



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 43.5/50

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

Commented [H(2): 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 [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)]: Incorrect, the correct response is (e)

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]

Commented [H(13)]: Total marks 7/10

Question 2.1 (2 marks)

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

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

A debtor may commence a voluntary proceeding under any application chapter by filing a petition. The Federal Rules of Bankruptcy Procedure specify a number of schedules, such as lists of assets and creditors, that are to be filed with a voluntary petition. The debtor need not be, or claim to be, insolvent.

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

A creditor may commence an involuntary proceeding against an eligible debtor under either Chapter 7 or Chapter 11. Involuntary proceedings cannot be commenced under the other chapters or against a farmer, family farmer or not-for-profit corporation.

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

Question 2.2 (2 marks)

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

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

An act taken in violation of the stay (even if taken without notice of the filing of the petition) constitutes contempt of court and is void or voidable (depending on the circuit in which the bankruptcy proceeding is pending due to a circuit split on the issue).

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

Parties in interest may seek to lift the stay prospectively to permit or retroactively validate an act that would otherwise be a violation of the stay. Failure to obtain relief from the stay may result in the imposition of contempt sanctions against the stay violator, which may include payment of the debtor's attorneys' fees and requiring the violator to take affirmative acts to undo the effects of the violation. Where the court is concerned the violator may not act promptly, it can impose coercive contempt sanctions, such as a daily fine to be paid to the court until the stay violation has been rectified.

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 is considered impaired where, under a plan of reorganization, the holder of that claim's contractual rights are to be modified or will be paid less than the full value of their claim under the plan. In other words, a claim is unimpaired if the plan leaves the holder's "legal, equitable, and contractual rights unaltered". Only impaired classes have the right to vote on the plan.

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

To mitigate the holdout problem that would occur if all impaired classes of creditors had to approve a plan, a plan may be confirmed by "cramming down" dissenting impaired classes, thereby overriding their right to vote. To use cramdown however, all the other requirements of the confirmation process need to be met, and at least one impaired class (not counting insiders) must have voted to accept the plan.

Commented [H(22)]: Incorrect, they still do vote. The impaired creditor who will receive nothing under the plan cannot vote and is deemed to reject

Question 2.4 (3 marks)

Commented [H(23)]: Total marks 2/3

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?

Such a transfer may be avoided as a preference. A preference is a transfer of the debtor's property made in a suspect period before the petitioner date that must be returned to the estate if it exceeds the amount the recipient would have received in a Chapter 7 liquidation had the transfer not been made. One of the elements of a preference claim is that the transfer must be for or on an account of an antecedent debt owed by the debtor before such transfer was made – i.e. the preference only arises where the debtor is paying a creditor for a pre-existing debt.

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?

A constructive fraudulent conveyance is proven by showing that the debtor received less than reasonably equivalent value in exchange for a transfer or incurrence of obligation and one of a number of factors was present, such as the debtor was insolvent at the time of or became insolvent as a result of the transaction.

Commented [H(25)]: Incorrect, while insolvency is an optional factor, it is a required element of a claim for preference

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

An actual fraudulent conveyance is proven by showing that the debtor made a transfer or incurred an obligation "actual intent to hinder, delay or defraud any entity to which the debtor was or became indebted".

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

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

Commented [H(27)]: Total marks 14/15

Question 3.1 (3 marks)

Commented [H(28)]: Total marks 2/3

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

Stern v Marshall was a surprising Supreme Court decision which held that, even in core proceedings, a bankruptcy court cannot issue final orders that invade Article III jurisdiction.

Commented [H(29)]: Correct, 1 mark, and now a bankruptcy court can enter a final order on a challenge to a petition or with the parties' consent

The bankruptcy courts are creatures of federal legislation, rather than most other federal courts which are established by Article III of the US Constitution. Jurisdictional provisions were enacted to grant jurisdiction over bankruptcy proceedings to district courts and permit district courts to refer such proceedings to the bankruptcy courts of their district.

That referral statute creates a distinction between core and non-core proceedings, permitting bankruptcy judges to hear and determine only core proceedings. The statute contains a non-exhaustive list of core proceedings. With regard to non-core proceedings, the bankruptcy court may hear them if they are sufficiently related to a bankruptcy proceeding but it cannot make a final determination.

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

In *Stern v Marshall*, although 28 USC ss. 157 provides that a counterclaim is a core proceeding as to which a bankruptcy court can issue a final order, the US Supreme Court held that the bankruptcy court's issuance of a final order over a state law claim was unconstitutional under Article III, and that the jury verdict was the first final judgment and was conclusive of the issues.

Question 3.2 (3 marks)

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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?

Chapter 15 excludes from the rights granted to foreign representatives the use of avoidance powers provided by the Bankruptcy Code. This provision has been widely (although not universally) interpreted only to apply to the use of the Bankruptcy Code's powers of avoidance of preferences and fraudulent conveyances, and not to bar a foreign representative from seeking to avoid pre-petition transactions under other applicable US or foreign law.

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

A foreign representative can only invoke the Bankruptcy Code avoidance powers in a plenary proceeding such as chapter 11. In some circumstances, such a proceeding was commenced by a debtor or its creditors prior to involvement of the foreign representative. In other, rarer circumstances, the foreign representative may choose to commence a plenary proceeding under the Bankruptcy Code after recognition of the foreign proceeding under chapter 15. In those situations, the scope of the plenary proceeding is limited to the debtor's US assets and will be coordinated with the foreign proceeding.

A foreign representative may wish to commence plenary proceedings to obtain access to the Bankruptcy Code's avoiding powers where relief under other applicable law is unsatisfactory, such as where the statute of limitations has expired or applicable law does not allow claims for constructive fraudulent conveyance.

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

Question 3.3 (4 marks)

Commented [H(35)]: 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?

US non-bankruptcy procedure distinguishes between final and interlocutory orders. Final orders are those that dispose of all issues in the case, leaving nothing further to be decided, while interlocutory orders resolve only some issues and claims.

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

Final orders may be appealed as of right, whereas interlocutory orders may be appealed only with the leave of the appellate court. In bankruptcy proceedings, this same framework applies, except that orders extending the period of exclusivity to propose a plan are appealable as of right. The US Supreme Court has held that a bankruptcy order resolving a discrete dispute is a final order for appeals purposes.

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

An appeal as of right or the granting of permission to pursue an interlocutory appeal divests the bankruptcy court of jurisdiction to alter its decision but does not stay its effect.

In general, appeals from bankruptcy court decisions are heard by the district court for the district in which they sit. In certain circuits however, bankruptcy appeals are heard by a Bankruptcy Appellate Panel (BAP), made up of judges of the bankruptcy courts within the circuit. In those circuits, a party has the option to request that the appeal be heard by the district court instead. There is a further appeal as of right (assuming the initial order could be appealed as of right) from the district court or BAP to the circuit court of appeals.

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

The first appeal from a bankruptcy case will go to a randomly assigned judge, who will then generally hear all future appeals.

Question 3.4 (5 marks)

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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?

In general, US director liability is more limited than elsewhere. Directors owe a fiduciary duty of loyalty to the corporation's best interest and a duty of care in educated decision making, but are protected from liability for errors of judgment by the business judgment rule. Under this rule, the board of directors is presumed to have acted in good faith on the basis of reasonable information. This presumption can be rebutted only by showing that a majority of the board in fact were not reasonably informed, or were not acting in good faith.

Commented [H(43)]: Correct, 1 mark

Commented [H(44)]: Assuming this is a typo for "care", correct, 1 mark

Directors' duties are owed to the corporation and its shareholders, not to creditors, even in circumstances where the corporation is potentially insolvent and therefore the shareholders stand to receive nothing in bankruptcy.

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

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

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

The Delaware Supreme Court has put to rest any suggestion that directors owe duties to creditors when a company is operating "in the zone of insolvency", or indeed is actually insolvent. In the case of North Am Catholic Educational Programming Foundation, Inc v Gheewalla, it was held that "individual creditors of an insolvent corporation have no right to asset direct claims for breach of fiduciary duty against corporate directors. Creditors may nonetheless protect their interest by bringing derivative claims on behalf of the insolvent corporation." There is therefore no equivalent under US law of the concept of "wrongful trading" or "deepening insolvency".

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

Commented [H(48)]: Total marks 14.5/15

Question 4.1 [4 marks]

Commented [H(49)]: Total marks 4/4

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.

The requirements of recognition for Chapter 15 are minimal. The foreign representative must establish that a foreign court or administrative proceeding with respect to the debtor is pending and that the foreign representative is empowered to act by the proceeding.

A foreign proceeding need not resemble a US bankruptcy case to be recognised. A foreign proceeding is defined by the Bankruptcy Code as "a collective judicial or administrative

proceeding in a foreign country... under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." Under this definition, proceedings as diverse as English schemes of arrangement have been granted recognition, which is helpful to Gambling Corp.

The one point of contention that may arise at the recognition stage is the characterisation of the foreign proceedings as foreign main or foreign non-main, as this determines the scope of relief available to the debtor following recognition. Foreign main proceedings are those that are commenced in the debtor's centre of main interests (COMI). A debtor's COMI is presumed to be its place of incorporation, but this is rebuttable. Gambling Corporation's COMI will be presumed to be Greece as that is where it is incorporated, but the fact it has significant assets across the world may serve to rebut this presumption, as does the location of a majority of its creditors.

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

Proceedings in a jurisdiction other than the debtor's COMI, such as the English scheme of arrangement, can be recognized as foreign non-main proceedings only if the debtor has an establishment in the jurisdiction, i.e. a place where it carried out non-transitory economic activity, prior to the commencement of Chapter 15 proceedings. Given that Gambling Corporation operates casinos and betting parlours in London, the English scheme of arrangement is likely to be recognised under Chapter 15 as a foreign non-main proceeding.

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Commented [H(53)]: Correct, 1 mark

Question 4.2 [5 marks]

Commented [H(54)]: Total marks 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?

By filing a chapter 11 petition, Oil Corp will enjoy the protection of a worldwide automatic stay of creditor enforcement proceedings from the moment the petition is filed. This will provide Oil Corp with breathing space to continue operating more or less in the ordinary course of business and work with its key constituencies to propose a plan of reorganisation that will adjust its debts.

Commented [H(55)]: Correct, 1 mark

The scope of the automatic stay is extremely broad in that it applies to any interference with the property of the estate anywhere in the world. The stay is however subject to certain statutory exceptions, including regulatory investigations, therefore the investigation by the US department of Justice will not be affected by the automatic stay.

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

The automatic stay will apply to the claim brought by ShipCo seeking damages of \$1 billion as it was a claim that arose before the filing of the bankruptcy petition, and does not fall within the statutory exceptions to the automatic stay.

Commented [H(57)]: Correct, 1 mark

The plan of reorganisation under chapter 11 allows the debtor to force its secured creditors, such as USA Bank, to accept altered terms on their debt. Under specific circumstances, a secured creditor, such as USA Bank, can obtain an order from the Court granting relief from the automatic stay. For example, when the debtor has no equity in the property and the

property is not necessary for an effective reorganisation, the secured creditor can seek to foreclose on the property, sell it, and apply the proceeds to the debt.

Commented [H(58): Correct, 1 mark, absent relief from the stay the foreclosure proceedings could not proceed

The automatic stay also does not apply to the eviction of a debtor-tenant from non-residential property where the lease has expired. It may be that the landlord of the office space (i.e. non-residential property) in Texas can proceed to seek to evict Oil Corp (although it will depend if the lease has expired).

Commented [H(59): Correct, 1 mark, on the facts here there is a failure to pay rent but it is not stated that the lease has expired by its terms

Question 4.3 [6 marks]

Commented [H(60): Total marks 5.5/6

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?

The bankruptcy Code abrogates contractual restrictions on assignment to enable the debtor to achieve a higher value for its asset than if such provisions were enforced. Counterparty consent is only required where the contract is one to make a loan or other financial accommodation, or where substantive non-bankruptcy law, such as intellectual property licensing law – provides that the counterparty cannot be compelled to accept performance from a transferee. A licensee of a third-party's intellectual property, might not be able to assume and continue performing under a pre-petition license without the licensor's consent. Trademark licences are therefore not assignable without licensor consent. In order to assume and assign the trademark license, Oil Corp will first have to obtain Plastic Corp's consent.

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Commented [H(62): Correct, 1 mark

Licensees of patents and copyrights owned by the debtor are protected such that their licenses may not be terminated in connection with the sale of the intellectual property without their consent. Therefore Oil Corp must obtain Plastic Corp's consent. The Supreme Court has held that when the licensor of a trademark files for bankruptcy, its "rejection" of the trademark license agreement does not terminate the licensee's rights in the mark.

Commented [H(63): Correct, 1 mark

Commented [H(64): Correct, 1 mark

Section 363 of the Bankruptcy Code provides for sale of assets outside the ordinary course free and clear of all liens and other interests. Creditor consent is necessary however, unless the creditor interest is disputed or where the value of the property exceeds the value of the interest. Oil Corp must therefore obtain USA Bank's consent before it can sell the manufacturing facility free and clear of all liens.

Commented [H(65): Partially correct, 1/2 mark, also the lien will attach to the proceeds

*** End of Assessment ***