlled by the lien. There was no invalidation of the lien of the secured creditors. So once the deal was taken away and the distribution was lost, that opportunity to access those funds outside of litigating was also lost. And the litigation is to a point where the recoveries and the cost of pursuing that litigation beyond, and then on multiple appeals, almost makes it impossible to reach a resolution.

The other issue that I'm more concerned about is this decision. It creates the possibility of increased silos and negotiation in the bankruptcy process. There has always been a concern that negotiations in bankruptcy oftentimes leave out certain parties, and there are silos. The issue with *Jevic* is that it presents the possibility that people may try to reach deals even before the leverage—that the priority structure would create in the bankruptcy—is able to be obtained. What that means is that the secured creditors may reach a deal with the debtor well before the case is even filed, and so that's before the WARN Act claims are ever at issue. And then those same employees may never get to the point of being able to have bankruptcy-based claims and litigation that they could pursue.

So I don't like to use really hot button terms, but it could be collusive. That is the concern a lot of times about the deals that are being struck. There is a perception of collusion, and there is now a reality that there may be deals that have been struck in order to specifically evade the bankruptcy laws.

MS. FIORENZA: So do we think that *Jevic* is going to create more litigation?

MS. DUGAN: I would say yes, and I think a couple of things. I think it will certainly cost a lot of money in a lot of ways to try and figure out what does *Jevic* really mean and what are the downstream effects going to be. I think that, like we've talked about before, it is a very narrow holding, but there are already a lot of instances in courts of how it can be applied more broadly.

One of the things that I find so interesting about chapter 11 practice is that I think there's this constant tension of, we've got our Code book, we've got our rules; this is our play book, and this is our guidebook. But sometimes when we're faced with the practicalities of this melting iceberg of a company, if we don't get it into bankruptcy and if we don't get a sale, if we don't get it done, all these people are going to lose their jobs and there's this constant pressure and leverage of just the whole thing is going to implode if we don't make something happen. And I think that's where the rhetoric of this is the lesser of two evils really comes into play, and I think a lot of times wins the day or has a lot of sway. But to me, thinking about the question is it a victory, I think in some ways I'm like, well, maybe there's an argument it's not really a victory for anyone because it just adds uncertainty into the process. And I think with the question of whether it will promote litigation, probably yes, because I think you can use it in its narrow holding to stop deals that maybe would have gone through otherwise when you got almost all the parties on board or to the table. And then I think it also is probably going to promote litigation in the sense of it could be expanded into different arenas.

Katie had mentioned before, other aspects of chapter 11 structured dismissals like bells and whistles as we call them, and I think there are a lot of other not-Code-based provisions out there, a lot of other tools that we have in our chapter 11 tool belt to get the deal done and things that have developed over time that are not really rooted in the Bankruptcy Code itself. Some that come to mind are equitable mootness, third party releases, even critical vendor payments. To say that these are impermissible, that may be taking a very expansive view of *Jevic*. I think certainly the door is left open for litigants to be able to use these tools despite *Jevic*.

One thing I think would be interesting is if there ends up being research or statistics about how many cases end up citing *Jevic*, and how much money is spent trying to figure out some of these secondary questions. I wonder, in comparison to one of the last seminal bankruptcy cases in the Supreme Court, the *Stern* case, where those numbers end up shaking out because I think that still—and it's been way less of a hot topic recently—that took a long time to die down. So I wonder if after *Jevic*, what other related issues may percolate up and how many questions it really leaves open.

MS. FIORENZA: So just a question for you, Alex, is do you think that maybe there is a way that this could make bankruptcies cheaper because since in *Jevic* one of the main things was end-of-case distribution and so this will require everyone to start settling and coming to agreement a lot sooner, and so maybe these chapter 11 bankruptcy cases will run for a shorter period of time? Is there an argument for that?

MS. DUGAN: I think it's a good question. I think *Jevic* is definitely a case you could very much nerd out on and go down all these different rabbit holes. I think that to me is one of the biggest questions I walk away from *Jevic* with, and there's also mention of what is more of an interim distribution or agreement versus a final one. And it's like what does that mean? Is that more of a just, I know it when I see it? Or is it really more like a structured dismissal before the end of the case?

And I think I'm probably jumping ahead a little bit of our program – but I think the *Fryar* case, which I believe was the first case that really dealt with *Jevic* after it was decided, is notable. This was a case in the Bankruptcy Court for the Eastern District of Tennessee. *Fryar* was a case where we had a motion to sell and motion to approve a settlement. I think it was about eight months into the case so there was not really a lot of indicia that this was going to be a successful reorganization. I think in fact they had tried bankruptcy unsuccessfully a couple of years before. So there were certain—the red flags were going up of like this is probably going the way of liquidation. This is probably going the way of a structured dismissal, something like that. But the settlement that was at issue was to sell a piece of property and have the proceeds distributed in a way that would violate the priority distributions, in particular the IRS was going to get skipped. And several unsecured creditors who were scheduled to receive 53 cents on the dollar objected and there was a lot of court skepticism that really there was anything better that could get done. Ultimately the Court denied the settlement and in a lot of ways was looking to *Jevic* and *Jevic*'s teachings to do that, and specifically noted, this does not look like it's going the way of a plan, it looks like it's going more the way of the liquidation and in particular that this settlement didn't serve a Code-related objective. And that's another one that I kind of pondered. I'm like what exactly is that going to mean? What are the cases going to tell us that this means?

MS. GOOD: One of the other things, even before the Supreme Court's decision in *Jevic* came down, that was percolating in the bankruptcy community is, judges were sometimes approving structured dismissals, but one of the judges in Delaware, Judge Carey, would routinely note this is a very inelegant way to wrap up your case. And there was a lot of discussion among the bar of what can we do to provide a more elegant solution to get to a chapter 11 plan that might not be as expensive as everyone thinks that it has to be?

In Delaware there is a big push and there's a local rule now to allow for a combined plan and disclosure statement hearing that would happen a little bit more quickly where you would get interim preliminary approval of your disclosure statement which in a case that's liquidating and post-sale, it's very short and sweet. You don't necessarily have a lot of concerns that you're not disclosing enough information because it's just simply not a complicated case. You set up a solicitation and instead of taking close to 70 days to get to confirmation, maybe you take closer to 50. And one of the things that was done in the *Radio Shack* case is the creditors committee said you don't need to solicit our unsecured creditors. You have your impaired accepting classes elsewhere. We're kind of getting the waterfall of whatever comes next, so we don't see a reason for general unsecured creditors to be solicited. And that cut down on the solicitation costs a lot in that case.

So I think one of the things that parties can do and should start thinking about doing and have been doing recently is finding a way to get to a plan that's maybe not as expensive as we all think that a traditional plan process has to be.

MS. HAYES: So that's on the administrative side of things that we can do more efficiently to limit costs. But then there are some aspects of *Jevic* that challenge our practitioners in the bankruptcy context on the substantive side.

Because with respect to the priority skipping, if that's a substantive component of either your plan or your structured dismissal order, the issue is going to be whether or not you have consent. That's the only thing that the Supreme Court left us with in terms of direction. So the question is, do you have consent. But what does that mean? That's not a defined term in the Code. So now you're thinking consent. Well, what will satisfy consent? Could I give negative notice? Do I have to actually get all of these creditors to come in that I plan to skip? Do I have to bring them to the table? And now I've given them a position, a seat at the table and that amount of leverage. But then what if they refuse to give consent and blow up the entire deal and no one wins?

And then there's issues about what satisfies consent. Does it need to be in writing? Does it need to just say we go along with this deal? Could it be that the unsecured creditors committee could say this is good enough for the unsecured creditors, but a particular member of the committee or a particular unsecured creditor could say that's not enough for me and I individually didn't consent? So we still have these substantive issues that are now created as a result of this case that kind of interferes with the practitioner's ability to be creative in these difficult scenarios.

MS. FIORENZA: I'm going to open this question up to the panel, and then I'd also love to hear from any of you if you have experience on this as well. The question here is, does *Jevic* signify a shift into further policing the Bankruptcy Code and spill over into other chapter 11 practices? For instance, have you seen the U.S. Trustee taking a more active role in chapter 11 cases, particularly in settlements? Has that been the rule?

MS. GOOD: I think that the U.S. Trustee's Office has definitely, when settlements are coming together, taken a very close look at them to make sure that *Jevic* isn't implicated. I know in a recent case we had a settlement in connection with a sale that was supposed to get very neatly buttoned up with a plan support agreement and a plan confirmation, but as neatly as that's all presented and as well as that seems to be moving down the track, they're not perfectly tied. It's not as if sale and confirmation will occur exactly together, and parties do have rights to either terminate a PSA for certain things or to just decide they're going to breach their obligations. There's never perfection and you can't guarantee something is going to happen. As the creditors committee, we tried to put some language in the sale order that said funds were going to be set aside for distribution to general unsecured creditors and the plan would pay for admin and priority claims in full, but what was going to be set aside for general unsecured creditors could be applied even if the PSA were terminated.

We got some pushback from the U.S. Trustee. We had to sort of mold that language a little bit more carefully, and now it sort of says that in the event that something like that happens the PSA parties will still be bound to support the application of those proceeds, rather than an order saying that they can be distributed to those unsecured creditors.

So I think we are seeing the U.S. Trustee taking a close look at settlements and seeing whether *Jevic* is implicated and whether it might be making a distribution that calls for priority skipping that would actually be a final distribution in the case.

MS. HAYES: Then outside of settlements I think that we can anticipate seeing courts grappling with this issue as it relates to sales and critical vendor motions. Anywhere there is going to be an interim payment and the payment is going to a party that's not a first-tier priority claimant, then you can expect questions as to whether *Jevic* is implicated. You should be prepared, if that is the case, to demonstrate that you have a Code-based reason for why you are proposing this course of action, be it a sale or a payment to a particular critical vendor, and then you need to have an explanation of how this process fits into your ultimate exit strategy.

MS. DUGAN: Just a quick note on that. Thinking back to our discussion about what makes bankruptcy expensive and why is it so expensive, and is it really that expensive, I do think that some of the uncertainties from *Jevic* and if there is really a shifting role and the UST taking a more active role and/or other parties objecting, I think that not so much even expense but just the uncertainty of litigation. And sometimes along with that uncertainty it's really hard to predict what the ultimate costs are going to be at the beginning of a case because especially when the landscape is shifting in terms of where the case law may be on some of these issues, it's challenging to predict what the cost may be.

MS. FIORENZA: And I will say that we've been told in our district here that it is an absolute priority for the U.S. Trustee. Any time there is a motion with priority skipping towards the end of the case the U.S. Trustee is absolutely required from his top boss down to object. That's whether there are other parties objecting or not, the U.S. Trustee will be objecting. So that's kind of in our experience. Does anyone else have any experience they would like to share with us? You don't have to be shy. Please.

[Inaudible comment or question from audience]

MS. HAYES: It matters. It goes back from my perspective. It's not that I have any rationale beyond the fact that the WARN Act is literally sacrosanct, and so it's a federal statute. If you're going to juxtapose one federal statute against another, then you're going to have to have a very good reason of why you are causing or interjecting the two. And so absent some type of foresight and preparation for the WARN Act claims and dealing with them at the table, after the fact their claim is what it is, and it's a WARN Act. So mind you, you're also putting into the context the conflict between the overall perspective of the Bankruptcy Code and bankruptcy judges over other Article III judges and what they can do to claims. And so those are issues that you're creating in your own case if you go run afoul of the WARN Act. Because now you're asking a bankruptcy judge to not only quiet or quell a right, now it's a federal right that you're asking the bankruptcy judge to allow you to extinguish through a bankruptcy process that's not even a bankruptcy plan. It's just something that you wrote outside in the hallway and now you're asking the bankruptcy judge to say, hey, it's okay. The WARN Act thing that Congress passed, uh, no big deal. We went outside in the hallway and struck up something else that we think works better. So that's the issue to me, it comes down to how far you can go in bankruptcy court. It comes to the whole idea about what perception people have about collusion and deal striking and what goes on in bankruptcy.

MS. GOOD: I think to counter that a little bit, one of the real struggles that I think that debtors and lenders and creditors' committees deal with and what made structured dismissals attractive in some scenarios is the ease with which you can negotiate with certain parties in a case. It is not always easy to negotiate with WARN claimants, in part because they're a class, in part because they know that they have this federal right. The other party that it's not easy to negotiate with that often gets pulled in to these situations is the IRS. They're not a party that comes to the negotiating table. And if you do try to engage in those negotiations, they are very slow. It requires a lot of up-the-chain approvals and down-the-chain responses, and it takes months, and it's just not something that is going to be a quick and efficient out. I think that's why parties have turned to structured dismissals in part. It's not because they're necessarily seeking always to exclude a certain class but because they look at it and they say, well, there's really no hope of us getting around this, so let's go strike our own deal and see what we can do.

MS. DUGAN: And then just to echo on that, in the *Fryar* case that I talked about a little bit before, the IRS was not a party that objected to it, and that was the party that was being skipped. So I think that from a practical perspective sometimes, I tend to a lot of times like the practical arguments more than the well-the-Code-says-this arguments and that's just maybe my personality, but I struggle sometimes to say but we're so close, if we're this close, is there one party that's going to hold this up or that pesky Code section that's going to hold it up. Although I know there are a lot of counterarguments to that.

MS. HAYES: The other thing I would pose to the audience is the shifting of tides from the past Supreme Court to the current Supreme Court, with the current Supreme Court being more textualist and wanting to stick so close to the text of the Code before relief can be granted. Then juxtaposing that against the equity that bankruptcy courts are charged with pursuing, and oftentimes the need in order to strike equity is to be creative and efficient and move outside of what the Code says and rely on the spirit of the Code in fashioning resolutions, and can you continue to do that in various areas of bankruptcy practice in light of the fact that a lot of the relief that we seek "for cause," is not Code-based. And can you rely on the order that you receive from a bankruptcy judge for cause not being challenged all the way up to the Supreme Court?

MS. DUGAN: Like if you just throw 105(a) in your brief, will that cure it?

MS. HAYES: There was a day, but that day has long gone.

MS. DUGAN: Not anymore.

MS. FIORENZA: So, are we saying that *Jevic* no longer allows for priority skipping?

MS. HAYES: The Court didn't go that far. You can have structured dismissals, you can have priority skipping. What you need is consent. Again, we don't know what that consent means, and whose consent would be sufficient. The Court didn't go that far to delineate, so I think in the priority skipping context, then you need to try to identify the parties, the claimants with the most leverage in terms of priorities and bring them to the table. It may be staggered, it may be over time, but you have to have at least accounted for them in your presentation before you get in front of the Court, because the judges will be reticent to grant that relief absent your showing of consent.

And then secondly, absent your showing of evidence to support the plan or the deal that you have struck is Code-based, it needs to relate back to substance that you can find in the Code for what you're planning to move forward with.

MS. GOOD: I think the other avenue where there's still potential for priority skipping is where the Supreme Court has a whole paragraph where it kind of goes into dicta talking about, well, interim distributions that serve Code-related objectives can violate the ordinary priority rules as long as they're not attached to a final distribution and they're serving a significant offsetting bankruptcy justification. And that paragraph was really going to things like critical vendor payments, certain employee wage payments, and things like that, that you would see in first day orders under the doctrine of necessity.

So you still have an avenue potentially, and there can be a lot of litigation that surrounds what is a Code-related objective or significant offsetting bankruptcy justification, and at what point does an interim distribution become attached to a final distribution? But there's still potential for payments in those settings, and I think one of the things that you might see more and more of, and we've certainly seen some of it to date, is debtors and lenders who say, okay, I'm going to take control of this case and I'm coming in. I know I want to buy the company. I'm going to make sure I pay all the critical trade, and then I won't have a committee. If I can get that done in the first 14 or so days of the case, I won't have a committee, and then I can just kind of run, and we'll see when all these priority and admin claims actually show up, if they actually show up. Because a lot of them, notwithstanding being served with a sale motion, just aren't responding as quickly in the case. So there is potential for quite a bit of litigation there. I think we're seeing the U.S. Trustee raising some objections on critical vendor motions and really putting the debtor to their burden to show that those vendors are truly critical and necessary for ongoing operations, and if they don't get paid they're really not going to ship going forward, or not going to ship on the terms that are necessary to keep the debtor afloat.

MS. FIORENZA: I guess that raises two interesting questions, and the first is to the critical vendors. Did *Jevic* change critical vendor? Did it make it more stringent? More relaxed? Or is it just as it was before the *Jevic* opinion came down?

MS. GOOD: In my experience we're still seeing critical vendor motions. We're still seeing a lot of critical vendor payments being approved. It's just a matter of burden of proof. And it's the U.S. Trustee telling the debtor, this isn't solved until you put your case on, and the judge takes in the evidence. So they're still out there, but I think that they're just eyed with a new lens post-*Jevic*.

MS. FIORENZA: So what about gift plans? Has *Jevic* changed those or taken those off the table? I'll raise that to any of you all.

MS. HAYES: I don't know that *Jevic* has taken it off the table. I think that it's really a continuation of the same discussion in terms of what type of presentation the practitioners will have to make in order to approve such a plan.

MS. DUGAN: Going back to one of the earliest comments on the dissent and what was actually the difference between the question on *cert* and the question that the parties briefed, that's one in particular that I think could have had a very different answer if we had gone with the original question which just more generally referenced settlement proceeds whereas what got briefed was estate property.

MS. GOOD: And whether you can still have gifting and priority skipping, in the context of gifting I think is still very much an open issue. It's one that's being litigated right now in the *Constellation* case. For full disclosure, my firm represents the committee in that case, so we are arguing that. These are my views and not those of my clients.

But in that case, the debtor sold their assets to one of the secured lender's newly formed acquisition vehicles through a credit bid, and in connection with that sale the committee negotiated for a trust. And what would be contributed to that trust from the secured lender was some cash, and the chapter 5 causes of action that the purchaser had purchased in the asset sale. So the settlement got structured between when the—I think it was between when the Third Circuit opinion came out, but it might have been a little bit before that—when the settlement got structured, *Jevic* was still a decision that said, yes, structured dismissals are good, and then *cert* got granted while this is up. And the bankruptcy judge said, you know what, I don't need to decide this until we see what the Supreme Court is going to do. So it literally went on hold, and then was argued and briefed before the bankruptcy court after the *Jevic* decision came down. And the issue there is really whether a case called *ICL*, out of the Third Circuit, applied and not *Jevic*. And *ICL* is a decision out of the Third Circuit where the holding was basically that the Code's distribution rules don't apply to non-estate property.

In *ICL*, the debtor was a series of healthcare centers. They failed, they ran a sale process, they got some offers, none of them were close to clearing the secured debt, and just really weren't acceptable offers in the view of the debtors, so ultimately it proceeds by sale by credit bid to the lenders. The government objected because the sale would have created by its own closing a $24 million admin tax claim and there would be no funds left in the estate to pay it.

Also in connection with this sale, the creditors committee reached a deal with the purchaser whereby those lenders who were not paying cash—this wasn't like they were taking a cash portion of their bid—they were bidding all credit bid, and they just took $3.5 million of the cash and created a general unsecured creditors trust. The bankruptcy court approved that settlement and then the Third Circuit said when you have secured lenders using their own funds to pay general unsecured creditors, we can't say that those are estate monies. They aren't the proceeds of their liens. They didn't become part of the estate even as a pass-through. They separately went into a separate trust account. They never became part of the estate, were never transferred through debtor accounts. They said those assets actually never belonged to the debtor's estate. So they said that priority scheme isn't an issue and the settlement is fine.

So the question in *Constellation* is, what applies? Does *Jevic* apply? And does *ICL* apply? And I guess factually there is some question of whether these causes of action are, as our opponents say, were laundered through the sale process. So that was argued before the district court. Oral argument was February 11, so that's under advisement. It'll be interesting to see how the district court rules on whether you can still have gifting and distribution of non-estate assets, if these are non-estate assets, outside of the context of the Code's priorities.

MS. FIORENZA: Because I want to open this up to any questions you all may have, I do want to mention that we didn't get to everything we wanted to discuss today. So there is still horizontal priority skipping, which there's a case decided on that. And then also what's happening right now in the *Jevic* bankruptcy case. And so our materials go over both of those issues and other issues. So I would encourage you to look at those.

Then, on that, does anyone have any questions? Any thoughts they would like to discuss? We'd love to hear from you.

[Inaudible comment or question from audience]

MS. FIORENZA: Just to be fair, all three courts, bankruptcy, district and Third, were hesitant to approve the structured dismissal settlement, although I think bankruptcy and then district and then Third Circuit stepped up the ladder for concern, Concern-wise, the Third Circuit certainly expressed the most concern out of those three courts. That's just to be fair. I think I cut someone off.

MS. HAYES: I was going to say, I guess the creative narrative. Generally, because bankruptcy courts are courts of equity, they subscribe to the priority scheme as their preference. And so that is what they thought was what should have been done. The issue was the priority scheme is required to be followed in the context of a plan. These guys are not moving forward with the plan, so you're comparing the rules of basketball to football. And they're saying, hey, well, this is football and I can dribble all I want and not incur a penalty even though I'm dribbling the football which in another world would cause a penalty. In football, I can do it. And so they did it and the bankruptcy bourt thought, I don't like this, but the rule that I would impose or enforce in order to stop you from doing this does not apply.

So I think in that sense, looking at the way bankruptcy is used to strike equity, the judge understood on a base level that they could do it. They were creative. The Code allows them, and the practice allows them, to be creative. That's fine. The district court respected that. The Third Circuit respected that. I think going back to textualism and the process, so that was the conflict between the majority at the Supreme Court being textualists and the dissent being focused on the process. Meaning you can't change the question in the last inning, and that is what happened, so Justice Thomas our Circuit Justice thought, no, and Justice Alito thought no, you can't change the question. We want to stick to and make sure that any process is correct before we resolve the issue. The majority thought we want to make sure that you are looking at the text and focusing on the text in every resolution that you create in the bankruptcy process. And so that's where we kind of have a disconnect.

I don't know that either is wrong. I tend to lean towards the dissent because it is something similar to every other process that has been pushed through and become a norm in the bankruptcy context. You need more time, and it needs to be filtered through more circuits, more decisions, more thoughtful practitioners and judges and thought leaders having enough time to chew on this issue and figuring out where to strike the balance between equity and efficiency. So that is why I would agree with the dissent that you should have given it more time for this to play out amongst the courts and let the people that do this every day figure out the best way to handle it.

MS. DUGAN: And I think that can be one of the challenges sometimes when bankruptcy cases go up. No means for any disrespect, but I think that the folks who deal with these issues on a day-to-day basis and are the experts and thought leaders in their field and the judges and practitioners who deal with these issues can understand and just see more easily some of the downstream effects it can have, and even when deciding a very narrow issue if some may have implications in other arenas.

MS. GOOD: I think the one critical thing that comes out if you actually read all opinions is if it tells you where the Supreme Court thought differently than the lower courts, the Supreme Court says, well, they could find someone to pursue—a chapter 7 trustee could find someone to pursue—these causes of action on a contingency. And the bankruptcy court said, if there's anyone here who's going to do that without any of their expenses being paid, without money to hire an expert, he actually said something along the lines of, they should have their head examined.

I think there was just a disconnect there. I mean in theory, yes, a chapter 7 trustee could've gone out and found someone to pursue that on a contingency, but being in a firm that does contingency work from time to time, if you don't have money to pay expenses and you don't have a million dollars for an expert, it's very hard to pursue certain causes of action on a contingency.

MS. HAYES: I guess that harkens back to the morning program when there was a discussion about *Midland Funding* and the resolution that the Court prescribed of, oh, yeah, you know what, the trustees can do this investigation. They have the time, they have nothing to do. But the practicalities of it make it difficult.

The other issue is that this has lent more credibility to the concept of litigation funding in the bankruptcy context and, having also represented a good deal of creditors' committees as well as trustees in bankruptcy litigation, it is quite expensive and for the most part my firm does it on a contingency fee basis, and there are risks that are borne on either side.

The concern I have about introducing litigation funding into this context is for the actual creditors because I would tell my trustee client, even though I may have some bias because I'm counsel and so that litigation funding may cut into my profit margins candidly. But also the issue is whether you're actually serving the creditors. Because I say the same thing that I say to my startup clients, there's no free money. So you're getting litigation financing but the cost of that financing, you actually don't know what that's going to be until you receive a recovery. And that's in addition to the cost of the litigation, meaning in addition to the cost that you're going to pay for counsel anywhere between 18%, 33%, sometimes 40%. Then you're going to pay your expenses. Now you're going to pay the interest and the fees on the litigation financing. And that may still be fine with the trustee or the committee, but then what about the individual creditors that are sometimes getting 5, 10 and in very extreme circumstances 70, 80 cents on the dollar. You add into that the cost of the litigation financing, is it really worth it at that point?

MS. FIORENZA: I think we had one other question, in the far back.

[Inaudible question from audience]

MS. HAYES: I have not seen it, but if I were to see it and I was representing the committee, and wasn't a part of that 363 plan, I have a case right now that a 363 sale is being proposed, and I raised the issue with the debtor's counsel and counsel for the lender because we weren't at the table when this deal was struck, and I raised the *Jevic* issue. So it's open for challenge even in the 363 context. It's also open, like we said before, in the critical vendor. So I don't think that a 363 is going to be the answer to *Jevic*. That's just another opportunity for a *Jevic* challenge.

MS. DUGAN: And that was, again harkening back to the *Fryar* case, it was a 363 sale in that one, a much smaller chapter 11 case.

MS. FIORENZA: Any other questions? Thank you again for listening.

MR. MAHER: Thanks again to our Corporate Panel. Thank you all for coming. We hope you will join us for lunch we have set up right outside. Please don't forget your bags or parking vouchers. Thank you so much.