

The Bankruptcy Protector



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Applying *Jevic*: How Courts Are Interpreting and Applying the Supreme Court's Ruling on Structured Dismissals and Priority Skipping

By [Shane G. Ramsey](#), [John T. Baxter](#)

Back in September, the Bankruptcy Protector announced that was introducing a new periodic series: the *Jevic* Files. As promised, we have published intermittent updates identifying cases where *Jevic* priority skipping issues are raised and adjudicated.

In this post, we attempt to provide a succinct summary of all cases decided post-*Jevic*.

How Courts Are Applying Jevic

The chart below includes all cases that have cited *Jevic*, current through November 17, 2017. This chart includes the case name, date, and citation; a brief description of the nature of the case; and a brief description of how the Court applied the *Jevic*.

Please note that this chart focuses only on cases where *Jevic* priority skipping issues are raised and adjudicated. The intent of the *Jevic* Files is to focus only on cases that directly relate to priority skipping issues, not decisions that merely cite *Jevic*.

CASE	DESCRIPTION	APPLICATION OF JEVIC
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<p><i>In re Haddad</i>, 572 B.R. 661 (Bankr. E.D. Mich. 2017)</p> <p>September 6, 2017</p>	<p>This is a chapter 13 case in which the debtor attempted to conceal a significant tort judgment from the Bankruptcy Court and moved to dismiss the case when the Court and Chapter 13 trustee learned of the undisclosed claim. The tort claim would have paid all creditors in full and allowed the debtor to retain nearly \$700,000.</p> <p>The trustee objected to the dismissal, and the bankruptcy court ultimately denied the dismissal under §349(b)(3)'s cause standard.</p>	<p>Despite <i>Jevic</i> placing a high bar on what constitutes cause under § 349, and the court finding that the Debtor's actions did not rise to the level of "fraud" or "bad faith," the court noted that "this is precisely the type of case referred to by <i>Jevic</i> in its discussion of the proper time to use § 349(b)(3)'s authority to 'order otherwise' for 'cause.'"</p> <p>The Court thoroughly analyzed <i>Jevic</i>, noting that this was not a priority-skipping case, but rather, a case where denying the dismissal would allow for the priority scheme to be followed, but allowing dismissal would "divert payments from creditors to end run the Bankruptcy Code.</p>
<p><i>In re Fryar</i>, 570 B.R. 602 (Bankr. E.D. Tenn., 2017)</p> <p>April 25, 2017</p>	<p>This is a chapter 11 case for an individual debtor who sought approval of a proposed settlement agreement that involved a series of transactions involving the debtor's ownership of certain stock and the conveyance of real property free and clear of liens.</p>	<p>The Court rejected this settlement proposal, citing <i>Jevic</i> primarily for the standard that "a significant Code-related objective" is necessary to approve a priority-skipping settlement like the one proposed.</p> <p>Because the settlement appeared to the court to be closer to a preamble to conversion or a structured dismissal, the court found that <i>Jevic</i> barred the settlement, as it skipped a priority IRS tax lien and preferred one secured creditor over others..</p>
<p><i>U.S. v. Ste-Bri Ent., Inc.</i>, 2017 WL 4226873 (N.D. Ohio Sept. 22, 2017)</p> <p>September 22, 2017</p>	<p>This case analyzes the priority of chapter 7 Trustee payments versus US Trustee quarterly fees. The bankruptcy court allowed the chapter 7 trustee to give her payments equal priority to the U.S. Trustee's fees, but junior to chapter 7 expenses. The District Court reversed, holding that this order shifted the priority scheme outlined in the Bankruptcy Code.</p>	<p>The Court cited <i>Jevic</i> as a "warning against utilizing congressional silence to disturb bankruptcy priority."</p> <p>By elevating the chapter 7 administrative expenses above the US Trustee's quarterly fees, the District Court noted, the bankruptcy court interpreted Congress' silence to signal a departure from the priorities in § 507(a).</p>
<p><i>In re Pioneer Health Svcs., Inc.</i>, 570 B.R. 228 (Bankr. S.D. Miss. 2017)</p> <p>April 4, 2017</p>	<p>This case involves a chapter 11 hospital debtor seeking payment of three independent-contractor doctors as "critical vendors" eight months after the petition date. The debtor argued</p>	<p>The Court cited <i>Jevic</i> for the proposition that there must be a "significant offsetting bankruptcy related justification" to allow for critical vendor payments. Absent such a</p>

	<p>that these doctors have threatened to leave the hospital absent payment. The bankruptcy court rejected the debtor's assertion that these doctors were "critical vendors," taking a narrow approach to "critical vendor" payments.</p>	<p>justification, the Court refused to allow for payment in violation of the priority scheme.</p> <p>Here, it appeared that no such justification existed. Further, the debtor had potential avenues, beyond a priority-breaking "critical vendors" motion, to waylay its fears regarding the doctors' threatened departure. Specifically, the doctors could be treated as stay-violators if they refused to continue providing services.</p>
<p><i>In re Eternal Enter., Inc.</i>, 2017 WL 1373239 (Bankr. D. Conn. Apr. 13, 2017)</p> <p>April 13, 2017</p>	<p>This case involves a single asset real estate debtor attempting to sell its real property to two separate purchasers through 11 U.S.C. § 363. The primary question before the Court was whether the debtor would obtain reasonable value for the property under the proposed § 363 sale.</p>	<p>The Court primarily cites <i>Jevic</i> for the <i>Jevic</i> court's approving citation of <i>In re Lionel Corp.</i>, 722 F.2d 106 (2d Cir. 1983). The Court noted "[i]n its recent decision in [<i>Jevic</i>], the United States Supreme Court compared the structured dismissal it disapproved with 'transactions that lower courts have refused to allow on the ground that they circumvent the Code's procedural safeguards' citing, among others, the <i>Lionel</i> decision."</p>
<p><i>In re Touchstone Home Health, LLC</i>, 572 B.R. 271 (Bankr. D. Col. 2017)</p> <p>August 21, 2017</p>	<p>This case involves the intersection of the Bankruptcy Code and the Federal Arbitration Act. Although an interesting case, its citation of <i>Jevic</i> is minor.</p>	<p>The Court cites <i>Jevic</i> for the general principle that "[t]o be successful in Chapter 11, 'debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor's estate" Beyond this cite, the case offers little interpretation or analysis of <i>Jevic</i>.</p>
<p><i>United States v. Rupari Food Servs., Inc.</i>, 254 F. Supp. 3d 1367 (Ct. Int'l Trade 2017)</p> <p>August 10, 2017</p>	<p>This case asks the question: does the automatic stay work to stay an action for a civil penalty brought by the U.S. against the debtor for alleged fraudulent, negligent, or grossly negligent misrepresentations made in the course of importing goods into the commerce of the country. Despite this interesting subject matter, the case offers little insight into the <i>Jevic</i> case.</p>	<p>The Court cites <i>Jevic</i> for the general principle that "[i]n Chapter 11, debtor and creditors try to negotiate a plan that will govern the distribution of valuable assets from the debtor's estate and often keep the business operating as a going concern." Beyond this cite, the case offers no analysis or interpretation of <i>Jevic</i>.</p>
<p><i>In re Hansen</i>, 2017 WL 1491765 (Bankr. D.N.H. Apr. 25, 2017)</p>	<p>This is a chapter 7 case that deals with a § 363 sale of the debtor's patent assets. Its treatment of <i>Jevic</i> is minimal, citing it only for general</p>	<p>The Court cites <i>Jevic</i> for the general principle that "the Bankruptcy Code provides for priority in payment to creditors over payment to debtors."</p>

<p>April 25, 2017</p>	<p>principles. Accordingly, the case offers little from the standpoint of how Courts are applying <i>Jevic</i>.</p>	
<p><i>In re Olympia Office LLC</i>, 574 B.R. 38 (Bankr. E.D.N.Y. 2017)</p> <p>June 30, 2017</p>	<p>This is a Chapter 11 order regarding the debtor's objections to certain proofs of claim filed by a secured creditor. The major inquiry is whether the debtor is a "party in interest" to object to the claims of a noteholder for a contract to which the debtor was not a party. The Court determined that the debtor was a party in interest, able to object to the proofs of claim, even though not a party to the contract.</p>	<p>The Court cites <i>Jevic</i> for the general principle that "a debtor in possession is a fiduciary installed as trustee to manage the estate in the interest of the creditors."</p> <p>Beyond this citation, the Court offers no analysis or interpretation of <i>Jevic</i>.</p>
<p><i>In re Lyondell Chem. Co.</i>, 567 B.R. 55 (Bankr. S.D.N.Y. 2017)</p> <p>April 21, 2017</p>	<p>This case deals with fraudulent transfer claims brought by the trustee of a litigation trust pursuant to claims arising from a prepetition leveraged buyout.</p>	<p>The Court cites <i>Jevic</i> in a footnote, noting that the Supreme Court had offered a "cogent primer on the dynamics of a typical leveraged buyout." Beyond citing <i>Jevic</i> for the general structure of leveraged buyouts providing therein, the case fails to otherwise analyze or interpret the case.</p>
<p><i>In re Briar Hill Foods, LLC</i>, 2017 WL 4404274 (Bankr. N.D. Ohio Sept. 29, 2017)</p> <p>September 29, 2017</p>	<p>This case involves an attempt by chapter 11 debtors to effectively have the Court treat receivers as the functional equivalent of chapter 11 trustees.</p>	<p>The Court cites <i>Jevic</i> for the proposition that the court "cannot concoct procedures and rules to accommodate a good result, especially when the means circumvent the bankruptcy code." While not offering significant analysis, this cite shows that the <i>Jevic</i> opinion has limited the potential potency of § 105.</p>
<p><i>Virginia, Dept of Soc. Servs. , Div. of Child Support Enf't v. Beskin</i>, 2017 WL 4706912 (W.D. Va. Oct. 19, 2017)</p> <p>October 19, 2017</p>	<p>This is a chapter 13 case involving whether Bankruptcy Code § 1326(a)(2) requires a chapter 13 trustee to return funds to a debtor after dismissal without a confirmed plan if a creditor has attempted to levy on the trustee. The court concluded that the trustee should return the funds to the debtor and that the creditor collect from the debtor, and not the chapter 13 trustee, as that would have been the protocol prepetition.</p>	<p>The Court does not go into a detailed examination of <i>Jevic</i>, but cites it for the proposition: "Last term, the Supreme Court emphasized that dismissal of a bankruptcy case 'aims to return to the prepetition financial status quo.'" Because prepetition, the creditor would have had to collect from the debtor, and because no plan was confirmed, the Court determined that the prepetition status quo was for the creditor to collect from the debtor, and not the trustee.</p>
<p><i>SHERRY LYNN BADALICH, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE W. SCOTT BURKE,</i></p>	<p>While this is not a bankruptcy case, <i>per se</i>, it arises shortly after the conclusion of an individual chapter 11 case and deals with the aftermath of a dismissal</p>	<p>The Court cites <i>Jevic</i> for the primary purpose of describing the role of the "debtor in possession" and the three possible outcomes of a chapter 11</p>

<p><i>JR. ESTATE, AND AS TRUSTEE OF THE BADALICH FAMILY TRUST, AND CARL BADALICH, INDIVIDUALLY AND AS TRUSTEE OF THE BADALICH FAMILY TRUST, APPELLANTS v. FIRST NATIONAL BANK OF WINNSBORO, APPELLEE</i>, 2017 WL 5477354 (Tex. App. Nov. 15, 2017)</p> <p>November 15, 2017</p>	<p>of a chapter 11 case without a confirmed plan. In the bankruptcy case, the debtor initially filed for bankruptcy protection under chapter 13, but converted his case to a chapter 11 proceeding. The debtor's case appears to have been filed to stop a lender-creditor from foreclosing on the debtor's property. After 18 months in bankruptcy, the debtor moved to dismiss the case, without a plan, asserting that "his lender of funds to pay his secured creditors will only provide financing to the debtor not in bankruptcy." As soon as the case was dismissed, the lender sued to foreclose on the property, and the trial court granted summary judgment in favor of the lender.</p>	<p>case: dismissal, conversion, or plan confirmation. The Court also cites <i>Jevic</i> in stating: "Unless the bankruptcy court for cause orders otherwise, the dismissal of a bankruptcy proceeding without approval of a plan 'reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.'"</p> <p>In essence, the court cites <i>Jevic</i> to explain that the debtor's dismissal without plan confirmation restored the debtor to the prepetition status quo.</p>
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Shane G. Ramsey

Partner

T 615.664.5355

shane.ramsey@nelsonmullins.com