



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: **[studentID.assessment3A]**. An example would be something along the following lines: 202122-514.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 "studentID" 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 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. 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 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

ANSWER ALL THE QUESTIONS

Commented [H(1)]: Total marks 41.5/50

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

Commented [H(2)]: Total marks 9/10

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 [H(3)]: Correct, 1 mark

ABC Corp is filing for bankruptcy under chapter 11. Which of the following **is not** a party in interest in that proceeding?

- (a) A neighboring land owner who has leased equipment to ABC Corp.
- (b) ABC's government regulator.
- (c) A bank that has loaned money to ABC.
- (d) A local advocacy group.**
- (e) All of the above.

Question 1.2

Commented [H(4)]: Correct, 1 mark

Which of the following statements regarding executory contracts is **false**?

- (a) Executory contracts are clearly defined by the bankruptcy code.**
- (b) Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.
- (c) In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.
- (d) A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.
- (e) Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.

Question 1.3

Commented [H(5)]: Incorrect, the correct response is (d)

In which of the following scenarios does a bankruptcy court have constitutional authority to issue a final order? Assume in each that the counterparty to the dispute has not consented to the bankruptcy court's exercise of jurisdiction.

- (a) A counterclaim against the estate that introduces a question under state law.
- (b) Since the list of core proceedings is non-exhaustive, a bankruptcy court may issue a final determination on any matter that comes before it.

- (c) A creditor's claim against an affiliate of the debtor that has guaranteed the debtor's obligation to the creditor
- (d) A debtor's motion to dismiss an involuntary bankruptcy petition.
- (e) None of the above.

Question 1.4

Commented [H(6): Correct, 1 mark

Which of the following statements about "pre-packs" is **false**?

- (a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.
- (b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.
- (c) A pre-pack debtor may spend as little as a single day in bankruptcy.
- (d) The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.
- (e) Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.

Question 1.5

Commented [H(7): Correct, 1 mark

Which of the following statements regarding cramdowns is **true**?

- (a) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.
- (b) Because cramdowns do not require the consent of all classes, the plan of reorganization may not be fair and equitable to all impaired classes.
- (c) Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.
- (d) Class definition is rarely a battleground when a debtor tries to cramdown classes.
- (e) Dissenting creditors are not permitted to challenge the classification of a creditor supporting the cramdown.

Question 1.6

Commented [H(8): Correct, 1 mark

Which of the following statements about the plan exclusivity period is **true**?

- (a) The exclusivity period is 1 year.
- (b) The exclusivity period cannot be extended.
- (c) The exclusivity period cannot be shortened.

(d) During the exclusivity period, only a creditor may propose a plan of reorganization.

(e) During the exclusivity period, only the debtor may propose a plan of reorganization.

Question 1.7

Commented [H(9)]: Correct, 1 mark

Which of the following statements about chapter 15 is **false**?

(a) The automatic stay applies upon the filing of a petition for recognition.

(b) A debtor cannot be subject to an involuntary chapter 15 proceeding.

(c) A chapter 15 petition must be filed by a foreign representative.

(d) The automatic stay applies only to property within the territorial jurisdiction of the United States.

(e) Recognition may be granted to a foreign proceeding as either foreign main or foreign non-main.

Question 1.8

Commented [H(10)]: Correct, 1 mark

Which of the following statements about 363 sales is **false**?

(a) A 363 sale permits a debtor to sell an asset free and clear of encumbrances.

(b) A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.

(c) A 363 sale must be conducted as an auction with a stalking horse bidder.

(d) Purchasers may pay a higher price for assets sold in a 363 sale than in an out-of-court transaction.

(e) Sophisticated parties will insist on a 363 sale if there is any question regarding whether the sale is "in the ordinary course of business".

Question 1.9

Commented [H(11)]: Correct, 1 mark

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 has a claim for damages for breach of contract.

(b) The counterparty must immediately stop using the trademark.

(c) The counterparty can continue using the trademark for the remaining period of the license.

(d) Both (a) and (b).

(e) Both (a) and (c).

Question 1.10

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

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

Commented [H(12)]: Correct, 1 mark

QUESTION 2 (direct questions) [10 marks]

Question 2.1 (2 marks)

What is the difference between a voluntary petition for bankruptcy and an involuntary petition for bankruptcy?

A voluntary petition for bankruptcy is initiated by a debtor and an involuntary petition is usually initiated by the creditor/s.

A debtor may commence voluntary proceedings under any relevant applicable chapter of the US Bankruptcy code. However, for an involuntary petition, it can only be commenced against an eligible debtor under chapters 7 and 11. It cannot be commenced against a farmer, family farmer or non-for profit organisation.

A debtor may commence voluntary bankruptcy by filing a petition with the requisite information (the form requires the debtor to provide details of its funds, creditors, assets and liabilities) and supplemental schedules (although, a naked petition can also be filed, with the schedules being filed subsequently, in order to invoke automatic stay earlier). It must be noted that the debtor need not be 'insolvent' (either cash-flow or balance sheet) to file such petition. However, in order for a creditor to qualify as a petitioner in such petitions, it must have a claim against the debtor that is non-contingent (as against a voluntary petition where there need not be any allegation of insolvency) and not subject to a *bonafide* dispute as to the debt. If the creditor does not meet these aforesaid requirements, it won't qualify as a creditor unless within 120 days prior to filing of the petition, a custodian had been appointed to manage a substantial portion of the debtor's estate.

Commented [H(13)]: Total marks 8/10

Commented [H(14)]: Total marks 2/2

Commented [H(15)]: Correct, 1 mark

Commented [H(16)]: Correct, 1 mark

Question 2.2 (2 marks)

What are two potential consequences of a violation of the automatic stay?

1. An act in violation of the automatic stay (despite taken without notice of filing of the bankruptcy petition) constitutes contempt of court and may result in imposition of contempt sanctions such as payment of debtors' attorneys' fees and affirmative acts to undo such violation;

Commented [H(17)]: Total marks 2/2

Commented [H(18)]: Correct, 1 mark

2. Such violation is void or voidable (depending on which circuit the bankruptcy is pending as different circuits may be split on this issue).

Commented [H(19)]: Correct, 1 mark

Question 2.3 (3 marks)

Commented [H(20)]: Total marks 1/3

In what circumstances is a claim considered "impaired"? When is a holder of an impaired claim not entitled to vote on a proposed plan of reorganization and what happens instead?

A claim or interests held by creditors against a debtor is considered impaired if the contractual, legal or equitable rights of such creditors as against the debtor are altered from the original terms or agreement in a rather detrimental manner such as delayed payment of debt, lesser interest, change of form of payment (eg. Issuance of new securities upon default and non-payment) etc.

Commented [H(21)]: Correct, 1 mark

While unimpaired classes of creditors (whose rights as above are not altered) are not entitled to vote, even certain holders are deemed unimpaired where a plan/ arrangement proposed by the debtor "reverses their contractual acceleration by curing any monetary default and compensating the holder for any damages" (Section 1124, Chapter 11, US Bankruptcy Code). In such instances the holders do not have a right to vote and if they have been completely compensated, they are deemed to have accepted the plan.

Commented [H(22)]: Impaired claims that receive nothing under the plan are not entitled to vote and are deemed to reject the plan

Question 2.4 (3 marks)

Commented [H(23)]: Total marks 3/3

Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:

- (1) Which cause of action applies only to transfers made on account of antecedent debt?

Antecedent Debt basically means a pre-existing debt, it is incurred before the transfer or payment from the Debtor. Such transfers could attract preferential transfer claims and causes of action as avoidable transactions under the US Bankruptcy Code. However, such preferential transfer claims must contain sufficient factual allegations on, inter alia, the debtors insolvency being plausible at the time of such transfer. Also, it must be noted that a contemporaneous exchange of value is not a preference, a prepayment for goods and services also cannot be a debt as it is not incurred until the debtor received the product and owes more than it has paid.

Commented [H(24)]: Correct, 1 mark

- (2) Which cause of action requires that the debtor be presumed or proven to have been insolvent at the time of the transfer?

Preferential transfer claims under the US Bankruptcy Code require that the debtor be presumed or proven insolvent at the time of transfer. The debtor is presumed to have been insolvent on or during the 90 days prior to the petition date for the purposes of determining preference claims. While a creditor may present evidence to rebut the presumption, the ultimate burden of proving insolvent on a balance sheet basis at the time of transfer is on the trustee or the debtor.

Commented [H(25)]: Correct, 1 mark

- (3) Which cause of action requires that the debtor be proven to have intended to frustrate creditors' recoveries?

Actual Fraudulent conveyances require that a debtor be proven to have intended to hinder, delay or defraud any entity to which the debtor was or became indebted. This includes

Commented [H(26)]: Correct, 1 mark

frustrating creditor recoveries. However, this does not include claims of constructive fraudulent transfers.

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

Commented [H(27)]: Total marks 14.5/15

Question 3.1 (3 marks)

Commented [H(28)]: Total marks 2.5/3

How did *Stern v Marshall* change the law of bankruptcy court jurisdiction and authority to enter a final order?

As the bankruptcy courts are creatures of federal legislation (and do not derive powers by the US Constitution (Article III) unlike the district courts), there is restriction on the exercise of powers and limit to the jurisdiction of such courts. The bankruptcy judges are only allowed to hear and determine "core" proceedings. Core proceedings include matters concerning the administration of estate, allowance and disallowance of claims (and counter claims) against the estate, proceedings determining preferences etc. This jurisdiction over core proceedings was well established and case law usually considered the distinction between core and non-core proceedings. For non-core proceedings which do not relate to bankruptcy matters, the bankruptcy courts do not have the jurisdiction hear or make a final determination.

Commented [H(29)]: Correct, 1 mark

However, the US Supreme Court (USSC) in *Stern v Marshall* held that even in core proceedings, the bankruptcy court cannot issue final orders that undertake the jurisdiction established under Article III of the US Constitution. The USSC also held that the final order over a state law counter claim was unconstitutional despite the same being a core matter (as per Section 157, US Chapter 28).

Commented [H(30)]: Correct, 1 mark

Through subsequent case law, the Bankruptcy courts are allowed to issue final orders in core proceedings. However, this is subject to the bankruptcy judges issuing a report and recommendation for review to the district court in cases where they lack constitutional authority or with the consent of the parties. Pursuant to these developments, the Bankruptcy Rules have also implemented the changes by requiring the parties to state in their pleadings whether they consent to the entry of final orders by the bankruptcy court.

Commented [H(31)]: Correct, 1/2 mark, the bankruptcy court can also enter final orders on a challenge to a petition

Question 3.2 (3 marks)

Commented [H(32)]: Total marks 3/3

What provisions of the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding? What are two ways that the foreign representative can obtain equivalent relief?

The foreign representatives are not allowed to invoke the powers of the bankruptcy code in relation to avoidance of preferences and fraudulent conveyances. This typically would not bar the foreign representative from seeking to avoid pre-petition transactions under the applicable foreign/US law.

Commented [H(33)]: Correct, 1 mark

Commented [H(34)]: Correct, 1 mark

For a foreign representative to obtain equivalent relief, it can (i) commence proceedings under Chapter 7 or 11 under the US Bankruptcy code as avoidance provisions can be invoked in plenary proceedings after its recognition or (ii) the debtor can commence such proceedings prior to the involvement of the foreign representative.

Commented [H(35)]: Correct, 1 mark

Question 3.3 (4 marks)

Commented [H(36)]: Total marks 4/4

Describe the differences between interlocutory and final orders and how an appeal may be taken from each. Which courts hear direct appeals from bankruptcy court orders?

Difference between Interlocutory orders (Io) and Final orders (Fo)

- Io are orders which resolve some claims or issues in a matter, while Fo resolve all issues and provide a definitive decision on all claims in a matter. This means that if an order is constitutionally final, it does mean that it is a Fo unless it resolves all claims;
- Io may be appealed only with leave of the appellate court while Fo can be appealed as a matter of right. Specifically, in relation to bankruptcy proceedings, the orders extending the plan exclusivity period are appealable as a matter of right (despite it not resolving the matter in its entirety);

Appeals:

Generally, appeals from bankruptcy courts are heard by the district courts having jurisdiction in which such bankruptcy courts are situated. In certain circuits (i.e. fifth, sixth, eighth, ninth, tenth), appeals from the bankruptcy courts are heard by the Bankruptcy Appellate Panel (BAP) comprising judges of the bankruptcy court from the concerned circuit. The parties, however, have an option to request that the matter be heard by the district court instead.

A further appeal of right lies from the district court or BAP (as the case maybe), to the circuit court of appeals where the relevant court from which an appeal lies certifies that (i) the appeal raises a question of law for which there is no controlling circuit court/ USSC precedent or requires resolving conflicting decisions, or (ii) immediate appeal may materially advance the progress of the case (Section 158(d), USC 28).

Commented [H(37)]: Correct, 1/2 mark

Commented [H(38)]: Correct, 1/2 mark

Commented [H(39)]: Correct, 1/2 mark

Commented [H(40)]: Correct, 1/2 mark

Commented [H(41)]: Correct, 1 mark

Commented [H(42)]: Correct, 1 mark

Question 3.4 (5 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?

Generally, director's liability is more limited than in other jurisdictions. According to the laws in Delaware, directors owe a fiduciary duty to the company and act in company's best interests. In addition to this, the directors also owe a duty of care in decision making. However, they are protected from any liability in exercising such decision making for errors of judgement by business judgement rule i.e. the directors are presumed to have acted in good faith and reasonably unless rebutted on the basis of bad faith or liable by showing gross negligence on their part.

Directors owe their duties to the company and its shareholders and not its creditors. Unlike other jurisdictions, even in circumstances when a company is insolvent, the directors do not owe duties to creditors. (*North Am Catholic Educational Programing Foundation Inc. v Gheewala*, 930 A.2d, 92.103 (Del 2007)). Thus, Delaware law imposes no absolute obligation on board of directors of a corporation that is unable to pay its bills to cease operations and to liquidate. Even when the company is insolvent, the board may proceed in good faith, strategies to maximize the value of the firm. (*See Trenwick AM Litig Trust v Ernst & Young LLP*, 906 A.2d 168 (Del. Ch. 2006)).

Commented [H(43)]: Total marks 5/5

Commented [H(44)]: Correct, 1 mark, this is typically termed the duty of loyalty

Commented [H(45)]: Correct, 1 mark

Commented [H(46)]: Correct, 1 mark

Commented [H(47)]: Correct, 1 mark

Commented [H(48)]: Correct, 1 mark

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

Commented [H(49)]: Total marks 10/15

Question 4.1 [4 marks]

Commented [H(50)]: Total marks 3/4

Gambling Corporation is incorporated and has a principal place of business in Greece and it operates casinos and betting parlors in many international cities, including Athens, Las Vegas, London and Macau. Gambling Corp's bonds (governed by English law) are due to mature in

one (1) year, but it is unable to repay or refinance them. Gambling Corp is considering using an English scheme of arrangement to restructure the bonds.

Discuss whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding.

An English scheme of arrangement can be granted recognition under US Chapter 15. The requirements for obtaining recognition are not very extensive and as long as a foreign representative of Gambling Corp (GC) establishes that a foreign court or administrative proceedings with respect to it are pending and that the foreign representative is entitled to act on behalf of GC in such foreign proceedings.

The definition of foreign proceedings is broad enough to include an English scheme of arrangement, and considering that GC operates business and has an establishment in London, would be enough to satisfy the requirements as to jurisdiction.

Foreign main proceedings are commenced in a debtors' center of main interests (COMI). COMI is usually the place of incorporation, but it is rebuttable and determined by several other factors such as location of the company's management, where primary assets are located, location of the majority of creditors etc. For a proceeding to qualify as foreign non-main proceedings, an establishment in such place will suffice.

Commented [H(51)]: Correct, 1 mark

Commented [H(52)]: Correct, 1 mark

As GC has a place of business in London, and even the debt (i.e. GC Bonds) is English law governed, it is arguable that despite it being incorporated in Greece, UK is the COMI and the English scheme of arrangement may be determined as foreign main proceedings. However, the final determination on main or non-main proceedings will be at the discretion of the US Court.

Commented [H(53)]: Correct, 1 mark, which can be the establishment required for non-main recognition

Commented [H(54)]: I think the principal place of business being in Greece and that England is one of a number of countries with some operations would weigh in favor of Greece as the COMI.

Question 4.2 [5 marks]

Commented [H(55)]: Total marks 3.5/5

Oil Corporation is incorporated in Delaware and has its principal place of business in Texas. Oil Corp is facing a number of challenges to its business. First, ShipCo, one of its key customers, has filed a breach of contract lawsuit in Texas state court alleging that Oil Corp sold it contaminated oil that caused USD 1 billion in damage to ShipCo's container ships. Second, the US Department of Justice is investigating whether Oil Corp illegally purchased oil from countries subject to US sanctions. Third, Oil Corp. has missed a payment on its secured loan from USA Bank, and USA Bank is threatening to foreclose on an Oil Corp refinery located in the Philippines. Fourth, because of all these distractions, Oil Corp has forgotten to pay rent on its Houston, Texas office space and its landlord is threatening to evict it. What would be the effect of Oil Corp filing a chapter 11 petition on each of these four situations?

While one of the key attractions of filing a voluntary petition under Chapter 11 is a worldwide automatic stay of all proceedings against the debtor (i.e. Oil Corp in this case) and exclusivity period for the debtor to formulate and negotiate a plan, there are certain exceptions and nuances to commencement of actions/making claims.

Commented [H(56)]: Correct, 1 mark

1. A breach of contract law suit filed by ShipCo will not be affected (i.e. stayed) by the automatic stay imposed upon Chapter 11 petition. It would be treated as a separate claim from the bankruptcy proceedings in a different state.
2. The US Department of Justice investigations will also not be affected by the automatic stay as it is subject to certain statutory exceptions, which include the exception of regulatory investigations (Section 362(b), US Chapter 11).
3. As actions commencing claims, even over assets located in foreign jurisdiction are barred, if the automatic stay comes into effect, USA Bank will be barred from actions (including foreclosure) of Oil Corp refinery in the Philippines.

Commented [H(57)]: Incorrect, litigation on pre-petition claims is stayed and the claim is against the bankruptcy estate.

Commented [H(58)]: Correct, 1 mark

Commented [H(59)]: Correct, 1 mark

4. The eviction of a debtor-tenant from a commercial (non-residential) property where the lease has expired is a statutory exception like in paragraph 2 above, and not subject to automatic stay. However, as the lease is not confirmed to be terminated in the factual scenario herein, there are 2 possibilities (a) If the landlord terminated the lease based on the default of Oil Corp on payment (and served Oil Corp with an eviction notice), then the statutory exception would apply, (b) If the lease was not terminated prior to filing of the petition, the landlord can still make a claim for lifting the stay from such proceedings by proving that the debtor has no equitable interests in the property (as it would at the maximum, be a possessory interest) and is not necessary for the reorganisation, and/ or by proving that the debtor filed a petition with in bad faith/ to delay the, hinder or defraud the creditors.

Commented [H(60): Partially correct, 1/2 mark, the exception permitting eviction only applies where the lease term has expired and not where it has been terminated due to a default (section 362(b)(10))

Question 4.3 [6 marks]

Commented [H(61): Total marks 3.5/6

Oil Corp has filed for bankruptcy and is planning to sell its plastic manufacturing business through a 363 sale. The plastic manufacturing business operates under the trademark "Interconnect", which is licensed from Plastic Corp. Oil Corp has invented several patented processes for plastic manufacturing, which it licenses to Plastic Corp. The main manufacturing facility for the plastic business is in Dallas, and Oil Corp has granted a lien on the facility to USA Bank to secure its USD 500 million loan.

Oil Corp thinks it will get the highest return for the plastics manufacturing business if it can (i) assume and assign the trademark license; (ii) reject the patent licenses so the purchaser has the exclusive right to use the patents; and (iii) sell the manufacturing facility free and clear of the USA Bank lien. Can Oil Corp achieve each of these goals without the consent of Plastic Corp and USA Bank? Why or why not?

- (i) Trademark licenses are generally not assignable as federal trademark law bans such assignment absent licensor's consent (*Trump Entertainment Resorts Inc*, 526 BR 116 (Bankr D Del 2015)). As the licensor for "Interconnect" is Plastic Corp, Oil Corp cannot assign the trademark without Plastic Corp's consent.
- (ii) Upon rejection of a contract, the counterparty usually retains whatever it receives under contract pre-petition. However, similar to (i) above, licensees of patents are protected (though classified as executory contracts – they are intellectual property rights) and cannot be assumed and rejected if in connection to a sale, without the consent of the licensor. While there is a circuit split on the treatment of "prohibition", and whether it means prohibition of assumption or assignment, the lower courts in Dallas (Fifth Circuit) have held that such provision apply only where the debtor i.e. Oil Corp actually intends to assign the agreement. In view of above and in any event, as Oil Corp is the licensor, its consent for termination of rights over the patent should suffice.
- (iii) Oil Corp can indeed sell properties free and clear of creditors' interests under section 363, Chapter 11. As a debtor in possession under Chapter 11, Oil Corp would be able to sell the manufacturing facility without approval as it may be required to operate the business. The sale is likely a non-ordinary transaction and accordingly, Oil Corp will have to establish that the transaction is in the best interests of the estate and it owes a fiduciary duty to the creditors including USA Bank. The sale will usually be conducted through a stalking horse to attract the best offers for the property. Potentially, USA Bank may even consider making a "credit bid" to offset the USD 500m loan against the purchase price of the property.

Commented [H(62): Correct, 1 mark

Commented [H(63): Correct, 1 mark

Commented [H(64): Partially correct, 1/2 mark, the protection is for the benefit of the licensee and therefore it is the licensee (here, Plastic Corp) who must consent

Commented [H(65): Correct, 1 mark, the USA Bank lien would attach to the proceeds

*** End of Assessment ***