



### **SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3A**

#### **THE INSOLVENCY SYSTEM OF THE UNITED STATES**

This is the **summative (formal) assessment** for **Module 3A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 3**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

**The mark awarded for this assessment will determine your final mark for Module 3A.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[student number.assessment3A]**. An example would be something along the following lines: 202021IFU-314.assessment3A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentnumber” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 3A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2021**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2021. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 3A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2021** or by **23:00 (11 pm) BST on 31 July 2021**. If you elect to submit by 1 March 2021, you **may not** submit the assessment again by 31 July 2021 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

**Commented [DB1]:** You are not supposed to insert your name or any other identifying mark – your student ID is as I have inserted it for you.

**ANSWER ALL THE QUESTIONS**

Commented [A&O2]: Total marks 41.75/50

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Commented [A&O3]: Total marks 8/10

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

Commented [A&O4]: Correct, 1 mark

FabCo, based in Utah, owes SupplyCo, based in Mexico, US\$10,000 on a past-due invoice. May SupplyCo file an involuntary petition to place FabCo into chapter 11 bankruptcy proceedings?

- (a) Yes.
- (b) Yes, if FabCo has fewer than 12 non-contingent, non-insider creditors.
- (c) **Yes, if other creditors owed at least US\$5,775 join in the petition.**
- (d) No, because SupplyCo doesn't know whether FabCo is insolvent.
- (e) No, because SupplyCo is not a US company.

**Question 1.2**

Commented [A&O5]: Correct, 1 mark

Which of the following is a *mandatory*, rather than *discretionary*, basis to deny recognition of a foreign judgment under state law based on one of the Uniform Acts?

- (a) The foreign judgment is subject to appeal in the foreign country.
- (b) **The foreign judgment is an injunction.**
- (c) The foreign judgment was issued by a court, contrary to the parties' agreement to arbitrate.
- (d) The defendant did not have sufficient notice of the foreign proceeding to put on a defense.
- (e) The foreign judgment is inconsistent with another final judgment on the same subject matter.

**Question 1.3**

Commented [A&O6]: Correct, 1 mark

Which of the following is likely to be a party in interest in the bankruptcy of XYZ Corp?

- (a) A shareholder in ABC Corp, to which XYZ Corp is substantially indebted.
- (b) A journalist writing about XYZ Corp's bankruptcy.
- (c) A shareholder in MNO Corp, which owns all of XYZ Corp's shares.

(d) A retired employee of XYZ Corp who receives payments from the company's pension plan.

(e) A non-profit organization that advocates for companies like XYZ Corp to be held responsible for climate change.

**Question 1.4**

If a debtor rejects an executory trademark license agreement under which it licenses a trademark to its counterparty, which of the following is true:

- (a) The counterparty must immediately stop using the trademark.
- (b) The counterparty can continue using the trademark for the remaining period of the license.

(c) The counterparty has a claim for damages for breach of contract.

- (d) Both (a) and (c).
- (e) Both (b) and (c).

**Question 1.5**

In which of the following circumstances may a counterparty enforce a contractual *ipso facto* clause?

- (a) The contract would obligate the counterparty to extend a loan to the debtor.
- (b) The contract is a lease of real property.
- (c) The clause is triggered by the bankruptcy filing of a third party, not the debtor.

(d) Both (a) and (c).

(e) *Ipso facto* clauses are never enforceable against a debtor.

**Question 1.6**

What does a chapter 11 debtor have exclusivity to propose for the first 120 days of proceedings?

- (a) Avoidance actions.
- (b) A plan of reorganization.
- (c) DIP financing.
- (d) Lifting the automatic stay.
- (e) Formation of an equity committee.

**Commented [A&O7]:** Incorrect, the correct response is (e)

**Commented [A&O8]:** Correct, 1 mark

**Commented [A&O9]:** Correct, 1 mark

**Question 1.7**

Which of the following is **not** a requirement to confirm a “cramdown” plan?

- (a) Acceptance of the plan by all classes of secured creditors.
- (b) Acceptance of the plan by at least one class of impaired, non-insider creditors.
- (c) The plan is fair and equitable to dissenting classes of creditors.
- (d) The plan does not discriminate unfairly against dissenting classes of creditors.
- (e) The dissenting creditors receive no less than they would under a liquidation scenario.

Commented [A&O10]: Correct, 1 mark

**Question 1.8**

When may distributions to creditors diverge from the absolute priority rule?

- (a) In a chapter 7 proceeding with consent of the affected senior creditor.
- (b) In a chapter 7 proceeding with consent of the affected junior creditor.
- (c) In a chapter 11 proceeding with consent of the affected senior creditor.
- (d) In a chapter 11 proceeding with consent of the affected junior creditor.
- (e) The absolute priority rule cannot be deviated from.

Commented [A&O11]: Correct, 1 mark

**Question 1.9**

Who may serve as a foreign representative to seek recognition of a foreign proceeding under chapter 15?

- (a) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (b) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (c) An insolvency professional appointed by the court overseeing the foreign proceeding.
- (d) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.
- (e) All of the above.

Commented [A&O12]: Incorrect, the correct response is (e)

**Question 1.10**

Which of the following is *not* available as relief in a chapter 15 proceeding?

- (a) Sale of US property free and clear pursuant to section 363.
- (b) Prosecution of avoidance actions pursuant to section 544.
- (c) Entrusting the management of US assets to the foreign representative.

Commented [A&O13]: Correct, 1 mark

(d) Application of the automatic stay under section 362 to the debtor's interests in US property.

(e) Discovery about the debtor's assets.

**QUESTION 2 (direct questions) [10 marks]**

Commented [A&O14]: Total marks 9.25/10

**Question 2.1 [maximum 1 mark]**

Commented [A&O15]: Total marks 1/1

What two alternative qualifications render a corporation eligible to be a debtor in a US chapter 7 or 11 proceeding?

The threshold requirements are that the corporation has its presence (or its place of business) in the United States and / or that it has assets in the United States.

Commented [A&O16]: Correct, ½ mark

Commented [A&O17]: Correct, ½ mark

**Question 2.2 [maximum 2 marks]**

Commented [A&O18]: Total marks 1.5/2

What is an executory contract?

An executory contract is one under which unperformed obligations remain for both parties (or where both sides have continuing obligations yet to perform); and in respect of which the debtor has the choice to (i) reject, (ii) assume, or (iii) assume and assign the contract.

Commented [A&O19]: Correct, ½ mark, specifically, they must be sufficiently significant that failure to perform would be a material breach

Commented [A&O20]: Correct, 1 mark

**Question 2.3 [maximum 2 marks]**

Commented [A&O21]: Total marks 2/2

What is a "priming lien" and what requirements must be met for such a lien to be granted to secure DIP financing?

A 'priming lien' is a term used in the context of post-petition-commencement debtor in possession financing, whereby the Court grants a lien that is senior or equal to a pre-petition lien on the debtor's estate property in order to allow the debtor to secure post-petition financing.

Commented [A&O22]: Correct, 1 mark

The court will only grant a priming lien if it is satisfied that that the interests of the secured creditor being primed is adequately protected and that the debtor could not obtain DIP financing on any of the following bases:

Commented [A&O23]: Correct, ½ mark

Commented [A&O24]: Correct, ½ mark

1. Unsecured debt
2. Unsecured debt having priority ahead of other administrative expenses (sanctioned by the court)
3. Secured debt with a lien on unencumbered state property (sanctioned by the court)
4. Secured debt with a junior lien on unencumbered state property (sanctioned by the court)

**Question 2.4 [maximum 2 marks]**

In voting on a plan of reorganization, which class(es) of creditors are (i) deemed to accept the plan, (ii) deemed to reject the plan and (iii) permitted to vote on the plan? What vote is necessary for a class of creditors to accept a plan?

An unimpaired class of creditors is deemed to accept the plan. A class that will receive nothing is deemed to reject the plan. Only impaired classes of creditors have the right to vote on the plan. In order for a class of creditors to accept a plan a simple majority of the creditors in the class, holding at least two-thirds of the value of claims in the class, must vote in favour.

**Question 2.5 [maximum 3 marks]**

How does the automatic stay available in chapter 15 proceedings differ from that available in chapter 11 proceedings?

The filing of a petition under chapter 15 (which may be done by the foreign representative of the debtor) does not automatically invoke a stay of creditor action, as in chapter 11 proceedings. Instead, a stay only arises upon the petition for recognition of a foreign main proceeding being granted, and in respect of recognition of a foreign non-main proceeding, the court may grant a stay at its discretion.

Further, whereas under chapter 11 proceedings a worldwide automatic stay is put in place, in chapter 15 proceedings the stay is limited to the property of the debtor within the territorial jurisdiction of the United States.

In Chapter 15 proceedings the court may grant a stay on an interim basis pending recognition of a foreign proceeding (whereas, as noted there is no need for such an interim stay in Chapter 11 proceedings given the automatic stay upon filing of the petition).

**QUESTION 3 (essay-type questions) [15 marks in total]**

**Question 3.1 [maximum 3 marks]**

What fiduciary duties do directors of Delaware corporations owe and to whom are the duties owed in the ordinary course of business? To whom are duties owed when the corporation is potentially or actually insolvent?

As a matter of Delaware law directors owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision-making. In the ordinary course of business such duties are owed to the corporation and its shareholders. If a company is potentially or actually insolvent, the duties remain owed to the corporation and its shareholders, rather than to the corporation's creditors (as is common in other jurisdictions): See North Am Catholic Educational Programming Foundation Inc v Gheewalla.

Notwithstanding the aforementioned duties, Directors are protected from liability for errors of judgment by the business judgment rule under which directors are presumed (subject to rebuttal) to have acted in good faith, on the basis of reasonable information

Commented [A&O25]: Total marks 1.75/2

Commented [A&O26]: Correct, ½ mark

Commented [A&O27]: Correct, ½ mark

Commented [A&O28]: Partially correct, ¼ mark, the creditors must be both impaired and receiving something under the plan

Commented [A&O29]: Correct, ½ mark

Commented [A&O30]: Total marks 3/3

Commented [A&O31]: Correct, ½ mark

Commented [A&O32]: Correct, ½ mark

Commented [A&O33]: Correct, ½ mark

Commented [A&O34]: Correct, ½ mark

Commented [A&O35]: Correct, ½ mark

Commented [A&O36]: Correct, ½ mark

Commented [A&O37]: Total marks 14.5/15

Commented [A&O38]: Total marks 3/3

Commented [A&O39]: Correct, ½ mark

Commented [A&O40]: Correct, ½ mark

Commented [A&O41]: Correct, ½ mark

Commented [A&O42]: Correct, ½ mark

Commented [A&O43]: Correct, ½ mark

Commented [A&O44]: Correct, ½ mark

**Question 3.2 [maximum 3 marks]**

Describe the circumstances in which a bankruptcy court may enter a final order, who reviews appeals from bankruptcy court orders and how non-final orders are reviewed.

Pursuant to the referral statute a bankruptcy court may only enter final orders in core bankruptcy proceedings, and the statute contains a non-exhaustive list of what is to be considered a 'core' proceeding.

A bankruptcy court may hear non-core proceedings if they are sufficiently related to bankruptcy proceedings but cannot make a final determination, and rather submits proposed findings of fact and conclusions of law to the district court for the district court's final decision. If a matter is non-core and does not fall within the 'related to' jurisdiction, the proper forum for the matter will depend on whether there is another basis for federal court jurisdiction, and if not the matter is to be resolved in state court.

However, the bankruptcy court's ability to enter final orders in respect of core proceedings is subject to the rule in the case of *Stern v Marshall*, whereby a bankruptcy court cannot invade a state law claim under Article III. As a result the current practice pursuant to the Bankruptcy Rules is that a bankruptcy court's ruling in a core bankruptcy proceeding may be treated as a final order by consent of the parties or by law (i.e. subject to the decision of the district court as to whether the bankruptcy court had jurisdiction).

As a general rule appeals from decisions of the bankruptcy court are heard by the relevant district court. However, in certain circuits bankruptcy appeals are heard by a Bankruptcy Appellate Panel convened from bankruptcy courts within the circuit (although a party in such a circuit may request that the appeal be heard by the district court instead).

Further appeals may be made to the circuit court of appeals. In rare cases, an appeal from a bankruptcy court may go directly to the court of appeals.

**Question 3.3 [maximum 4 marks]**

Describe how claims for recovery of preferences, fraudulent conveyance and constructive fraudulent conveyance differ.

The key differences between an avoidable preference claim and fraudulent conveyance (whether actual or constructive) are as follows:

1. Preference avoidance is broadly aimed at transactions immediately prior to bankruptcy (except in the case of insider transferees). As such the suspect period for a preference claim is 90 days prior to the petition date (extended to one year with regard to insiders); whereas the suspect period for a fraudulent conveyance is two years prior to the petition date.
2. With regard to preference avoidance there is no need to show any fault of either the debtor or the recipient in connection with the payment having been made. However, an actual fraudulent conveyance requires satisfactory proof of the debtors intention when making the transfer, and a constructive fraudulent conveyance is proven by showing the debtor received less than the reasonably equivalent value in exchange for a transfer and certain of the statutory additional factors was present.
3. A fraudulent conveyance may have been made during a time that the debtor was solvent (unless relying on the specific insolvency factor for a constructive fraudulent

Commented [A&O45]: Total marks 2.5/3

Commented [A&O46]: Correct, 1 mark

Commented [A&O47]: Correct, ½ mark, also the bankruptcy court has authority to enter a final order on a challenge to a petition

Commented [A&O48]: Correct, ½ mark

Commented [A&O49]: Correct, ½ mark

Commented [A&O50]: Total marks 4/4

Commented [A&O51]: Correct, ½ mark

Commented [A&O52]: Correct, ½ mark

Commented [A&O53]: Correct, 1 mark

Commented [A&O54]: Correct, ½ mark



conveyance); whereas an avoidable preference only occurs at a time when the debtor was insolvent.

Commented [A&O55]: Correct, 1 mark

Commented [A&O56]: Correct, ½ mark

4. The recipient of a fraudulent preference may retain the property received or enforce the obligation created if it took for value and in good faith; whereas the transferee of an avoidance preference must return the transfer to the estate (and claim as an unsecured creditor in the bankruptcy proceedings).
5. The fundamental elements of the claims are different, including that an avoidable preference only arises if it enabled the creditor to receive more than it would have in a chapter 7 liquidation; whereas a fraudulent transfer does not consider the transferee's position so much as the circumstances (and with regard to actual fraudulent transfer, the intention) of the debtor when the transfer was made.

The key differences between an actual and constructive fraudulent preference is that the former is proven by showing the debtor's intention (albeit provable with reference to badges of fraud) whereas the latter may be proved without reference to the debtor's intention and instead with regard to the value received by the debtor.

#### Question 3.4 [maximum 5 marks]

Commented [A&O57]: Total marks 5/5

How does a US bankruptcy court determine whether a foreign proceeding is a main or non-main proceeding under chapter 15?

As the US has adopted the UNCITRAL Model Law, the relevant provisions of the Model law, as enacted and interpreted by the US courts, govern the determination of whether a foreign proceeding is a main or non-main proceeding under chapter 15.

The starting point is that foreign main proceedings are those that are commenced in the debtor's centre of main interests (COMI). There is a rebuttable presumption that a debtor's COMI is its place of incorporation. An example of a case where that presumption was rebutted is *Bear Stearns* in which the Court held that a Cayman Islands incorporated hedge fund did not have its COMI in the Cayman Islands, including because it carried out no business there and indeed was not permitted to as a matter of Cayman Islands law.

Commented [A&O58]: Correct, 1 mark

Commented [A&O59]: Correct, ½ mark

In determining the COMI of a debtor the Court will have regard to, inter alia the location of the debtors (i) headquarters, (ii) management, (iii) primary assets and (iv) creditors or a majority of the creditors who will be affected by the relief requested by the foreign proceedings. Moreover the Court will consider which jurisdiction's law will apply to most disputes.

Commented [A&O60]: Correct, 1 mark

As an overriding principle, the debtor's COMI should be ascertainable by its creditors or third parties on the basis of objective evidence. COMI is to be assessed as at the date of the US Petition, not the commencement of the foreign proceedings.

Commented [A&O61]: Correct, ½ mark

Commented [A&O62]: Correct, 1 mark

The law as to COMI shifting for the purpose of establishing a foreign main proceeding is not settled.

With regard to foreign non-main proceedings, these may only be recognised if the debtor had an establishment in the jurisdiction in question.

Commented [A&O63]: Correct, 1 mark

**QUESTION 4 (fact-based application-type question) [15 marks in total]**

Commented [A&O64]: Total marks 10/15

**Question 4.1 [maximum 5 marks]**

Commented [A&O65]: Total marks 5/5

Rental Corporation is a publicly-traded company that leases office space from office building owners and sublets the space to small businesses. It has recently announced that it is being investigated by the US Department of Justice Fraud Division (DOJ) regarding allegedly fraudulent misstatements of revenues; shortly after the announcement, a securities class action litigation was filed against Rental Corporation in New York federal court. Due to the increase in the numbers of businesses operating remotely, Rental Corporation has suffered a decline in revenues. As a result, it has failed to pay rent on some of its office space leases and it has just defaulted on its quarterly payment on its credit facility. What would be the effect of a chapter 11 petition being filed by Rental Corporation on each of (i) the DOJ investigation, (ii) the securities class action litigation; (iii) the delinquent leases and (iv) the credit facility?

The effect of a chapter 11 petition filed by Rental Corporation ("RC") would be as follows:

1. The DOJ investigation

The automatic worldwide stay enacted by the petition would not be effective in relation to the DOJ's regulatory (and potentially criminal) investigation and any proceedings or other regulatory action brought as a result; and the chapter 11 proceedings would not affect the DOJ investigation in any other way.

Commented [A&O66]: Correct, 1 mark

Commented [A&O67]: Correct, 1 mark

2. The securities class action litigation

This would be automatically stayed upon the filing of the petition. The plaintiffs could seek to lift the stay in order to continue with the litigation.

Commented [A&O68]: Correct, 1 mark

3. The delinquent leases

The leases would be subject to the automatic stay during the remaining term of the leases. However, where a lease has expired the stay cannot prevent the eviction of a defaulting debtor-tenant. As the tenants under the defaulting leases are in occupation pursuant to sub-leases, more information would be required to advise on their position. Subject to the terms of the relevant lease and sub-leases, it is likely that they could be evicted but would have claims against RS under their sub-leases.

Commented [A&O69]: Correct, 1 mark

The landlords would fall into an impaired creditor class with the right to vote on the chapter 11 reorganisation plan.

The leases are likely to be executory contracts if there are material unperformed obligations on both sides. As such RS may reject, assume or assume and assign the leases. Perhaps in this case it would be sense for the leases to be assigned to the sub-letting tenants.

4. The credit facility

The credit facility debt is subject to the automatic stay, and therefore no claim may be commenced in respect of it. The creditor in question would fall into an impaired class with the right to vote on the chapter 11 plan.

Commented [A&O70]: Correct, 1 mark

**Question 4.2 [maximum 5 marks]**

Considering the facts set forth in Question 4.1, what protections does the Bankruptcy Code provide to lessors of office space to Rental Corporation?

The lessors benefit from the absolute priority rule, whereby they cannot receive under the chapter 11 plan less than they would receive under a chapter 7 liquidation. In that regard, with respect to leases that were assumed and subsequently rejected the lessors will be priority creditors in respect of two years of lease payments from the later date of rejection of the lease or turnover of the property.

The lessors benefit from the certainty of the time-frame of 120 days which RC has to propose a plan (subject to extension to a maximum period of 18 months upon Court sanction).

The lessors must be provided with adequate information about the plan and will have the right to vote on the plan.

The lessors benefit from the criteria which the plan has to meet in order to be approved, including that the plan must be feasible and in the event that the lessors are 'crammed-down' that the plan must not discriminate unfairly and must be fair and equitable to them as members of a non-consenting impaired class.

Importantly, the lessors may evict tenants from the non-residential properties upon expiry of the leases if the leases have been defaulted on, regardless of the automatic stay.

Should the lessors wish to take action in respect of the unpaid debts of RC, they may apply to lift the automatic stay.

If RC rejects the leases as executory contracts, the lessors would have an unsecured pre-petition claim in damages against RC.

The lessors would also be able to recover from RC their legal and advisory costs of enforcement if so provided for in the leases.

**Question 4.3 [maximum 5 marks]**

Paint Corporation formulates house paint according to proprietary and patented recipes at its factory in the United States, which it sells to home improvement stores under a number of distribution contracts. The US Environmental Protection Agency is investigating whether Paint Corporation's operations are causing harmful chemicals to contaminate a nearby river. Paint Corporation is concerned it cannot afford the clean-up that may be required and is seeking to sell its business. Home Corporation is interested in buying the business, but does not want the potentially contaminated property (it can manufacture paint at its own factory) and is concerned about obtaining consent from all the home improvement stores to assign the distribution contracts. How would a sale under section 363 of the Bankruptcy Code address these issues?

A 363 sale sanctioned by the court has the potential to benefit both Paint Corporation and Home Corporation.

It is noted that Home Co. does not want to buy Paint Co.'s factory because of the risk of contamination. Therefore rather than buying the entirety of Paint Co.'s business which includes the factory (and may have significant liabilities pending the EPA's investigation),

**Commented [A&O71]:** Total marks 1/5

**Commented [A&O72]:** Correct, 1 mark, they would also have unsecured claims for the unpaid pre-petition rent

**Commented [A&O73]:** Was looking for you to note the 120 day deadline to assume or reject a lease of commercial real estate, subject to a 90 day extension for cause, after which any extension requires lessor consent. In the period prior to the assumption or rejection decision, the debtor must pay rent on an administrative priority basis.

**Commented [A&O74]:** Total marks 4/5

Home Co. may wish to consider buying the other assets of the business including the Paint Co. brand (and its interests in the distribution contracts), as well as its proprietary and patented recipes.

**Commented [A&O75]:** Correct, 1 mark, and this may yield a higher purchase price than out of bankruptcy

There would be significant benefits to conducting that sale pursuant to section 363. Firstly, the sale (which would not be in the ordinary course of Paint Co.'s business) would be sanctioned by the Court and Home Co would not need to worry about the reversal of the sale provided the sale / auction was conducted correctly and was done in good faith. Home Co. would also benefit from obtaining ownership of the property free and clear of any lien or claim. This is of particular benefit, because of Paint Co. is found liable by the EPA and subject to a heavy fine or other sanctions, or large debts are incurred in the clean-up, Home Co. will not be at risk of having the 363 sale reversed to claw back assets to the estate for the benefit of creditors.

**Commented [A&O76]:** Correct, 1 mark

**Commented [A&O77]:** Correct, 1 mark

Alternatively, Paint Co could – if it can find a buyer – sell the factory to a third party pursuant to s 363, thereby divesting the business of the factory and then sell the business to Home Co.

As regards the distribution contracts, Paint Co. could transfer its interest in the distribution contracts to Home Co, regardless of any contractual restrictions on assignment or ipso facto clauses. Furthermore, if Paint Co enters chapter 11 proceedings, it may treat the distribution contracts as executory contracts and assign them without the consent of the stores (however this is a matter unrelated to section 363).

**Commented [A&O78]:** Correct, 1 mark

**Commented [A&O79]:** While the assignability is technically a separate matter, the debtor would probably sell its interest in the contracts under section 363

**\* End of Assessment \***