

---

# Hughes Hubbard & Reed

## Structured Dismissal: The “Least Bad Alternative”

### Client Advisories

Hughes Hubbard & Reed LLP • A New York Limited Liability Partnership  
One Battery Park Plaza • New York, New York 10004-1482 • +1 (212) 837-6000

Attorney advertising. Readers are advised that prior results do not guarantee a similar outcome. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. For information regarding the selection process of awards, please visit <https://www.hugheshubbard.com/legal-notices-methodologies>.

---

**August 27, 2015** - The Third Circuit, in *Official Committee of Unsecured Creditors v. CIT Group/Business Credit Inc. (In re Jevic Holding Corp.)*,<sup>[1]</sup> became the first court of appeals to approve the settlement and dismissal of a chapter 11 case. Structured dismissals, as understood by the Third Circuit, are “simply dismissals that are preceded by other orders of the bankruptcy court (e.g., orders approving settlements, granting releases, and so forth).” This decision may provide flexibility in future bankruptcy resolutions as structured dismissals may become a tool for parties and judges, and deviation from the Bankruptcy Code’s claim priority scheme can be permitted in rare situations.

In 2006 Jevic Transportation, Inc. (“Jevic”), a New Jersey trucking company, was acquired by a subsidiary of Sun Capital Partners (“Sun”) in a leveraged buyout led by CIT Group (“CIT”). Two years later, Jevic filed a voluntary chapter 11 petition in the United States Bankruptcy Court for the District of Delaware. During the bankruptcy proceedings, two lawsuits were filed against the debtor: (i) a group of Jevic’s terminated truck drivers (“Drivers”) filed a class action against Jevic and Sun alleging violations of federal and state Worker Adjustment and Retraining Notification Acts because the Drivers were not given 60 days written notice before termination;<sup>[2]</sup> and (ii) the Official Committee of Unsecured Creditors (“Committee”) brought a fraudulent conveyance action against CIT and Sun on the estate’s behalf.<sup>[3]</sup> In March 2012, three of the parties – the Committee, CIT and Sun – reached a settlement agreement, under which the the fraudulent conveyance and preference actions would be dismissed, CIT would contribute \$2 million to pay legal fees and administrative expenses for Jevic and the Committee, Sun would transfer its lien on Jevic’s assets to a trust in order to fully pay administrative and tax creditors (but not other priority creditors) and to pay unsecured creditor on a pro rata basis, and finally the bankruptcy case would be dismissed. The settlement did not include the Drivers who, along with the U.S. Trustee, objected to the settlement on the grounds that structured dismissals were not authorized under the Bankruptcy Code and that the settlement violated the Bankruptcy Code’s priority scheme by excluding the Drivers priority wage claims.

The Third Circuit had to determine whether structured dismissals were allowed under the Bankruptcy Code and if so, whether strict compliance with the Code’s priority distribution scheme in § 507 was required. The majority found that “absent a showing that a structured dismissal has been contrived to evade the procedural protections

and safeguards of the [chapter 11] plan confirmation or conversion processes, a bankruptcy court has discretion to order such disposition.” The Third Circuit then compared the outcome of cases in the Fifth and Second Circuits that discussed whether the priority scheme must be followed when settlement proceeds are distributed in chapter 11 cases, and found that in “rare” circumstances a structured dismissal that does not strictly adhere to the Code’s priority scheme is warranted. The Fifth Circuit, in *Matter of AWECO, Inc.*, held that the “fair and equitable” standard required by Federal Rule of Bankruptcy Procedure 9019 applies to settlements and that “fair and equitable” means compliant with the priority system.[4] In *In re Iridium Operating LLC* the Second Circuit held that a settlement that did not comply with the priority scheme could be approved as long as the balance of other factors weighed heavily in favor of approving a settlement and that “specific and credible grounds to justify [the] deviation” existed. [5] The Third Circuit followed the more flexible *Iridium* approach. Admittedly unsatisfied by the exclusion of the Drivers, the Third Circuit conceded that, when compared with “no prospect” of a plan being confirmed or the secured creditors’ taking “all that remained” in a chapter 7 conversion, the settlement was the “least bad alternative.” The dissent did not find the special circumstances required by *Iridium* present in *Jevic*.

This decision is the first by a circuit court of appeals to approve the use of a structured dismissal as an alternative to converting a case to chapter 7 or returning the parties to status quo via dismissal. Future use of structured dismissals will help clarify and continue to refine the definition of “rare” circumstances. For now, debtors should note the possibility of utilizing a structured dismissal and secured creditors should be warned that they may now risk being frozen out of settlements to the benefit of unsecured creditors.

## Footnotes

[1]. No. 14-1465 (3d Cir. May 21, 2015).

[2]. The Bankruptcy Court eventually granted summary judgment for Sun finding that it did not qualify as an employer of the Drivers, *In re Jevic Holding Corp.*, 492 B.R. 416, 425 (Bankr. D. Del. 2013), and entered summary judgment against Jevic because it had violated the New Jersey Worker Adjustment and Retraining Notification Act, *In re Jevic Corp.*, 496 B.R. 151, 165 (Bankr. D. Del. 2013).

[3]. CIT’s motion to dismiss was granted in part and denied in part. The Bankruptcy Court held that the Committee had adequately pleaded claims of fraudulent transfer and preferential transfer under 11 U.S.C. §§ 548 and 547, but dismissed without prejudice the Committee’s claims for fraudulent transfer under 11 U.S.C. § 544. *In re Jevic Holding Corp.*, 2011 WL 4345204, at \*10 (Bankr. D. Del. Sept. 15, 2011).

[4]. 725 F.2d 293, 298 (1984).

[5] *In re Iridium Operating LLC*, 478 F.3d 452, 464, 466 (2d Cir. 2007). The four factors, from *In re Martin* are (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay of necessarily attending it; and (4) the paramount interest of the creditors. 91 F.3d 389, 393 (3d Cir. 1996).

## Related People



**Dustin P. Smith**

**Related Areas of Focus**

Corporate Reorganization & Bankruptcy.