Paul | Weiss

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Restructuring Department Bulletin

Paul, Weiss Welcomes Experienced Restructuring and Special Situations Partner Kai Zeng in London

Kai Zeng, who advises on cross-border restructurings and special situations matters, has joined the firm in London as a partner in the Restructuring Department and Finance and Hybrid Capital & Special Situations groups.

Kai advises sponsors, debtors, creditors and strategic investors on restructurings of stressed and distressed businesses, as well as hedge and credit funds, investments banks and private equity firms on their review and diligence of European investment opportunities in par, stressed and distressed transactions.

Kai earned his LL.B. from the University of Law in London and his B.A. from the University of Cambridge. He is admitted to practice in England and Wales.

Cramdown Plan that Extinguishes Valuable Equity for No Consideration May Violate Fair and Equitable Test Even if Absolute Priority Rule Satisfied

In *In re Global Fertility & Genetics, N.Y., LLC*, Case No. 23-10905 (Bankr. S.D.N.Y. Sept. 8, 2024), the Bankruptcy Court considered what cram-down requirements protect equityholders when a chapter 11 plan pays creditors in full but extinguishes equity interests for no consideration. Section 1129(b) of the Bankruptcy Code—the so-called cramdown provision—provides that a plan that gives equity no recovery can only be confirmed if it "does not discriminate unfairly and is fair and equitable" to the equity class. *See* 11 U.S.C. § 1129(b)(1). Section 1129(b)(2) provides that "fair and equitable" in this context requires compliance with the absolute priority rule—that is, that equity receive its full value or that any junior interest receive no value on account of such junior interest.

In *Global Fertility*, the Bankruptcy Court faced two competing plans: one that would pay creditors in full, extinguish equity for no consideration, and give the reorganized equity to the plan proponent; and another competing plan that would pay all creditors in full, with post-petition interest, and would also pay $1 million to the Debtor's equity holder. The proponent of the first plan argued that where there is no class junior to an objecting equity class, the plan satisfies the fair and equitable requirement as a matter of law, even if the record indicates that the equity has value. The proponent of the competing plan argued that where the plan extinguishes equity that has some value for no consideration—as evidenced by the competing plan's proposed distributions of $1 million to equity—the plan does not satisfy the fair and equitable test even if it does comply with the absolute priority rule.

Citing to legislative history that "Congress intended the courts to apply [the term "fair and equitable"] broadly and flexibly in accordance with its ordinary meaning," the Bankruptcy Court refused to adopt a *per se* rule that a plan that satisfies the absolute priority rule also satisfies the fair and equitable standard as a matter of law. A plan that extinguishes valuable equity for no consideration over the equity class's objection is anything but fair and equitable in the ordinary sense of those words, the Bankruptcy Court reasoned. Thus, where a plan satisfies the "absolute priority rule," the plan proponent is relieved of the "burden of presenting affirmative evidence, let alone a formal valuation, showing that the equity has no value." If, however, an objector presents evidence that equity may have value, the court cannot "ignore that evidence." In that case, the fair and equitable standard requires a determination of whether the Debtor's equity has value. Under this interpretation of the cramdown requirements, a plan proponent that satisfies the absolute priority rule is spared the burden of presenting a full-fledged valuation, except to the extent needed to respond to any proof of value that objecting parties may present. Finding the record clear that the Debtor's equity had no value when the Debtor was valued on a standalone basis, the Bankruptcy Court held that the initial plan satisfied the fair and equitable requirement and should be confirmed.

DID YOU KNOW...

Alice Eaton Wins Futures and Options Dream Big Award

Futures and Options named restructuring partner Alice Eaton a 2024 Dream Big Award honoree for embodying its mission to kickstart young New Yorkers' career development.

John Weber Named to ABI's "40 Under 40"

ABI named restructuring partner John Weber a "40 Under 40 Emerging Leader in Insolvency Practice." The recognition annually spotlights top U.S. insolvency professionals under age 40.

Questions? Please contact any of our Restructuring Partners to discuss these or other topics in greater depth.

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