INSIDERS AND PLANS OF REORGANIZATION

Definition of Insider

A director, officer or person in control of the debtor; a partnership in which the debtor is a general partner; a general partner of the debtor; or a relative of a general partner, director, officer or person in control of the debtor.

Definition of Good Faith

The mental and moral state of honesty, conviction as to the truth or falsehood of a proposition or body of opinion, or as to the rectitude or depravity of a line of conduct. This concept is important in law, especially equitable matters.

Good Faith Requirement

Section 1129 requires, as a condition of plan confirmation, that the plan was proposed in good faith.

> Section 1192 (a)(3) The plan has been proposed in good faith and not by any means forbidden by law.

In addition, the court must fund that the service of the insiders is in the interest of creditors and not against public policy.

> Section 1129(a)(5)(A)(ii) the appointment to, or continuance in, such office of such individuals is consistent with the interests of creditors and equity security holders and ***with public policy;***

Non-insider Acceptance

The Court cannot confirm a plan unless it has been confirmed by at least one class of ***non-insiders*** who hold impaired claims.

> Section 1129 (a)(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted tha plan, determined without including any acceptance of the plan by any insider.

New Value Plans

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A unique situation arises when a Debtor proposes a plan that puts an old equity holder in a position to contribute new value for equity in the reorganized debtor.

A plan is fair and equitable (one of the conditions for confirmability) if, in part, it does not allow holders of any junior claims or interests to receive or retain any property under the plan "on account of" such claims or interests. New value plans implicate the absolute priority rule because, at their heart, old equity would receive new equity in the reorganized debtor.

There are two principal concerns related to new value plans:

> Ensuring that holders of old equity do not receive or retain any property on account of their prepetition equity interests
>
> Confirmating that the debtor receives the highest and best offer for the newly-issued equity

In re Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership, 526 U.S. 434, 455-6 (1999), the Supreme Court held that where an old equity holder regained control of the reorganized debtor in a "cramdown" reorganization by offering new value, a question will always arise as to whether the old equity holder was acquiring the equity of the reorganized debtor "on account of" its new value contribution, or, on the other hand, "on account of" its old equity position and control of the debtors' reorganization process.

> "Under a plan granting exclusiving rights, making no provision for competing bids or plans, any determingation that the price was top dollar would necessarily be mad by the judge in bankruptcy court, whereas the best way to determine value is exposure to market."

When faced with a non-consensual new value plan, the central focus becomes whether old equity receives or retains property on account of its prepetition equity inteest in violation of the absolute priority rule. 203 N. La Salle teaches that the appropriate tool to use to make that determination is a "market test" - either by the termination of the debtor's exclusive period within which only it may file a plan or by an opportunity to bid for the interest sought by the old equity.

> The best way to provide a check is by terminating exclusivity, equalizing the parties' bargaining powers by sparing creditors the cost of fighting exclusivity, thereby obviating the need to deduct that cost from their bid to achieve their desired profit
>
> If creditors disagree with the amount of value allocated to them under the plan, they may

automatically propose their own plan, thus neutralizing owners' use of their control of the debtor.

If a debtor proposes a new value plan, its creditor constituencies may contend that, in order to comply with 203 N. LaSalle, the debtor must undertake a concurrent sales and marketing process to test both the new value the debtor seeks to raise and the debtor's market value.

If the debtor (by a decision of its board of directors) ultimately elects o pursue its new value plan when other outside proposals are also available to it, the debtor's creditor constituencies may contend that the decision violates certain principles of corporate law.

It requires the debtor to demonstrate that it has complied with the "entire fairness" doctrine: fair dealing and fair price.

Fair dealing deals with questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors and how the approvals of the directors were obtained.

Fair price relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock