

From Negotiated Reorganization to Pre-Packaged Bankruptcy:

What Creditors Need to Know



The Webinar Will Begin Shortly

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From Negotiated Reorganization to Pre-Packaged Bankruptcy: What Creditors Need to Know



Part One Negotiating Workouts in the Shadow of Bankruptcy

Presented by
Stephen Williamson, Esq.

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Out-of-court Workouts

Defined: a negotiated modification of debt terms or “a private, negotiated adjustment of creditor-debtor relations.” *In re Pengo Industries*, 962 F.2d 543, 549 (5th Cir. 1992).



Conditions favoring private workouts

- Small number of creditors holding the majority of debt
- Adequate financial records have been kept by debtor and the debtor is forthcoming with information.
- Negotiations begin soon after financial difficulty, default threat and/or default takes place and there is a reasonable basis for the belief that the particular business relationship can be maintained
- Debtor can anticipate acceptance by large percentage of creditors affected



“Pay me later” workout arrangements

- **Forbearance agreements:** refraining from enforcing a right, obligation, or debt.
- **Moratorium-styled extensions:** an authorized postponement in the deadline for paying a debt or performing an obligation.
- **Standstill agreements:** Any agreement to refrain from taking further action for a fixed time or until the occurrence of an event.



The Moratorium-Styled Extension

- Extensions pending the resolution of the debtor's difficulties
- Seeks eventual full payment of debts, often the result of major restructuring of debtor's finances
- Common examples: refinancing, liquidation of valuable property, infusion of investment capital
- May involve temporary concessions on term of debt, interest rate, or financial covenants



Forbearance

- “Standstill agreement”
- Obliges creditor to refrain from enforcement of the obligations created by an instrument
- Agreements concern existing or anticipated defaults
- Term of “standstill” varies by agreement, may be for a specific time period, until the occurrence of an event, based on a series of milestones.



When does forbearance benefit the creditor?

- Assets securing indebtedness illiquid (enforcement via liquidation would yield loss)
- Loan documentation or collateral coverage problems exist; agreement can correct these
- “**merger**” threatens to prevent amendment or restructure of debt (underlying note obligation merges into the judgment and judgment, rather than the instrument, becomes proof of obligation)
- Extra fee income possible for lender



Pitfalls of forbearance

- Lender needs borrower to reverse negative trends in order for ongoing relationship to work
- Creditor may be an agent for lending participants with agendas different than creditor's
- Collateral position may deteriorate during standstill
- Other creditors may force issue



Approaching the forbearance negotiation

- Clarity regarding negotiation letters – they are not agreements to forbear
- Imposition of good faith requirements on negotiations if jurisdiction does not express these under contract law
- “good faith” fee paid in advance of actual agreement (generally .25 to 2 percent)



Essentials of the forbearance agreement

- Identification of all obligors (primary and secondary)
- Identification of all documents (loan instruments and security agreements)
- Description and location of collateral
- Litigation description, including a recital of judgments in existence
- Description of defaults
- Itemization of the amount of debt, including fees and professional fees
- Waiver of defenses; release: creditor obtains clean slate for agreement not to pursue/enforce rights
- Clear articulation of events of default
- Legally enforceable contract. Detriment to the creditor, such as forbearance to file a collection action, is adequate consideration. *In re Choate*, 184 B.R. 270, 273 (Bankr. N.D.Tex. 1995).

“Pay me less or pay me differently” workout arrangements (indebtedness adjustment)

- Composition
- Combination
- Assignment for benefit of creditors





Compositions

- Pro rata cash settlement
- Contract to accept less than full payment (% of total indebtedness)
- Among debtor and two or more creditors and among the involved creditors themselves
- Creditor agrees to accept immediate payment of amount less than what is due
- Composition acts as a novation
- Payment extinguishes preexisting debt and can be viewed as accord and satisfaction
- Failure to make payment pursuant to compromise breathes life into the preexisting (full) debt

Assignment for the benefit of creditors

- Assignment of debtor's non-exempt property to a fiduciary for liquidation and distribution
- May invoke “Troubled Debt Restructuring” accounting caveats (see later discussion)
- Has become nearly extinct under Bankruptcy Code



Combinations

- Most common type of private workout
- Blends features from other types
- Often includes a *pro rata* cash payment and a promise to make further installation payments on the remainder of the non-canceled debt
- In theory, same principles should guide non-performance (re-invigoration of the full, pre-existing debt)



Debtor's Advantages in Workouts

- Avoidance of bankruptcy's commercial stigma
- Discharge can be broader than statutory bankruptcy discharge
- Does not affect debtor's right to file a future bankruptcy
- Creditors cannot cram down offensive concessions in voluntary agreements
- Saves money on administrative costs
- Preserves privacy of finances in non-public entities
- Potentially preserves commercial relationships with creditors



Debtor disadvantages to workouts

- A few holdout creditors can effectively kill the workout
- Creditors who do not agree are free to pursue collection
- No automatic stay
- No preference or fraudulent conveyance recovery (this can cut either way)
- No ability to reject disadvantageous contracts and leases
- Unlike bankruptcy, courts cannot force creditors to take action consistent with release of obligations (lien cancellation, etc.)
- Potential tax liabilities for forgiven indebtedness



Positives of workouts from the creditor's perspective

- Debtor seeking to avoid filing may be willing to make concessions he wouldn't in bankruptcy
- Can time payments to perfect against bankruptcy preference period
- May be able to improve position in a subsequent bankruptcy if workout fails
- Potentially preserves commercial relationship with debtor
- Workout payments can begin much sooner than in bankruptcy.
- Avoids administrative and professional costs of Bankruptcy filing



Some creditor considerations before attempting workout

- Information deficit: difficulty of obtaining reliable current financial information from debtor
- Debtor's negative cash flow often renders workout untenable
- Most Favored Nation problem
- Debtor may be waiting for time to run and more grass to grow over fraudulent conveyances or preferences
- Debtor cannot contractually give up right to file, so creditor remains exposed to threat of bankruptcy
- Payments received in workout may be recoverable in subsequent bankruptcy as preferences or fraudulent conveyances



Recent developments in workout practice

- Effective June 15, 2011, Financial Accounting Standards Board provides clarification on certain “troubled debt restructuring” for the purposes of determining whether gains have been realized.
- FASB No. 2011-02 examines the calculation of gains in a variety of workout situations – where a creditor, because of legal/economic reasons, grants a concession to the debtor that it would not otherwise consider.
- <http://www.fasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey=id&blobwhere=1175822278141&blobheader=application%2Fpdf>

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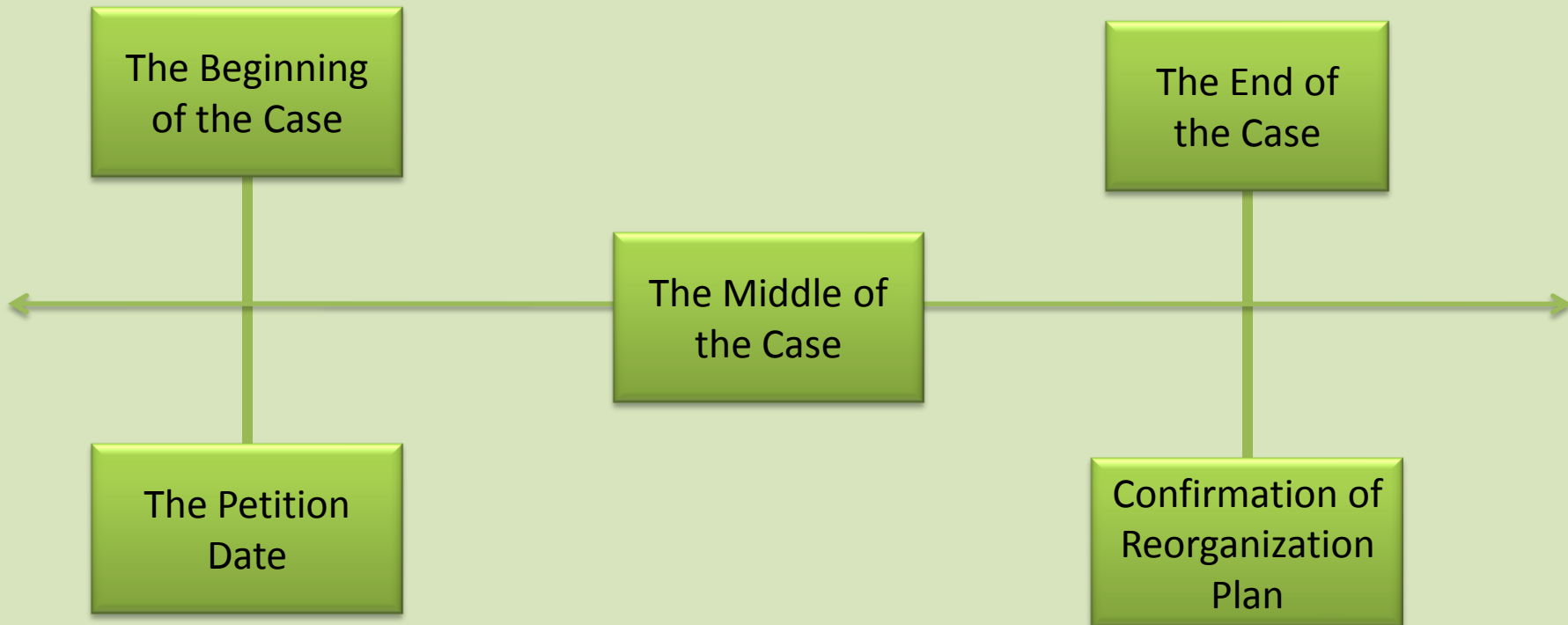


Part Two Dealing With a Pre-Packaged Bankruptcy

Presented by
Samuel C. Wisotzkey, Esq.

KOHNER, MANN & KAILAS, S.C.
ATTORNEYS AT LAW

The Chapter 11 Lifecycle



The Usual Chapter 11 Process

- The Petition Date
- Stabilize operations
- Sell unprofitable / non-core business assets
- Negotiate Plan with main secured and unsecured creditors



The Usual Chapter 11 Process

- File Disclosure Statement and Plan of Reorganization
- Disclosure Statement approval
- Voting on Plan by creditors
- Confirmation of Plan by court



The Usual Chapter 11 Timeline

- Initially, Debtor has sole right to propose the Plan
- This “exclusivity period” initially lasts 4 months from Petition Date
- Court can extend, but not more than 18 months from Petition Date
- Once Plan approved, company is “out of bankruptcy”



The Disclosure Statement

- Must contain “adequate information” to allow creditors to vote on Plan
- Includes estimated recoveries for creditors
- Usually must be filed at least 28 days before court hearing to approve Disclosure Statement
- Once approved, disclosure statement and plan sent to creditors for voting – another 28 day process



THIS IS NOT A SOLICITATION OF ACCEPTANCE OR REJECTION OF THE PLAN. ACCEPTANCES OR REJECTIONS MAY NOT BE SOLICITED UNTIL A DISCLOSURE STATEMENT HAS BEEN APPROVED BY THE BANKRUPTCY COURT. THIS DISCLOSURE STATEMENT IS BEING SUBMITTED FOR APPROVAL BUT HAS NOT BEEN APPROVED BY THE BANKRUPTCY COURT.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----x		:	
	:		
In re	:	Chapter 11	
	:		
UNO RESTAURANT HOLDINGS CORPORATION, et al.,	:	Case No. 10-10209 (MG)	
	:		
Debtors.	:	(Jointly Administered)	
	:		
-----x			

**FIRST AMENDED DISCLOSURE
STATEMENT FOR THE FIRST AMENDED JOINT
CONSOLIDATED PLAN OF REORGANIZATION UNDER
CHAPTER 11 OF THE BANKRUPTCY CODE FOR UNO RESTAURANT HOLDINGS CORPORATION AND ITS AFFILIATED DEBTORS AND DEBTORS IN POSSESSION**

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Counsel for the Majority Noteholder Group

Dated: May 7, 2010

THE PLAN PROPONENTS BELIEVE THAT THE PLAN WILL MAXIMIZE THE RECOVERY FOR THE DEBTORS' CREDITORS AND ALL PARTIES IN INTEREST, ENABLE THE DEBTORS TO REORGANIZE SUCCESSFULLY, AND ACCOMPLISH THE OBJECTIVES OF CHAPTER 11 AND THAT ACCEPTANCE OF THE PLAN IS IN THE BEST INTERESTS OF THE DEBTORS AND THEIR CREDITORS. THE PLAN PROPONENTS URGE CREDITORS TO VOTE TO ACCEPT THE PLAN.

addition, detailed voting instructions accompany each Ballot. Each holder of a Claim entitled to vote on the Plan should read this Disclosure Statement, the Plan, the Disclosure Statement Order and the instructions accompanying the Ballots in their entirety before voting on the Plan. These documents contain important information concerning the classification of Claims and Interests. No solicitation of votes to accept the Plan may be made except pursuant to Section 1125 of the Bankruptcy Code.

A. HOLDERS OF CLAIMS ENTITLED TO VOTE

Pursuant to the provisions of the Bankruptcy Code and the Disclosure Statement Order, only certain holders of allowed claims or interests in "impaired" classes are entitled to vote on the Plan (unless such holders, for reasons discussed in more detail below, are deemed to accept or reject the Plan). Under Section 1124 of the Bankruptcy Code, a class of claims or interests are deemed to be "impaired" under the Plan unless (1) the Plan leaves unaltered the legal, equitable and contractual rights to which such claim or interest entitles the holder thereof or (2) notwithstanding any legal right to an accelerated payment of such claim or interest, the Plan cures all existing defaults (other than defaults resulting from the occurrence of events of bankruptcy) and reinstates the maturity of such claim or interest as it existed before the default.

Through this vote, the Debtors' goal is to consummate a financial restructuring transaction that will significantly reduce the Debtors' outstanding debt and put the Debtors in a stronger financial position for future growth and stability.

The following table summarizes the estimated recovery for the holders of Claims and Interests under the Plan:

<u>Class</u>	<u>Type of Claim or Interest</u>	<u>Treatment</u>	<u>Approximate Allowed Amount²</u>	<u>Approximate Percentage Recovery³</u>
1	Priority Non-Tax Claims	Unimpaired	0	100%
2	Secured Tax Claims	Unimpaired	0	100%
3	Other Secured Claims	Unimpaired	41,133,944	100%
4	Senior Secured Notes Claims ⁴	Impaired	82,139,134	100%
5	General Unsecured Claims	Impaired	74,885,653 ⁵	0%

² The amounts set forth herein are estimates based on the Debtors' books and records and are expressed in U.S. dollars, except for Interests which are expressed in number of shares or units outstanding. Actual amounts will depend upon the final reconciliation and resolution of all Claims, and the negotiation of cure amounts. Accordingly, the actual amounts may vary from the amounts set forth herein.

³ The approximate percentage recovery for each Class set out in this Disclosure Statement is based on certain assumptions, which are subject to change.

⁴ The approximate Allowed Amount reflects only the secured portion of the claim and does not include the Noteholder Deficiency Claim.

⁵ Includes General Unsecured Claims of \$8,950,343 and Noteholder Deficiency Claim of \$65,935,310.

The Plan of Reorganization

- **Confirmation Requirements:**
 - Impaired claims must recover at least what they would in Chapter 7
 - One impaired class must accept plan
 - 2/3 in dollar amount of claims
 - 1/2 in number of claims
 - All impaired classes must accept OR plan must be fair and equitable to rejecting classes



In re:	X	Chapter 11
UNO RESTAURANT HOLDINGS CORPORATION, <i>et al.</i> ,	:	Case No. 10-10209 (MG)
Debtors.	:	(Jointly Administered)
	X	

CERTIFICATION OF ALISON M. TEARNEN WITH RESPECT TO THE TABULATION OF VOTES ON THE DEBTORS' FIRST AMENDED JOINT CONSOLIDATED PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE OF UNO RESTAURANT HOLDINGS CORPORATION AND ITS AFFILIATED DEBTORS AND DEBTORS IN POSSESSION¹

I, Alison M. Tearnen, depose and say under the penalty of perjury:

1. I am a Senior Managing Consultant employed by Kurtzman Carson Consultants LLC ("KCC"), located at 2335 Alaska Avenue, El Segundo, California 90245, the firm retained by Uno Restaurant Holdings Corporation and certain of its affiliates, as debtors and debtors in possession (collectively, the "Debtors"), as the noticing and claims agent in the above-captioned cases pursuant to the Order Pursuant to 28 U.S.C. § 156(c) and Local Bankruptcy Rule 5075-1(a) for Entry of an Order Authorizing the Debtors to Employ and Retain Kurtzman Carson Consultants LLC as Noticing and Claims Agent for the Debtors on January 22, 2010 [Docket No. 54].

2. As the Debtors' noticing and claims agent, KCC was charged with the duty of distributing solicitation materials to creditors and other interested parties pursuant to the Order (i) Approving the Disclosure Statement, (ii) Establishing Plan Solicitation and Voting Procedures, (iii) Scheduling a Confirmation Hearing, and (iv) Establishing Notice and Objection Procedures for Confirmation of the First Amended Joint Consolidated Plan of Reorganization, entered by the Bankruptcy Court on May 11, 2010 [Docket No. 456] (the "Disclosure Statement Order").

¹ The Debtors filed the Second Amended Joint Consolidated Plan of Reorganization Under Chapter 11 of the Bankruptcy Code of Uno Restaurant Holdings Corporation and Its Affiliated Debtors and Debtors In Possession [Docket No. 516] on June 29, 2010.

12. Set forth below is a summary of the voting results with respect to the Voting Classes:

Total Ballots Received			
Accept		Reject	
Number	Amount	Number	Amount
Class 4 – Senior Secured Notes Claims			
11 (100.00%)	\$69,991,797.28 (100.00%)	0 (0.00%)	\$0.00 (0.00%)
Class 5 – General Unsecured Claims			
222 (92.89%)	\$64,457,614.70 (99.95%)	17 (7.11%)	\$31,108.93 (0.05%)

13. Exhibit A to this Affidavit is a detailed report of Ballots tabulated in Classes 4 and 5.

C. The Unacceptable Ballots

14. The following exhibits to this Affidavit contain detailed reports of any Ballots not included in the tabulation above because they did not satisfy the requirements for a valid Ballot set forth in the Disclosure Statement Order for the reasons described below:

- (a) Exhibit B - Late Filed Ballots – pursuant to the Disclosure Statement Order, Ballots received after the Voting Deadline were not tabulated;
- (b) Exhibit C - Duplicate Claim Ballots – pursuant to the Disclosure Statement Order, a Creditor who files duplicate claims is entitled to vote a single claim in a dollar amount based upon its Claim against one of the Debtors. Ballots cast for a person or entity on account of a duplicate Claim were not tabulated.
- (c) Exhibit D - Abstained Ballots – pursuant to the Disclosure Statement Order, Ballots cast by a person or entity that do not indicate either an acceptance or rejection of the Plan were not tabulated.


Continued On Following Page

Consequences for Long Chapter 11

- Post-petition borrowing – it's expensive
- Utility deposits and trade credit restrictions
- Have to work with Unsecured Creditors Committee
- Public Relations issues



The Pre-Packaged Process

- Debtor gets key creditors to approve plan before case is filed
- Avoids transaction costs of long Chapter 11
- Puts “disfavored” (or unfriendly) creditors behind the  ball



The Pre-Packaged Process

- Plan must still meet confirmation requirements
- But votes solicited and obtained before the petition date are binding



SIMILAR, BUT NOT IDENTICAL

- **Plan Support Agreements**
 - Innkeepers
- **Pre-Arranged Sales**
 - Chrysler
 - GM



Chrysler

04/30/2009

05/20/2009

06/10/2009

12/14/2009

04/23/2010

Petition Date

Bids Due

Sale Closed

Plan Filed

Plan Confirmed

General Motors

06/01/2009

06/22/2009

07/10/2009

08/31/2010

03/29/2011



What is a Creditor to Do?

- **Don't rely** on the press release
- **Review** the plan and disclosure statement with experienced bankruptcy counsel
- **Verify** the date the case is filed
 - The Petition Date has consequences!



What is a Creditor to Do?

- **Don't** lose sight of your 20-day administrative claim
- **Preserve** records – claim disputes can still arise
- **Don't** forget about preference claims
- **Join** the creditors committee?



Conclusion

- Pre-packaged plans are a useful tool to expedite the bankruptcy process
- Beware of PR hype - press releases that suggest nothing will change should not be relied upon
- Some cases do not harm trade creditors, but if no creditor rights are impaired, why declare bankruptcy at all?

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QUESTIONS?

