BANKRUPTCY LAW

PRINCIPLES, POLICIES, AND PRACTICE
FOURTH EDITION

2017 Supplement

CHARLES J. TABB
Mildred Van Voorhis Jones Chair in Law
University of Illinois College of Law
Of Counsel, Foley & Lardner LLP

RALPH BRUBAKER
Carl L. Vacketta Professor of Law
University of Illinois College of Law

CAROLINA ACADEMIC PRESS

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION TO DEBT COLLECTION AND BANKRUPTCY

On page 5, insert the following at the end of the paragraph immediately after the block quotation of section 803(6) of the FDCPA:

In *Henson v. Santander*, 137 S. Ct. 1718 (2017), the Supreme Court held that a party collecting a debt that party has purchased from another is *not* collecting a debt "owed or due another." As the business models of debt collection firms has shifted toward discounted purchases of delinquent debts (in lieu of fee-based collections), this holding is a major limitation on the scope of coverage of the FDCPA.

CHAPTER 2
INVOKING BANKRUPTCY RELIEF

On page 77, replace the dollar amounts in paragraph at top of page with the following:

"$1,250" should be "$1,300"
"$18,675" should be "$19,250"
"$12,475" should be "$12,850"

On page 78, at the end of the second to last paragraph, add "See Official Form 103B."

On pages 78-79, replace the numbers of the Official Forms and the letters on the Schedules with the following. Note that all Bankruptcy Forms now have "B" as a precedent; that is not included below:

"3" should be "103A"
"6" should be "106"
"A, B" should be "A/B"
"E, and F" should be "E/F"
"7" should be "107"
"4" should be "104"
"22" should be "122A-1"
"8" should be "108"

On page 102, substitute the following for the first URL and the two sentences subsequent:

https://www.justice.gov/ust/eo/bapcpa/20170501/bci_data/median_income_table.htm

So, for example, in Illinois, the single earner income median applicable to cases filed on or after May 1, 2017 is $50,765. The median income for a family of four in Illinois is $91,216.

On page 102, in the sentence preceding the second URL, replace "Form B22A2" with "B122A-2." After that sentence, add the following:

Note that the Official Bankruptcy Forms were revised and renumbered effective December 1, 2015. For example, old Form B22A2 became Form B122A-2.

On page 102, substitute the following for the second URL:

http://www.uscourts.gov/forms/means-test-forms/chapter-7-means-test-calculation

In the middle of page 103, substitute the following for "d.," and the first full paragraph following the alphabetical list:

d. The debtor fails the means test if that total is not less than the *lesser* of:

(i) $7,700 *or* 25% of the debtor's nonpriority unsecured claims, whichever is *greater*, § 707(b)(2)(A)(i)(I)

or

(ii) $12,850, § 707(b)(2)(A)(i)(II).

Thus, the range of repayment capacity that may demonstrate presumptive abuse ranges from a low of $7,700 to a high of $12,850 (depending on the amount of nonpriority unsecured claims). That means that any individual debtor with primarily consumer debts whose family income is above the state median and who has at least $128.34 per month in repayment capacity according to the means test could potentially face a presumption of abuse, and a debtor with excess income of $214.17 per month always would face the presumption.

On page 104, substitute the following for the facts of Problem 2.5:

Debtor and his spouse both work. Combined, their "current monthly income" is $5,600 per month. The Illinois state median income for 2-person families is $66,487 per year (as of April 1, 2017). Debtor is self-employed as a painting contractor, and his spouse has a steady wage-earning job. Under the means test, their deductible monthly expenses are as follows: $3,000 (net of secured debt payments) under the IRS standards; secured debts of $1,900; priority debts of $300; and various other deductible expenses of $100, for a total of $5,300. Their combined nonpriority unsecured debts are $80,000. They want to file chapter 7, and come to see you for advice.

On page 105, substitute the following for the clause preceding the URL near the middle of 105, the URL itself, and the paragraph subsequent to the URL:

See (as of May 1, 2017):

https://www.justice.gov/ust/eo/bapcpa/20170501/bci_data/median_income_table.htm

If the debtor is in a household of more than 4 individuals, the highest median family income of the applicable state for a family of 4 or fewer individuals is used, plus an additional $700 per month (or $8,400 per year) for each individual in excess of four. § 707(b)(7)(A).

On page 105, substitute the following for the last sentence of Problem 2.6:

For cases filed on or after May 1, 2017, the median income for a family of four in New York was $91,988 and in New Jersey was $114,886.

On pages 108 through 115, substitute "Form B22A2" with "B122A-2."

On page 108, substitute the following URL in the second sentence of the first paragraph:

(http://www.uscourts.gov/forms/means-test-forms/chapter-7-means-test-calculation).

On page 108, in the paragraph that is captioned "Additional Living Expense Deductions," change "$1,875" to '$1,925."

On page 108, for the first URL under "(a) Living Expenses," substitute the following:

https://www.justice.gov/ust/means-testing/20170501

On page 109, substitute the following for the URL and the ensuing "applicable to" parenthetical in the first full paragraph:

https://www.justice.gov/ust/means-testing/20170501

(applicable to cases filed on or after 05/01/17, and updated periodically).

On pages 109 and 110, substitute the following for the text following the heading "National Standards":

The National Standards establish allowances for food, clothing, and other items. For cases filed on or after May 1, 2017 (and to be updated periodically), see:

https://www.justice.gov/ust/eo/bapcpa/20170501/bci_data/national_expense_standards.htm

The amount of these allowances increases with family size. There is also a separate national allowance for out-of-pocket healthcare expenses. That allowance is larger for a person who is 65 or older ($117 per month) than for those younger than 65 ($49 per month). See:

https://www.justice.gov/ust/eo/bapcpa/20170501/bci_data/national_oop_healthcare.htm

For families larger than 4 people, a total per-person additional allotment is provided ($325, plus age-appropriate healthcare allowance of either $49 or $117). Under the means test, debtors can add an extra 5% to the National Standards food and clothing allowances, if such an increase is demonstrated to be "reasonable and necessary" — whatever that means! The following table provides the National Standards for a family of 4, all under age 65 (for cases filed on or after 05/01/17), including health care:

Collection Financial Standards for Food, Clothing and Other Items, Plus Health Care	
Expense	**Four Persons**
Food	$845
Housekeeping supplies	$65
Apparel & services	$293
Personal care products & services	$77
Miscellaneous	$370
Out-of-pocket health care	$196
Total	**$1,846**

On page 110, under "Local Standards," substitute the following two URLs for the transportation allowance and for housing and utilities, respectively:

https://www.justice.gov/ust/eo/bapcpa/20170501/bci_data/IRS_Trans_Exp_Stds_MW.htm

…

https://www.justice.gov/ust/eo/bapcpa/20170501/bci_data/housing_charts/irs_housing_charts_IL.htm

On page 111, substitute the following for the third through fifth sentences of the second full paragraph:

The numbers used assume the case was filed on or after May 1, 2017 (and before the next periodic allowance adjustment). A debtor who lives in Cook County, Illinois has a housing allowance for a family of 4 of $2,457 ($684 for non-mortgage or rent expenses, and $1,773 for mortgage or rent costs); for neighboring DuPage County, the allowance is $2,680 ($628 and $2,052, respectively) — $223 per month higher. So, by moving across the county line, a debtor could insulate an additional $13,380 of income over the 60-month means test calculation period.

On page 111, in the fourth full paragraph, change the dollar amounts from "$262" to "$241" and from "$524" to "$482".

On page 111, in the fifth full paragraph, change the dollar amount from "$182" to "$189" change the parenthetical date from "(as of April 1, 2014)" to "(as of May 1, 2017)".

On page 111, in the last paragraph, change the dollar amount from "$517" to "$485" and substitute the following for the URL in the portion of that paragraph carrying over to the top of page 112:

http://www.uscourts.gov/forms/means-test-forms/chapter-7-means-test-calculation

On page 112, in the last two paragraphs, carrying over to the top of page 113, change the following dollar amounts each time they appear:

"$517" should be "$485"
"$150" should be "$118"
"$884" should be "$852"

On page 115, change the URL under the first paragraph to:

https://www.justice.gov/ust/eo/bapcpa/20170501/bci_data/ch13_exp_mult.htm

On page 115, in the second full paragraph, substitute the following for the second sentence:

For example, in Illinois, debtors in the Central District may claim 10.0%, but debtors in the Northern District are only allowed 7.7%.

On page 115, in the second paragraph under "Note on Charitable Contributions," change "$12,475" to "$12,850" each time it appears.

On pages 116 and 117, substitute the following for everything from "Step Three" up to problem 2.12:

Step Three: Compare that figure with the statutory "trigger" amount, which is the *lesser* of:

(a) 25% of the debtor's nonpriority unsecured claims *or* $7,700, whichever is *greater*

or

(b) $12,850.

If the amount computed in Step Two (debtor's actual projected repayment capacity) is greater than or equal to the figure in Step Three (the trigger amount), then abuse is presumed. § 707(b)(2)(A)(I). It's that simple (just kidding).

A convenient way to think about the means test is to split debtors into three tiers based on the amount of unsecured debt they have.

- Tier One is for debtors with less than $30,800 of unsecured debt. For these debtors, abuse is presumed if their Step Two total of net monthly income over 60 months is at least **$7,700**.
- Tier Two is for debtors with unsecured debts between $30,800 and $51,400. Abuse is presumed if the debtor's Step Two total ("net monthly income" over 60 months) is more than **25%** of the debtor's unsecured debts; the repayment range is between $7,700 and $12,850.
- Tier Three includes debtors with more than $51,400 of unsecured debt. For these debtors, abuse is presumed if the debtor's Step Two total of net monthly income over five years is at least **$12,850**, without regard to how much unsecured debt such debtor actually has.

Another way to conceptualize the means test is in terms of "trigger points." Since $7,700 is the minimum amount that can trigger a presumption of abuse, and because $7,700 divided by 60 months (the projected presumption period) is just over $128.33, if a debtor has net monthly income (current monthly income minus deductions) of *$128.33 or less a month*, the means test presumption of abuse *never* arises. On the other hand, since any repayment capacity over 60 months of $12,850 or more always triggers the presumption, and given that $12,850 divided by 60 is just under $214.17, the presumption of abuse *always* arises if a debtors net monthly income is *more than $214.17*. These trigger points can be summarized by the following table:

Monthly Disposable Income	**Presumption of Abuse**
Less than $128.34	Never Arises
$128.34–214.17	(1) Arises if nonpriority unsecured debt ≤ $30,800; (2) If nonpriority unsecured debt > $30,800, arises if repayment capacity ≥ 25% of unsecured debt
More than $214.17	Always Arises

Note how small a margin a debtor has under the means test. A difference of $86 of income over expenses a month can be the difference between abuse *never* being presumed and abuse *always* being presumed!

On page 117, replace "$5,125" with "$5,150"in Part a. of Problem 2.12.

On page 135, replace "Form B22C" with "Forms B122-C1 and 122C-2" each time it appears.

On page 150, change "$315" to "$345" each time it appears in Question 18.

On page 153, under "Claim Requirements," on the fourth bullet point, change "$15,325" to "$15,775," and change the date in the parenthetical to "April 1, 2019". Make the same dollar value change to Question 5 at the bottom of the page

On page 160, in last line, strike "the deal" the second time it appears.

CHAPTER 3
PROPERTY OF THE ESTATE

On page 182, in Question 4, replace "$1,245,475" with "$1,283,025" and replace "($2,490,950)" with "($2,566,050)".

On page 182, replace "$6,225" with "$6,425" each time it appears in Question 6, including the portion of the paragraph that carries over to page 183.

CHAPTER 5
UNSECURED CLAIMS

On page 259, replace the dollar amounts in the priorities list with the following:

"$12,475" should be "$12,850"
"$6,150" should be "$6,325"
"$2,775" should be "$2,850"

On page 278, replace "$12,475" with "$12,850" in the second full paragraph. Change the year in the last sentence of that paragraph from "2016" to "2019".

On page 281, replace "$6,150" with "$6,325" in the "Grain producers and fishermen" paragraph.

On page 281, replace "$2,775" with "$2,850"in the first paragraph under "Consumer layaway deposits."

CHAPTER 9
AVOIDING POWERS

On page 525, in the last bullet point at the top of the page, replace "$6,225" with "$6,425".

CHAPTER 10
DISCHARGE

On page 591, in the third sentence of the last paragraph, replace "$155,675" with "$160,375" and "2013" with "2016".

On page 611, in the second sentence of the first full paragraph, replace "$155,675" with "$160,375" and "2013" with "2016".

*On page 623, in the second full paragraph under "**Fraud and Related Provisions**", replace "$650" with "$675" and "$925" with "$950".*

CHAPTER 11
EXEMPTIONS

On page 662, in citation for Robinson v. Hagan, replace "2014 U.S. Dist. LEXIS 155467" with "527 B.R. 314" and at end of citation, add "aff'd, 811 F.3d 267 (7th Cir. 2016)

On page 674, replace "$3,675" with "$3,775" in the first line of the page.

On page 691, in the fifth sentence of the second full paragraph, replace:
"$6,225" with "$6,425"
"2013" with "2016"
"2016" with "2019"

On page 693, in the fourth sentence of the third full paragraph, replace "$155,675" with "$160,375" and "2013" with "2016".

CHAPTER 12
REORGANIZATION

At the end of page 818, insert the following:

F. SYNTHESIS: STRUCTURED DISMISSALS

CZYZEWSKI v. JEVIC HOLDING CORP.
137 S. Ct. 973 (2017)

JUSTICE BREYER delivered the opinion of the Court.

Bankruptcy Code Chapter 11 allows debtors and their creditors to negotiate a plan for dividing an estate's value. But sometimes the parties cannot agree on a plan. If so, the bankruptcy court may decide to dismiss the case. The Code then ordinarily provides for what is, in effect, a restoration of the prepetition financial status quo.

In the case before us, a Bankruptcy Court dismissed a Chapter 11 bankruptcy. But the court did not simply restore the prepetition status quo. Instead, the court ordered a distribution of estate assets that gave money to high-priority secured creditors and to low-priority general unsecured creditors but which skipped certain dissenting mid-priority creditors. The skipped creditors would have been entitled to payment ahead of the general unsecured creditors in a Chapter 11 plan (or in a Chapter 7 liquidation). The question before us is whether a bankruptcy court has the legal power to order this priority-skipping kind of distribution scheme in connection with a Chapter 11 *dismissal*.

In our view, a bankruptcy court does not have such a power. A distribution scheme ordered in connection with the dismissal of a Chapter 11 case cannot, without the consent of the affected parties, deviate from the basic priority rules that apply under the primary mechanisms the Code establishes for final distributions of estate value in business bankruptcies.

I
A
1
* * * *

It is important to keep in mind that Chapter 11 foresees three possible outcomes. The first is a bankruptcy-court-confirmed plan. Such a plan may keep the business operating but, at the same time, help creditors by providing for payments, perhaps over time. See §§ 1123, 1129, 1141. The second possible outcome is conversion of the case to a Chapter 7 proceeding for liquidation of the business and a distribution of its remaining assets. §§ 1112(a), (b), 726. That conversion in effect confesses an inability to find a plan. The third possible outcome is dismissal of the Chapter 11 case. § 1112(b). A dismissal typically "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case"—in other words, it aims to return to the prepetition financial status quo. § 349(b)(3).

Nonetheless, recognizing that conditions may have changed in ways that make a perfect restoration of the status quo difficult or impossible, the Code permits the bankruptcy court, "for

cause," to alter a Chapter 11 dismissal's ordinary restorative consequences. § 349(b). A dismissal that does so (or which has other special conditions attached) is often referred to as a "structured dismissal," defined by the American Bankruptcy Institute as a

> "hybrid dismissal and confirmation order … that … typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case." American Bankruptcy Institute Commission to Study the Reform of Chapter 11, 2012–2014 Final Report and Recommendations 270 (2014).

Although the Code does not expressly mention structured dismissals, they "appear to be increasingly common." *Ibid*., n. 973.

2

The Code also sets forth a basic system of priority, which ordinarily determines the order in which the bankruptcy court will distribute assets of the estate.… The Code makes clear that distributions of assets in a Chapter 7 liquidation must follow this prescribed order. §§ 725, 726. It provides somewhat more flexibility for distributions pursuant to Chapter 11 plans, which may impose a different ordering with the consent of the affected parties. But a bankruptcy court cannot confirm a plan that contains priority-violating distributions over the objection of an impaired creditor class. §§ 1129(a)(7), 1129(b)(2).

The question here concerns the interplay between the Code's priority rules and a Chapter 11 dismissal. Here, the Bankruptcy Court neither liquidated the debtor under Chapter 7 nor confirmed a Chapter 11 plan. But the court, instead of reverting to the prebankruptcy status quo, ordered a distribution of the estate assets to creditors by attaching conditions to the dismissal (i.e., it ordered a structured dismissal). The Code does not explicitly state what priority rules—if any—apply to a distribution in these circumstances. May a court consequently provide for distributions that deviate from the ordinary priority rules that would apply to a Chapter 7 liquidation or a Chapter 11 plan? Can it approve conditions that give estate assets to members of a lower priority class while skipping objecting members of a higher priority class?

B

In 2006, Sun Capital Partners, a private equity firm, acquired Jevic Transportation Corporation with money borrowed from CIT Group in a "leveraged buyout." In a leveraged buyout, the buyer (B) typically borrows from a third party (T) a large share of the funds needed to purchase a company (C). B then pays the money to C's shareholders. Having bought the stock, B owns C. B then pledges C's assets to T so that T will have security for its loan. Thus, if the selling price for C is $50 million, B might use $10 million of its own money, borrow $40 million from T, pay $50 million to C's shareholders, and then pledge C assets worth $40 million (or more) to T as security for T's $40 million loan. If B manages C well, it might make enough money to pay T back the $40 million and earn a handsome profit on its own $10 million investment. But, if the deal sours and C descends into bankruptcy, beware of what might happen: Instead of C's $40 million in assets being distributed to its existing creditors, the money will go to T to pay back T's loan—the loan that allowed B to buy C. (T will receive what remains of C's assets because T is now a secured creditor, putting it at the top of the priority list). Since C's

shareholders receive money while C's creditors lose their claim to C's remaining assets, unsuccessful leveraged buyouts often lead to fraudulent conveyance suits alleging that the purchaser (B) transferred the company's assets without receiving fair value in return.

This is precisely what happened here. Just two years after Sun's buyout, Jevic (C in our leveraged buyout example) filed for Chapter 11 bankruptcy. At the time of filing, it owed $53 million to senior secured creditors Sun and CIT (B and T in our example), and over $20 million to tax and general unsecured creditors.

[During the pendency of Jevic's Chapter 11 proceedings, Jevic's saleable assets were liquidated and the proceeds were used to repay CIT's secured debt. In addition, t]he circumstances surrounding Jevic's bankruptcy led to two lawsuits. First, petitioners, a group of former Jevic truckdrivers, filed suit in bankruptcy court against Jevic and Sun. Petitioners pointed out that, just before entering bankruptcy, Jevic had halted almost all its operations and had told petitioners that they would be fired. Petitioners claimed that Jevic and Sun had thereby violated state and federal Worker Adjustment and Retraining Notification (WARN) Acts—laws that require a company to give workers at least 60 days' notice before their termination. The Bankruptcy Court granted summary judgment for petitioners against Jevic, leaving them (and this is the point to remember) with a judgment that petitioners say is worth $12.4 million. Some $8.3 million of that judgment counts as a priority wage claim under 11 U.S.C. § 507(a)(4), and is therefore entitled to payment ahead of general unsecured claims against the Jevic estate.

Petitioners' WARN suit against Sun continued throughout most of the litigation now before us. But eventually Sun prevailed on the ground that Sun was not the workers' employer at the relevant times.

Second, the Bankruptcy Court authorized a committee representing Jevic's unsecured creditors to sue Sun and CIT. The Bankruptcy Court and the parties were aware that any proceeds from such a suit would belong not to the unsecured creditors, but to the bankruptcy estate. See §§ 541(a)(1), (6); *Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 552–553 (C.A.3 2003) (en banc) (holding that a creditor's committee can bring a derivative action on behalf of the estate).…

Sun, CIT, Jevic, and the committee … tried to negotiate a settlement of this "fraudulent-conveyance" lawsuit. By that point, the depleted Jevic estate's only remaining assets were the fraudulent-conveyance claim itself and $1.7 million in cash, which was subject to a lien held by Sun [the validity of which was being challenged in the fraudulent-conveyance suit].

The parties reached a settlement agreement. It provided (1) that the Bankruptcy Court would dismiss the fraudulent-conveyance action with prejudice; (2) that CIT would deposit $2 million into an account earmarked to pay the committee's legal fees and administrative expenses; (3) that Sun would assign its lien on Jevic's remaining $1.7 million to a trust, which would pay taxes and administrative expenses and distribute the remainder on a pro rata basis to the low-priority general unsecured creditors, *but which would not distribute anything to petitioners* (who, by virtue of their WARN judgment, held an $8.3 million mid-level-priority wage claim against the estate); and (4) that Jevic's Chapter 11 bankruptcy would be dismissed.

[Petitioners participated only minimally in the settlement discussions and were unable to agree to a settlement of their WARN claims.] Apparently Sun insisted on a distribution that would skip petitioners because petitioners' WARN suit against Sun was still pending and Sun did not want to help finance that litigation. Sun's counsel acknowledg[ed] before the Bankruptcy Court that "Sun probably does care where the money goes because you can take judicial notice that there's a pending WARN action against Sun by the WARN plaintiffs. And if the money

goes to the WARN plaintiffs, then you're funding someone who is suing you who otherwise doesn't have funds and is doing it on a contingent fee basis." The essential point is that, regardless of the reason, the proposed settlement called for a structured dismissal that provided for distributions that did not follow ordinary priority rules.

Sun, CIT, Jevic, and the committee asked the Bankruptcy Court to approve the settlement and dismiss the case. Petitioners and the U.S. Trustee objected, arguing that the settlement's distribution plan violated the Code's priority scheme because it skipped petitioners—who, by virtue of their WARN judgment, had mid-level priority claims against estate assets—and distributed estate money to low-priority general unsecured creditors.

The Bankruptcy Court agreed with petitioners that the settlement's distribution scheme failed to follow ordinary priority rules. But it held that this did not bar approval … because the proposed payouts would occur pursuant to a structured dismissal of a Chapter 11 petition rather than an approval of a Chapter 11 plan. The court accordingly decided to grant the motion in light of the "dire circumstances" facing the estate and its creditors. Specifically, the court predicted that without the settlement and dismissal, there was "no realistic prospect" of a meaningful distribution for anyone other than the secured creditors. A confirmable Chapter 11 plan was unattainable. And there would be no funds to operate, investigate, or litigate were the case converted to a proceeding in Chapter 7.

The District Court affirmed the Bankruptcy Court. The Third Circuit affirmed the District Court by a vote of 2 to 1. The majority held that … courts could, "in rare instances like this one, approve structured dismissals that do not strictly adhere to the Bankruptcy Code's priority scheme." …

II

Respondents initially argue that petitioners lack standing because they have suffered no injury, or at least no injury that will be remedied by a decision in their favor.…

The reason, respondents say, is that petitioners would have gotten nothing even if the Bankruptcy Court had never approved the structured dismissal in the first place, and will still get nothing if the structured dismissal is undone now. Reversal will eliminate the settlement of the committee's fraudulent-conveyance lawsuit, which was conditioned on the Bankruptcy Court's approval of the priority-violating structured dismissal. If the Bankruptcy Court cannot approve that dismissal, respondents contend, Sun and CIT will no longer agree to settle. Nor will petitioners ever be able to obtain a litigation recovery. Hence there will be no lawsuit money to distribute. And in the absence of lawsuit money, Jevic's assets amount to about $1.7 million, all pledged to Sun, leaving nothing for anyone else, let alone petitioners. Thus, even if petitioners are right that the structured dismissal was impermissible, it cost them nothing. And a judicial decision in their favor will gain them nothing. No loss. No redress.

This argument, however, rests upon respondents' claims (1) that, without a violation of ordinary priority rules, there will be no settlement, and (2) that, without a settlement, the fraudulent-conveyance lawsuit has no value. In our view, the record does not support either of these propositions.

As to the first, the record indicates that a settlement that respects ordinary priorities remains a reasonable possibility. It makes clear … that Sun insisted upon a settlement that gave petitioners nothing only because it did not want to help fund petitioners' WARN lawsuit against it. But, Sun has now won that lawsuit. If Sun's given reason for opposing distributions to petitioners has

disappeared, why would Sun not settle while permitting some of the settlement money to go to petitioners?

As to the second, the record indicates that the fraudulent-conveyance claim could have litigation value. CIT and Sun, after all, settled the lawsuit for $3.7 million, which would make little sense if the action truly had no chance of success. The Bankruptcy Court could convert the case to Chapter 7, allowing a Chapter 7 trustee to pursue the suit against Sun and CIT. Or the court could simply dismiss the Chapter 11 bankruptcy, thereby allowing petitioners to assert the fraudulent-conveyance claim themselves. Given these possibilities, there is no reason to believe that the claim could not be pursued with counsel obtained on a contingency basis. Of course, the lawsuit—like any lawsuit—*might* prove fruitless, but the mere *possibility* of failure does not eliminate the value of the claim or petitioners' injury in being unable to bring it.

Consequently, the Bankruptcy Court's approval of the structured dismissal cost petitioners … a chance to obtain a settlement that respected their priority. Or, if not that, they lost the power to bring their own lawsuit on a claim that had a settlement value of $3.7 million.…

III

We turn to the basic question presented: Can a bankruptcy court approve a structured dismissal that provides for distributions that do not follow ordinary priority rules without the affected creditors' consent? Our simple answer to this complicated question is "no."

…The priority system applicable to [creditor] distributions has long been considered fundamental to the Bankruptcy Code's operation. See H.R. Rep. No. 103–835, p. 33 (1994) (explaining that the Code is "designed to enforce a distribution of the debtor's assets in an orderly manner ... in accordance with established principles rather than on the basis of the inside influence or economic leverage of a particular creditor") …. The importance of the priority system leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure. See *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) ("Congress ... does not, one might say, hide elephants in mouseholes"). Put somewhat more directly, 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.

We can find nothing in the statute that evinces this intent. The Code gives a bankruptcy court the power to "dismiss" a Chapter 11 case. § 1112(b). But the word "dismiss" itself says nothing about the power to make nonconsensual priority-violating distributions of estate value. Neither the word "structured," nor the word "conditions," nor anything else about distributing estate value to creditors pursuant to a dismissal appears in any relevant part of the Code.

Insofar as the dismissal sections of Chapter 11 foresee any transfer of assets, they seek a restoration of the prepetition financial status quo. See § 349(b)…; see also H.R. Rep. No. 95–595, p. 338 (1977) (dismissal's "basic purpose ... is 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").

Section 349(b), we concede, also says that a bankruptcy judge may, "for cause, orde[r] otherwise." But, read in context, this provision appears designed to give courts the flexibility to "make the appropriate orders to protect rights acquired in reliance on the bankruptcy case." H.R. Rep. No. 95–595, at 338; cf., *e.g.*, *Wiese v. Community Bank of Central Wis.*, 552 F.3d 584, 590 (C.A.7 2009) (upholding, under § 349(b), a Bankruptcy Court's decision not to reinstate a

debtor's claim against a bank that gave up a lien in reliance on the claim being released in the debtor's reorganization plan). Nothing else in the Code authorizes a court ordering a dismissal to make general end-of-case distributions of estate assets to creditors of the kind that normally take place in a Chapter 7 liquidation or Chapter 11 plan—let alone final distributions that do not help to restore the *status quo ante* or protect reliance interests acquired in the bankruptcy, and that would be flatly impermissible in a Chapter 7 liquidation or a Chapter 11 plan because they violate priority without the impaired creditors' consent. That being so, the word "cause" is too weak a reed upon which to rest so weighty a power. Cf. *In re Sadler*, 935 F.2d 918, 921 (C.A.7 1991) (" 'Cause' under § 349(b) means an acceptable reason. Desire to make an end run around a statute is not an adequate reason").

We have found no contrary precedent, either from this Court, or, for that matter, from lower court decisions reflecting common bankruptcy practice.…

We recognize that [there are lower court decisions] in which a court has approved interim distributions that violate ordinary priority rules. But in such instances one can generally find significant Code-related objectives that the priority-violating distributions serve. Courts, for example, have approved "first-day" wage orders that allow payment of employees' prepetition wages, "critical vendor" orders that allow payment of essential suppliers' prepetition invoices, and "roll-ups" that allow lenders who continue financing the debtor to be paid first on their prepetition claims. In doing so, these courts have usually found that the distributions at issue would "enable a successful reorganization and make even the disfavored creditors better off." *In re Kmart Corp.*, 359 F.3d 866, 872 (C.A.7 2004) (discussing the justifications for critical-vendor orders). By way of contrast, in a structured dismissal like the one ordered below, the priority-violating distribution is attached to a final disposition; it does not preserve the debtor as a going concern; it does not make the disfavored creditors better off; it does not promote the possibility of a confirmable plan; it does not help to restore the *status quo ante*; and it does not protect reliance interests. In short, we cannot find in the violation of ordinary priority rules that occurred here any significant offsetting bankruptcy-related justification.

Rather, the distributions at issue here more closely resemble proposed transactions that lower courts have refused to allow on the ground that they circumvent the Code's procedural safeguards. See, *e.g.*, *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (C.A.5 1983) (prohibiting an attempt to "short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets"); *In re Lionel Corp.*, 722 F.2d 1063, 1069 (C.A.2 1983) (reversing a Bankruptcy Court's approval of an asset sale after holding that § 363 does not "gran[t] the bankruptcy judge carte blanche " or "swallo[w] up Chapter 11's safeguards"); cf. *In re Chrysler LLC*, 576 F.3d 108, 118 (C.A.2 2009) (approving a § 363 asset sale because the bankruptcy court demonstrated "proper solicitude for the priority between creditors and deemed it essential that the [s]ale in no way upset that priority"), vacated as moot, 592 F.3d 370 (C.A.2 2010) (*per curiam*).

IV

We recognize that the Third Circuit did not approve nonconsensual priority-violating structured dismissals in general. To the contrary, the court held that they were permissible only in those "rare case[s]" in which courts could find "sufficient reasons" to disregard priority. Despite the "rare case" limitation, we still cannot agree.

For one thing, it is difficult to give precise content to the concept "sufficient reasons." That fact threatens to turn a "rare case" exception into a more general rule. Consider the present case.

The Bankruptcy Court feared that (1) without the worker-skipping distribution, there would be no settlement, (2) without a settlement, all the unsecured creditors would receive nothing, and consequently (3) its distributions would make some creditors (high- and low-priority creditors) better off without making other (mid-priority) creditors worse off (for they would receive nothing regardless). But, as we have pointed out, the record provides equivocal support for the first two propositions. And, one can readily imagine other cases that turn on comparably dubious predictions. The result is uncertainty. And uncertainty will lead to similar claims being made in many, not just a few, cases. See Rudzik, A Priority Is a Priority Is a Priority—Except When It Isn't, 34 Am. Bankr. Inst. J. 16, 79 (2015) ("[O]nce the floodgates are opened, debtors and favored creditors can be expected to make every case that 'rare case'").

The consequences are potentially serious. They include departure from the protections Congress granted particular classes of creditors. They include changes in the bargaining power of different classes of creditors even in bankruptcies that do not end in structured dismissals. They include risks of collusion, i.e., senior secured creditors and general unsecured creditors teaming up to squeeze out priority unsecured creditors. See *Bank of America Nat. Trust and Sav. Assn. v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 444 (1999) (discussing how the absolute priority rule was developed in response to "concern with 'the ability of a few insiders, whether representatives of management or major creditors, to use the reorganization process to gain an unfair advantage'").…

For these reasons, as well as those set forth in Part III, we conclude that Congress did not authorize a "rare case" exception. We cannot "alter the balance struck by the statute," *Law v. Siegel*, 134 S.Ct. 1188, 1198 (2014), not even in "rare cases." Cf. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 207 (1988) (explaining that courts cannot deviate from the procedures "specified by the Code," even when they sincerely "believ[e] that ... creditors would be better off"). The judgment of the Court of Appeals is reversed, and the case is remanded ….

It is so ordered.

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

* * * *

We granted certiorari to decide "[w]hether a bankruptcy court may authorize the distribution of settlement proceeds in a manner that violates the statutory priority scheme." According to petitioners, the decision below "deepened an existing ... split" among the Courts of Appeals on this question, citing *In re AWECO, Inc.*, 725 F.2d 293, 298 (C.A.5 1984) [no], and *In re Iridium Operating LLC*, 478 F.3d 452, 464 (C.A.2 2007) [yes]. After we granted certiorari, however, petitioners recast the question presented to ask "[w]hether a Chapter 11 case may be terminated by a 'structured dismissal' that distributes estate property in violation of the Bankruptcy Code's priority scheme." Although both questions involve priority-skipping distributions of estate assets, the recast question is narrower—and different—than the one on which we granted certiorari. It is also not the subject of a circuit conflict.… Accordingly, I would dismiss the writ as improvidently granted. I respectfully dissent.

Questions

1. How did the "structured dismissal" in *Jevic* violate the priority rules of the Bankruptcy Code?

2. Why did the Court conclude that the Code's dismissal provisions do *not* authorize a priority-violating distribution?

3. What interpretive presumption did the Court pronounce regarding priority-violating distributions when the Code is silent regarding applicable distribution rules? Why did the Court adopt that interpretive presumption? How does Judge Easterbrook's interpretation of Code § 363(b) in the *Kmart* case fare under such an interpretive presumption? How about the courts' interpretation of § 363(b) in the *Chrysler* and *GM* cases?

4. Why did the Court reject the respondents' "no harm, no foul" argument? With regard to the bankruptcy court's finding that the $3.7 million settlement would likely garner *more* aggregate value for the debtor's estate than continuing to litigate the fraudulent-conveyance suit, did the Court conclude that the Bankruptcy Court's finding was clearly erroneous?

5. Why did the Court reject respondents' argument that there would be no settlement without the priority violation? What was the "evidence" proffered in support of that contention? Do you see any parallels to the "evidence" proffered in support of critical vendor orders? Did the Court conclude that the Bankruptcy Court's finding (that there likely would be no settlement without the priority violation) was clearly erroneous?

6. The Third Circuit concluded that, under its holding permitting the priority-violating structured dismissal in *Jevic*, such a nonconsensual priority violation "is likely to be justified only rarely," when "the Bankruptcy Court provide[s] sufficient reasons to support its approval." *In re Jevic Holding Corp.*, 787 F.3d 173, 186 (3d Cir. 2015). Did the Court agree? Why (or why not)?

7. What did the Court mean when it referred to "risks of collusion" in approval of priority-violating distributions? Was there a "risk of collusion" in *Jevic*? If so, who stood to gain and lose from such "collusion" (*other than* that which was taken away from the Drivers and given to the general unsecured creditors)? Did the unsecured creditors' committee (in control of the fraudulent-conveyance litigation) have any incentive to settle that suit for less than its full, fair settlement value? Do you see any parallels to the "serious mischief" surrounding the asserted "gifting" exception to the absolute priority rule, about which the Second Circuit expressed concern in *DBSD*?

8. Why didn't the respondents argue that the bankruptcy court's general equitable powers under Code § 105 include the power to approve priority-violating distributions in appropriate cases?

9. Why did the court limit its holding to *final* priority-violating distributions. Should *interim* priority-violating distributions (e.g., via critical vendor orders) be subject to a *different* interpretive presumption when the statute is silent regarding what priority rules apply? Why (or why not)? If, in the case of *final* priority-violating distributions, "courts cannot deviate from the procedures 'specified by the Code,' even when they sincerely believ[e] that … creditors would be better off," can they nonetheless do so in the case of *interim* priority-violating distributions?

10. Where did the Court get the distinction between *final* priority-violating distributions and *interim* priority-violating distributions? From the statute? Did the Court announce how to determine the difference between a *final* priority-violating distribution and an *interim* priority-violating distribution? According to the Court, is a priority-violating distribution authorized in conjunction with a § 363 sale an *interim* or a *final* distribution?

11. Was the structured dismissal order in *Jevic* an order approving a settlement or was it an order dismissing the bankruptcy case? Wasn't it both? What difference does it make?