



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: 202223-336.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 "student number" 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 2023. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2023. 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 2023 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2023. If you elect to submit by 1 March 2023, you may not**

submit the assessment again by 31 July 2023 (for example, in order to achieve a higher mark).

7. Prior to being populated with your answers, this assessment consists of 9 pages.

ANSWER ALL THE QUESTIONS

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

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

Which of the following entities does not satisfy the minimum presence requirement to be a debtor under any chapter of the Bankruptcy Code?

- (a) A foreign domiciled company that pays a US attorney a retainer.
- (b) A company with several US bank accounts, but no physical presence in the United States.
- (c) A company with US patents, but no physical presence in the United States.
- (d) All of the above satisfy the minimum requirement for presence in the United States.**
- (e) None of the above satisfy the minimum requirement for presence in the United States.

Question 1.2

ABC Corp is an industrial manufacturing company that is filing for bankruptcy. Which of the following could not be considered a party in interest?

- (a) A neighboring landowner to ABC Corp's manufacturing plant.**
- (b) An environmental advocacy group that opposes ABC Corp's operations.
- (c) The landlord of ABC Corp's corporate office.

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The marker has flagged various instances of plagiarism and marks have been deducted accordingly. Please be reminded of the instructions pertaining to plagiarism contained in the Course Handbook as well as in the assessment itself.
Course Leader

Total marks 30.5/50, but the assessment contains extensive plagiarism from both the course text and online sources

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Commented [la4]: Incorrect, the correct response is (b), the neighboring landowner may have claims arising from environmental contamination or an easement over the property

- (d) *People who live several miles downstream from ABC Corp's manufacturing plant and have been exposed to the plant's toxic waste.*
- (e) *The US Internal Revenue Service.*

Commented [la5]: Incorrect, the correct response is (a), the software license is subject to intellectual property protections because software is copyrighted

Which of the following contracts to which ABC Corp is a party is executory and may be assigned without counterparty consent?

- (a) *A lease on a manufacturing plant that contains a provision that requires landlord approval of any assignment.*
- (b) *An employment contract between ABC Corp and a former employee, requiring the company to provide health insurance through the end of the current year.*
- (c) *A 10-year software licensing agreement with XYZ Corp that is three years into performance.*
- (d) *A lease on office space that ended the prior year, but for which ABC Corp still owes past rent.*
- (e) *None of the above are executory and may be assigned without counterparty consent.*

Question 1.4

Commented [la6]: Incorrect, the correct response is (b)

Which of the following conditions must be true about a reorganization plan for a court to confirm it under Chapter 11 proceedings?

- (a) *Have a possibility of success, even if it relies on speculative or improbable events to be capable of execution.*
- (b) *The plan is not likely to be followed by liquidation.*
- (c) *All impaired classes must accept the plan.*
- (d) *All of the above.*
- (e) *None of the above.*

Question 1.5

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Which of the following about cramdowns, is false?

- (a) *The plan of reorganization must be fair and equitable to all impaired classes.*
- (b) *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.*
- (c) *Class definition is often a battleground when a debtor tries to cramdown classes.*
- (d) *Dissenting creditors are permitted to challenge the classification of a creditor supporting the cramdown.*
- (e) ***If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.***

Question 1.6

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Which of the following about 363 sales is false?

- (a) *A good faith purchaser at a 363 sale may retain the property notwithstanding a subsequent reversal of court approval for the sale on appeal.*
- (b) *The debtor in possession must establish that the transaction is in the best interests of the estate as a whole.*
- (c) ***In chapter 15 proceedings, a foreign court's approval alone suffices for a 363 sale.***
- (d) *Debtors must carry out a robust marketing process for the sale.*
- (e) *A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.*

Question 1.7

Commented [1a9]: Incorrect, the correct answer is (c) because actual fraudulent conveyance does not require that the debtor was insolvent at the time

Which of the following is true of both an actual fraudulent conveyance and a constructive fraudulent conveyance?

- (a) ***The debtor must have had an actual intent to hinder, delay, or defraud any entity to which the debtor was or became indebted.***
- (b) *Both require at least circumstantial evidence of the fraudulent intent.*
- (c) *The debtor must have been insolvent at the time of transaction.*

(d) In addition to provisions in the Bankruptcy Code, the debtor or the trustee may invoke applicable state or foreign fraudulent conveyance laws.

(e) All of the above are true.

Question 1.8

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When does an automatic stay come into effect?

(a) Immediately on the filing of any plenary petition.

(b) On the filing of a voluntary petition but not on the filing of an involuntary petition.

(c) Once the court reviews the petition and grants the stay.

(d) Once the petitioner announces their intention to file for bankruptcy publicly.

(e) Once a plan of reorganization is confirmed.

Question 1.9

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Which of the following regarding substantive consolidation is true?

(a) It respects the boundaries of corporate separateness.

(b) It is the treatment of two or more creditors as a single creditor to simplify the claims process.

(c) If a creditor can show it extended credit on the basis of corporate separateness, it has a valid objection to substantive consolidation.

(d) Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.

(e) Authority for substantive consolidation comes from the Bankruptcy Code.

Question 1.10

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Which of the following are relevant factors in determining a debtor's center of main interests (COMI) in the recognition stage of a Chapter 15 bankruptcy case?

(a) The location of the headquarters.

(b) The location of primary assets.

(c) *The location of the majority of the affected creditors in the request for relief.*

(d) *The jurisdiction whose law will apply to most disputes.*

(e) **All of the above.**

QUESTION 2 (direct questions) [10 marks]

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Question 2.1 [1 mark]

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What is setoff and why is it not permitted in many circumstances?

Set-off allows for the termination of obligations with no exchange of performance. When parties are indebted to one another, set-off operates automatically under the common law when the requirements for set-off are satisfied.

It is not permitted in many circumstances because the Bankruptcy Code exempts the exercise of rights of setoff arising under non-bankruptcy law from avoidance as a preference depending on the circumstances.

A creditor holding a claim against the debtor and simultaneously owing money to the debtor to net out any obligations is permitted in a setoff. setoff is not permitted in many circumstances because the setoff rights can improve the position of the creditor if compared to other unsecured creditors who are not owed money by the debtor. It decreases its obligation to the estate by the full amount owed by the debtor rather than the lesser amount the debtor would pay on the unsecured claim.¹

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[Type your answer here]

Question 2.2 [2 marks]

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Course Leader

What rules should you review when preparing a filing for a bankruptcy court?

If you do not practice regularly in a jurisdiction, consult with a local practitioner for advice on unwritten local practices. Further one should review the Bankruptcy Rules, the Federal Rules of Civil Procedure, the local rules of the bankruptcy court and the judge's personal practices.

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Choice of a forum for bankruptcy proceedings can have important consequences, in some instances the interpretation of the Bankruptcy Code on important points may be different from regional circuit courts of appeal for years before a decision of the US Supreme Court is made. It could be statutory amendment, or a change of position by one of the courts of appeal.

Further a choice of forum may enable a debtor to predict which judge will preside over the proceedings. Due to the regional differences in the US economy, certain courts also have greater experience in cross-border proceedings or with debtors in specialized industries.²

¹ Page 58

² Guidance Text, Insolvency system of the United States, page 13 & 14

[Type your answer here]

Question 2.3 [2 marks]

What does the absolute priority rule require and when can it be deviated from?

[Type your answer here]

Absolute priority, is a rule governing the order of payment among creditors and shareholders in the event of a corporate liquidation. The absolute priority rule is used in corporate bankruptcies to decide the portion of payment that will be made to each participant.³ It prioritize a creditor's claim over a shareholders claim further to that secured claims are invariably prioritized over unsecured claims.

In a Chapter 11 bankruptcy proceeding, if a company or individual filer (the "debtor") is unable to pay its creditors in full, the absolute priority rule bars owners from retaining their interests unless the owners contribute "new value" to the business.

The principle of bankruptcy law requiring the claims of a dissenting class of creditors to be paid in full before any class of creditors junior to such dissenting class may receive or retain any property in satisfaction of their claims.⁴

The hierarchy of the absolute priority rule is as follows :

- The senior class of creditors is paid first and in full.
- Claims of junior creditors are fulfilled.
- Claims of equity holders are serviced.

Deviation from the absolute priority rule in a chapter 11 plan is permitted with the consent of affected creditors, but deviation is not permitted in chapter 7, where the statutory priorities must be strictly followed.⁵

Question 2.4 [2 marks]

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

[Type your answer here]

In finance, being "primed" is a colloquial term which refers to the situation in which the seniority position of a lender with respect to a secured loan is superseded by another lender. Meaning , a lender is considered primed when they are surpassed by another lender with respect to their priority status regarding the collateral of a secured loan. This situation is also known as lien priming because there are usually liens or other restrictions placed on the collateral.

A lender is primed if their priority status with respect to a debtor's collateral is surpassed by another lender. Ensuring a high priority status is an important way for lenders to reduce their risk. Sometimes a lender might allow themselves to be primed if they believe doing so

³ Investopedia, <https://www.investopedia.com/terms/a/absolutepriority>.

⁴ S1129(b)(2), Bankruptcy Code

⁵ Guidance Text, Insolvency system of the United States, page 33

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Course Leader

will ultimately maximize their chances of being repaid. These situations typically arise when a company is facing bankruptcy or in the midst of restructuring.⁶

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A lien on property senior to, existing liens on the same property. A priming DIP financing is only available as a last resort when the debtor is unable to obtain any other type of financing.

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- either the holders of existing liens (the primed lenders) consent; or
- the debtor can demonstrate such secured creditors are adequately protected from the diminution in value of their collateral as a result of the priming lien.⁷

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Question 2.5 [3 marks]

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What is a preference? What are the elements of a preference claim that need to be proved? Is a showing of fault, by either the debtor or creditor, required?

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Course Leader

[Type your answer here]

A preference is a transfer of the debtor's property made in a suspect period before the petition 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.⁸

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The elements of a preference claim are:

- A transfer of an interest of the debtor in property.

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The transfer may be of funds, property or an interest in property, ie, the granting of a lien. Transfer of property in which the debtor does not have an interest, such as property held as agent for another, cannot be a preference.

- To or for the benefit of a creditor.

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If the recipient was not a creditor of the debtor prior to the transfer, the transfer cannot be a preference, but may be considered and recoverable as a fraudulent conveyance.

- For or on account of an antecedent debt owed by the debtor before such transfer was made.

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Preferences only arise where the debtor is paying a creditor for a pre-existing debt. A contemporaneous exchange of value is not a preference. Further, a prepayment for goods and services cannot be a preference because debt, if any, is not incurred until the debtor receives the product and owes more than it has paid.⁹ The Bankruptcy Code looks to applicable laws, maybe contract law etc, to determine when a debt arose and when a transfer of an interest in the debtor's property occurred.

⁶ <https://www.investopedia.com/terms/p/primed.asp>

⁷ <https://ca.practicallaw.thomsonreuters.com/Priminglien>

⁸ Guidance Text, Insolvency system of the United States, page 50

⁹ 11 USC, Section 547(e)

Where the transfer is a security interest, the date of the transfer is the date of perfection of the security interest, eg a notarial bond over movable property, if perfection occurred more than 30 days after the transfer became effective between the parties. Therefore, a delay in perfection may cause a transfer to be deemed not to have occurred contemporaneously and the date may move to the date of the transfer into the preference period. Therefore if a security interest is not perfected before the petition date, the automatic stay will bar the interest from being perfected and the security interest will be unenforceable.¹⁰

- Made while the debtor was insolvent.

The debtor is presumed to have been insolvent on and during the 90 days prior to the petition date for purposes of determining preference claims.¹¹

- Made during the suspect period.

The suspect period for transfers to third parties is 90 days prior to the petition date, and the suspect period for insiders is one year prior to the petition date.

- That enables the creditor to receive more than it would have in a chapter 7 liquidation.

A transfer is only an avoidable preference if it resulted in the creditor improving its position as compared to the result of a liquidation had the transfer not occurred.

There is no need to show any fault of the debtor or the recipient in connection with the payment having been made. The recipient creditor suffers no penalty other than return of the transfer, and, perhaps, prejudgment interest from the date of the transfer.¹²

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

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Question 3.1 [3 marks]

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

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Course Leader

The bankruptcy courts are creatures of federal legislation, in particular the 1978 Bankruptcy Code, rather than established with most other federal courts by Article III of the US Constitution.

Due to a series of decisions, it was held by the US Supreme Court that judges cannot exercise jurisdiction over matters subject to Article III who have not been appointed pursuant to and with the protections of Article III.¹³

Due to the fact that issues arise in and relate to bankruptcy proceedings involve

¹⁰ 11 USC, Section 544(a)

¹¹ 11 USC, Section 547(f).

¹² Guidance Text, Insolvency system of the United States, page 50

¹³ Guidance Text, Insolvency system of the United States, page 16

statutory and contract rights that otherwise would be within the jurisdiction of Article III courts, the Supreme Court struck down the jurisdictional provisions of the 1978 Bankruptcy Code as unconstitutional.¹⁴

Therefore, new 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.¹⁵

This referral statute creates a distinction between “core” and “non-core” matters, and permits bankruptcy judges to hear and determine only core proceedings.

At the outset of each motion or pleading, parties must state whether the matter at issue is core or non-core, so that the bankruptcy court can determine the scope of its jurisdiction and power to render a final order or judgment.

As to non-core proceedings, the bankruptcy court may hear the non-core proceedings if they are sufficiently related to a bankruptcy proceeding,¹⁶ but cannot make a final determination; instead, it submits proposed findings of fact and conclusions of law to the district court, to which interested parties may object, for the district court’s final decision.¹⁷

In 2011, however, the US Supreme Court shocked bankruptcy practitioners by holding, in *Stern v Marshall*,¹⁸ that even in core proceedings, a bankruptcy court cannot issue final orders that invade Article III jurisdiction.

The US Supreme Court it was held that bankruptcy judges may determine a core proceeding over which they lack constitutional authority by issuing a report and recommendation for review by the district court,¹⁹ with the same procedure as in non-core proceedings or with the consent of the parties, may issue final orders.²⁰

In terms of the Bankruptcy Rules it requiring litigants to state in their pleadings whether they consent to the entry of final orders or judgment by the bankruptcy court, and by permitting a district court that determines that a bankruptcy court did not have jurisdiction to enter a final order to treat that its order as proposed findings of fact and conclusions of law.²¹

Generally, appeals from bankruptcy court decisions are heard by the district court for the district in which they sit. A randomly assigned judge will preside over the first appeal, who will then generally hear all future appeals from those bankruptcy proceedings. In certain circuits, bankruptcy appeals are heard by a Bankruptcy Appellate Panel (BAP), convened from the judges of the bankruptcy courts within the circuit. The First, Sixth, Eighth, Ninth and Tenth Circuits have elected, pursuant to 28 USC, Section 158(b), to form Bankruptcy Appellate Panels.²²

¹⁴ *Northern Pipeline Construction Co v Marathon Pipe Line Co*, 458 US 50 (1982).

¹⁵ 28 USC, Section 157 and 1334

¹⁶ If a matter is non-core and not within “related to” jurisdiction, the proper forum for the matter will depend on whether there is another basis for federal court jurisdiction; if not, the matter will have to be resolved in state court.

¹⁷ 28 USC, Section 157(c).

¹⁸ 564 US 462 (2011)

¹⁹ *Executive Benefits Ins Agency v Arkinson*, 134 S. Ct. 2165 (2014)

²⁰ *Wellness Int’l Network, Ltd. v. Sharif*, 135 S Ct 1932 (2015).

²¹ Fed R Bankr P 7008. If this requirement is not complied with, a court may deem the non-compliant party to have consented to its exercise of jurisdiction. See, eg, Delaware Bankruptcy Local Rule 7008-1

²² Guidance Text, Insolvency system of the United States, page 20

Commented [la39]: Correct, 1 mark, this leaves bankruptcy courts able to render final decisions on matters specific to the Bankruptcy Code, such as a challenge to a petition

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If the ruling was in a noncore proceeding the district court or BAP reviews *de novo* all findings of fact and conclusions of law to which a party has objected. The order of both, the district court and BAP is reviewed by a circuit court of appeal *de novo* for abuse of discretion for findings of fact and as regards conclusions of law.²³

Question 3.2 [3 marks]

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What provisions of the Bankruptcy Code automatically apply to the debtor's property within the territorial jurisdiction of the United States upon recognition of a foreign main proceeding? What relief may be granted on a discretionary basis for either foreign main or non-main proceedings?

[Type your answer here]

Certain provisions of the Bankruptcy Code automatically apply to the debtor's property within the territorial jurisdiction of the United States Upon recognition of a foreign main proceeding.

11 USC, Section 1520. Also, upon recognition of either a foreign main or non-main proceeding, the foreign representative is granted the right to intervene in any US state or federal court proceedings to which the debtor is a party.

Sections 361 and 362 apply with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States.²⁴

11 USC, Section 1524, upon the recognition of a foreign proceeding, the foreign representative may intervene in any proceedings in a State or Federal court in the United States in which the debtor is a party.²⁵

11 U.S. Code Section 1523, Upon recognition of a foreign proceeding, the foreign representative has standing in a case concerning the debtor pending under another chapter of this title to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724.

When a foreign proceeding is a foreign non-main proceeding, the court must be satisfied that an action as stated herein above relates to assets that, under United States law, should be administered in the foreign non-main proceeding.

The relief available upon recognition is:

- a) The automatic stay in a chapter 15 proceeding is subject to a carveout to permit the filing of a plenary US bankruptcy proceeding even after the recognition of a foreign proceeding - 11 USC, Section 1520(c)
- b) operation of the debtor's business in the ordinary course by the foreign representative;
- c) sale, transfer or use of property outside the ordinary course;
- d) avoidance of post-petition transfers and post-petition perfection of security

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²³ Guidance Text, Insolvency system of the United States, page 20

²⁴ <https://www.law.cornell.edu/uscode/text/11/1520>

²⁵ <https://www.law.cornell.edu/uscode/text/11/1524>

interest

Upon recognition and on a discretionary basis of a foreign non-main proceeding, any of the above relief may be granted.

Further to the above the following recognition as either foreign main or foreign non-main, relief also may be granted on a discretionary basis as follows in terms of 11 USC, Section 1521:²⁶

- I. authorization of discovery regarding the debtor's assets and affairs;
- II. any other relief "necessary to effectuate the purposes of [chapter 15] and to protect the assets of the debtor or the interests of creditors in terms of 11 USC, Section 1521(a);
- III. entrusting administration of the debtor's US assets to the foreign representative or other persons in terms of 11 USC, Section 1521(b); and
- IV. extension of provisional relief.

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Question 3.3 [4 marks]

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What duties do directors owe to a Delaware corporation in the ordinary course of business? To whom are these duties owed when the corporation is potentially or actually insolvent? What rule protects directors from liability for errors of judgment?

The Delaware General Corporation Law is the statute of the Delaware Code that governs corporate law in the U.S. state of Delaware.

Under common law principles a director owes a duty of confidentiality to their company and must use and or disclose the company's confidential information for the benefit of the company only.

Under Delaware law, directors owe a fiduciary duty to a corporation's shareholders.

A director's fiduciary duty includes both a duty of care and a duty of loyalty. Among other things the duty of care requires that directors keep themselves reasonably informed when making decisions on behalf of the corporation.

The duty of loyalty requires a director to act in good faith and in a manner, it reasonably believes to be in the best interests of the corporation and its shareholders, and to avoid engaging in acts of self-dealing.

Director's duty of loyalty is often implicated in connection with conflicts of interest and corporate opportunities.²⁷

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²⁶ Guidance Text, Insolvency system of the United States, page 64

²⁷<https://bradshawlawgroup.com/duty-of-care-and-duty-of-loyalty-owed-by-directors-in-delaware/>

Directors generally owe duties to the shareholders of a corporation, but not to its creditors. When a company became insolvent, the duties of directors shifted from the company's shareholders to the company's creditors.²⁸

A seminal decision from the Delaware Supreme Court in 2007 changed the landscape regarding the fiduciary duties owed by directors when a company is insolvent or operating in the zone of insolvency.²⁹

In *Gheewalla*, the court held the dismissal of breach of fiduciary claims against the directors of a Delaware corporation asserted by a creditor of the company.

The court first held that when a company is in the zone of insolvency, a creditor does not have standing to assert a direct fiduciary duty claim against a director.

Albeit the court did not squarely address whether creditors can assert derivative fiduciary claims, the reasoning and language of the case strongly suggest that no fiduciary duties, whether direct or derivative, are owed to creditors in the zone of insolvency. And it was in this case concluded that when a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners.

The court thereafter considered the duties of a director when a company is insolvent. The court held, for the first time that a creditor of an insolvent corporation has standing to sue a director for breach of duty in a derivative action on behalf of the corporation. The courts reasoning was that when a company is insolvent, "its creditors take the place of the shareholders as the residual beneficiaries of an increase in value of the corporation. Thereby the corporation's insolvency makes the creditors the primary constituency injured by any fiduciary breaches that diminish the firm's value.

Based on the court's ruling, there are commentators who have suggested that when a company is insolvent the most advisable course of action is for a director to focus on preserving the value of the corporation.³⁰

As long as a court believes that directors are acting rationally and in good faith, it will take no action against them. The Business Judgment Rule is a judicial doctrine arising from United States Courts' respect for corporate self-governance.³¹

The underlying principle of the rule is that the Director of the Company should be allowed to make decisions without fear of prosecution by shareholders who might object. The rule assumes that it is unreasonable to expect managers and or Directors to make optimal decisions at all times.

This doctrine creates a presumption of good faith business judgments of corporate management. This shifts the burden to the Shareholder or affected person to demonstrate that a decision at issue falls into any of the below limits and exceptions.

Question 3.4 [5 marks]

List and describe the requirements that a creditor's claim must fulfill in order to qualify as a petitioning creditor in an involuntary proceeding.

²⁸ *In re Healthco Int'l., Inc.*, 208 B.R. at 300 (upon insolvency "the rights of creditors become paramount.").

²⁹ *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007)

³⁰ Douglas H. Flaum and Shahzeb Lari, *Fiduciary Duties of Distressed Companies*, 241 N.Y. L.J. 65 (2009).

³¹ <https://www.investopedia.com/terms/b/businessjudgmentrule.asp#:~:text=As%20long%20as%20a%20court,respect%20for%20corporate%20self%20governance.>

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Updated: 1.5 marks
Course Leader

[Type your answer here]

An involuntary bankruptcy is commenced by the filing of an involuntary petition by a "petitioning" creditor.³²

The requirements set forth for the creditor to satisfy petition be filed against an individual or business entity, other than "a farmer, family farmer, or a corporation that is not a money business, or commercial corporation" and only under Chapters 7 or 11 of the Bankruptcy Code.

Chapter 7 is the liquidation chapter for individuals and businesses. Chapter 11 is the reorganization chapter of the Bankruptcy Code. Involuntary petitions cannot be filed against not-for profit entities being schools, churches, charitable organizations and foundations are protected from involuntary petitions.³³

A petitioning creditor is qualified to file an involuntary petition if it satisfies the following requirements:

1) it holds a claim against the debtor that:

a) is "not contingent as to liability"

(i) A contingent claim is one that is dependent on the occurrence of a future event. For example, a claim under a surety is typically contingent on the occurrence of a default under the surety obligation.

(ii) A debt that is unmatured due to the payment being due in the future is not contingent if all requirements for liability, unless the passage of time, have occurred.

b) The subject of a *bona fide* dispute as to liability or amount.

(i) A *bona fide* dispute exists if there is an basis for a dispute as a matter of fact or law; the debtor's subjective belief that the debt is not owed or the amount claimed is incorrect and is not sufficient.

(ii) If a portion of the amount claimed is disputed, the creditor cannot use the undisputed portion to reach the monetary threshold as required, but a dispute as to one claim does not disqualify application of other, undisputed claims held by the same creditor to meet petitioning creditor requirements.

c) and equals at least USD 16,750, separately or in the aggregate with all other petitioning creditors claims, in terms of 11 U.S.C. Section 303 (b), this amount increases consideration be given to inflation. Qualified unsecured claims include the undersecured portion of a secured debt.

(2) it demonstrates that the debtor is "generally not paying such debtor's debts as such debts become due"³⁴ unless such debts are the subject of a bona fide dispute as to liability or amount.

An involuntary petition may be filed by a single qualifying creditor (if the debtor has less than 12 qualifying creditors) and three or more qualifying creditors (if a debtor has 12 or more

Commented [la56]: Correct, 1 mark, but this is copied from the course text with the exception of the word surety

Commented [la57]: Correct, 1/2 mark

Commented [la58]: Incorrect, it must *not* be subject of bona fide dispute

Commented [la59]: Correct, 1/2 mark

Commented [la60]: Correct, 1/2 mark

Commented [la61]: Specifically the debt must unsecured or undersecured

Commented [la62]: Correct, 1/2 mark

³² 11 U.S.C. Section303(b)

³³ <https://www.wilkauslander.com/news-and-insights/insights/Involuntary-Bankruptcy-Petition-A-Powerful-Tool-for-Creditors>

³⁴ 11 U.S.C. Section303(h). This requirement is excused if a custodian is appointed within 120 days of the filing of the petition.

creditors). In terms of 11 U.S.C. Section 303(b)(1), (2), When counting qualifying creditors, employees, insiders (related entities) and recipients of transfers that may be recovered under the Bankruptcy Code are not counted.

If the debtor does not answer the petition or seek its dismissal within 21 days after service of the petition or, if there is a trial and the petitioning creditor has satisfied the statutory requirements, then the Bankruptcy Court shall grant and of order relief in terms of the chapter under which the petition was filed which is subject to Bankruptcy Court jurisdiction.³⁵ Creditors can expect debtors subject to involuntary bankruptcy to fight to avoid entry of an order for relief.

The voluntary petition requires no allegation of insolvency, but the involuntary petition form requires the petitioning creditors to allege either that the debtor is generally not paying its debts as they become due, unless they are the subject of the following:-

- a) a *bona fide* dispute as to liability or amount;
- b) that, "within 120 days before the filing of this petition,
 - i) a custodian, other than a trustee, receiver, or an agent appointed
 - ii) or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession."³⁶

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

Commented [la63]: Total marks 2/15

Question 4.1 [5 marks]

Commented [la64]: Total marks 0/5, and the response is copied from multiple sources

Speculation Inc is engaged in day-trading stocks from leased office space with two employees. It funds its trading through a margin loan from its broker, where the shares it purchases are held as collateral. For a while, Speculation Inc was very successful in trading, and the US Department of Justice (DOJ) has announced an investigation into whether its success was due to illegally trading on insider information. More recently, Speculation Inc has had serious trading losses, causing its broker to declare a default on the margin loan. It also has fallen behind on its rent, and been sued by a former employee alleging she was fired due to due to gender bias.

What would be the effect of a Chapter 11 petition being filed by Speculation Inc on each of the (i) DOJ investigation, (ii) margin loan default; (iii) delinquent lease and (iv) employment discrimination lawsuit?

When a company files for Chapter 11 bankruptcy, it is asking for protection from creditors while it reorganizes its business and restructures its debt.

Under Chapter 11, the firm's management oversees daily operations. The company directs significant business decisions (e.g., debt or debt securities decisions) to the bankruptcy court for approval.

³⁵ 11 USC Section303(h); FED. R. BANK. P. 1013(b)

³⁶ Guidance Text, Insolvency system of the United States, page 11

THE ADVANTAGES OF FILING FOR CHAPTER 11³⁷

- Chapter 11 bankruptcy allows businesses to reorganize and restructure debt while receiving protection from creditors.
- Stock values are affected negatively by bankruptcy speculation, and even more so by the actual filing.
- The company's stock will be delisted from the major exchanges, after the filing for Chapter 11,
- Common shareholders are last in line to recover their investments, behind bondholders and preferred shareholders.
- As a result, shareholders may receive cents on the dollar, if not anything.
- Obtaining Chapter 11 bankruptcy protection means that a company is on the verge of needing to cease operations, but believes that it has a reasonable chance become successful once again if given an opportunity to reorganize its business affairs, assets and debts.
- Albeit the Chapter 11 reorganization process is complex and expensive, most companies prefer Chapter 11 to Chapter 7, under which companies totally cease operations and leads to the total liquidation of assets to creditors. Filing for Chapter 11 gives companies another chance to do a turnaround and bring the company back into business.

The biggest advantage is that the a business, can continue operations while going through the reorganization process. This allows it to generate cash flow that can aid in the repayment process. The court also issues an order that keeps creditors at bay. Majority of creditors are amenable to Chapter 11 as they stand to recover more, or 100 percent of their money over the course of the repayment plan rather than if the company simply went into liquidation.

The disadvantage of Chapter 11 bankruptcy is that it is complex and expensive. For a company that is struggling and may consider bankruptcy the legal costs alone might be onerous. Further the reorganization plan has to be approved by the bankruptcy court and must be manageable enough that the business can reasonably pay off the debt over the period approve.

Most importantly Chapter 11 can allow a business that is experiencing serious financial difficulties to regroup and get back on track therefore the company must consider Chapter 11 reorganization after detailed analysis ensuring that the reorganization is viable and workable or exploration of other possible alternatives.

The effect of the Chapter 11 filing on the DOJ investigation

The United States Trustee Program is the component of the Department of Justice that works to protect the integrity of the bankruptcy system by overseeing case administration and litigating to enforce the bankruptcy laws.

The duties of the U.S. Trustee in a Chapter 11 bankruptcy case are set forth in 28 U.S.C. Section 586.

When filing a voluntary petition for relief under chapter 11, a written disclosure statement together a plan of reorganization must be filed with the court. The disclosure statement contains information concerning the assets, liabilities, and business affairs of the debtor sufficient to enable a creditor to make an informed judgment about the debtor's plan of reorganization. The information that is required is governed by judicial discretion and based on the circumstances of each case.

In terms of Section 1104(a) "at any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or

³⁷ <https://www.investopedia.com/ask/answers/10/stock-holder-lose-equity-chapter-11.asp#:~:text=After%20filing%20for%20Chapter%2011,dollar%2C%20if%20anything%20at%20all.>

Commented [la65]: This is an erroneous description of the automatic stay, which comes into effect as a matter of law on filing of the petition

Commented [la66]: The US Trustee program is not relevant here

similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.”³⁸

Should the trustee find that there was illegal trading on insider information the trustee can pursue civil (non-criminal) penalties, and refer cases of apparent criminal fraud to the U.S. Attorney for investigation and criminal prosecution.³⁹

The effect on (ii) margin loan default

A margin loan allows you to borrow against the value of securities you already own. It's an interest-bearing loan that can be used to gain access to funds that cover both investment and non-investment needs. It is the difference between the amount of money borrowed from the brokerage firm and the total worth of the securities being held by an investor in its investment account. Margin is majorly used to gain and generate high leverage that has the ability to increase both profit and losses.

Margin trading is the method of using an individual's asset to acquire a loan from a broker. Thereafter the money obtained is used in the form of trades.

The investor must open a margin account to buy on margin and make a small initial investment. This sum acts as the leverage, and it is called the minimum margin. The sum amount invested in the trade is referred to as the initial margin, and the amount of money kept in the margin account is referred to as the maintenance margin. If the sum amount falls below the value, the broker will call to either deposit more money or pay back all the loan by using the leftover funds or liquidating investment in a practice known as a margin call.

After filing for Chapter 11:

- the company's stock will be delisted from the major exchanges;
- Common stock shareholders are last in line to recover their investments, behind bondholders and preferred shareholders. As a result, shareholders may receive minimum to the dollar, if anything at all.
- over-the-counter (OTC) trading may still occur.
- The value of the stock may determine the risk whether the company's chapter 11 becomes a chapter 7.

This value is composed of the potential income that shareholders may receive after liquidation and the possibility that the firm may restructure and begin to operate successfully in the future.⁴⁰

What is the effect (iii) delinquent lease

Upon a tenant filing a Chapter 11 bankruptcy case and becomes a debtor-in-possession, it has the option of assuming and perhaps assigning or rejecting its unexpired lease. If a lease is assumed, the lease continues in full force and effect, and any defaults by the debtor must be settled and damages compensated.

If the debtor tenant also assigns the lease, the landlord would acquire a new tenant. Where an unexpired lease is deemed rejected, the Bankruptcy Code provides that the debtor tenant shall surrender the premises and the landlord shall have a claim for rejection and other damages, and further a possible claim for post-petition rent. In negotiating the terms of a lease, a landlord should therefore try to maximize the debtor tenant's obligations to settle any rental payment defaults under an assumption. The landlord should also try to maximize its claim under a rejection.⁴¹

What is the effect on employment discrimination lawsuit

³⁸ www.govinfo.gov/content/pkg/USCODE-2021-title11/pdf/USCODE-2021-title11-chap11-subchap1-sec1104.

³⁹ <https://www.justice.gov/ust/bankruptcy-fact-sheets/us-trustees-role-chapter-11-bankruptcy-cases>

⁴⁰ <https://www.nirmalbang.com/knowledge-center/margin-vs-leverage-trading.html#:~:text=The%20sum%20amount%20invested%20by,increase%20both%20profit%20and%20losses.>

⁴¹ <https://www.blankrome.com/publications/bankruptcy-risks-landlord-when-tenant-files-bankruptcy-case#:~:text=Once%20a%20tenant%20enters%20a,be%20cured%20and%20damages%20compensated.>

Commented [la67]: The US trustee would have no role in investigating pre-bankruptcy fraud. The DOJ Fraud section would continue to investigation due to an exception to the automatic stay.

Commented [la68]: This is irrelevant as the shares securing the margin loan are not shares in the debtor--it is an investment company. The margin loan is a securities contract exempt from the automatic stay so the broker may liquidate the collateral.

Commented [la69]: The automatic stay would bar the landlord from commencing proceedings for unpaid rent or eviction.

Commented [la70]: The lawsuit would be stayed by the automatic stay.

A plaintiff in an employment case is a creditor of the defendant employer, because under the Bankruptcy Code, a claim that arose against the debtor at the time of or before the filing of the bankruptcy petition is a creditor. The Bankruptcy Code does provide mechanisms for creditors to maximize their claims against the debtor.

The purpose of a bankruptcy petition, even a Chapter 11 reorganization is to relieve the debtor of all debts that existed prior to the bankruptcy filing and give the debtor a "fresh start."

A corporate entity that initiates a debt reorganization process through the bankruptcy court has little incentive to pay debts incurred before the bankruptcy is filed, especially unliquidated, unsecured debt, such as a plaintiff's employment claim. The filing triggers an automatic stay of all litigation.

In order to improve your chances of obtaining a recovery against a bankrupt company one can;

- file a proof of claim, contact the debtor's counsel and/or the trustee;
- Seek relief from the automatic stay to liquidate the claim;
- vote on the plan of reorganization; and
- participate on the unsecured creditors committee.

Bankruptcy is about negotiated resolutions. File a nondischargeable complaint in the bankruptcy court.

Further and particular to the above case the U S Employment Opportunity Commission (EEOC's) or any state human rights commission, if informed undertakes action against the employer/debtor for a public purpose (other than a private litigant's individual charge of discrimination), the automatic stay does not apply to such proceedings.⁴²

Question 4.2 [5 marks]

Commented [la71]: Total marks 1/5

Stella SA (Stella) is a an international cosmetics company incorporated in France, with its headquarters in Paris. Stella's products are made in Italy and shipped to its retail stores in Europe (including England), Asia, and North America. Stella's funding comes from a bank loan and Eurobonds, both of which are governed by English law. Stella's retail sales have suffered due to pandemic-related closures and it is considering options to restructure its debt. One option is to use an English scheme of arrangement with respect to the Eurobonds. Could the English scheme of arrangement be recognized by a US bankruptcy court under Chapter 15, and would such recognition be as a foreign main or non-main proceeding?

Schemes of arrangement is basically any court-approved arrangement between a company, its shareholders, and its creditors when it experience financial difficulties which is executed under English company law. A creditor, shareholder, or appointed insolvency practitioner can apply to the court to initiate a scheme of arrangement. A company's key stakeholders can use schemes of arrangement to restructure or reorder the company's obligations to its creditors and shareholders. Provided 75% of each creditor class agrees to the plan's terms,

⁴² <https://gitteslaw.com/employee-rights/employer-bankruptcy-lawsuits/>

the court has the power to make the arrangement legally binding. Companies and their creditors use schemes of arrangement to avoid the company becoming insolvent.⁴³

Prior to sanctioning a scheme of arrangement, the English court will need to be persuaded that there is a sufficient connection to England and Wales in order to accept jurisdiction.

There are 2 jurisdictional questions frequently arise in respect of schemes of arrangement.

1. Whether the court is satisfied that the company proposing the scheme is a company "liable to be wound up under the Insolvency Act 1986". For overseas companies with separate legal personality and limited liability for their members, this is not a difficult test to satisfy.
2. Whether there are any limits or restrictions as a matter of EU law on the English court's jurisdiction in a scheme. The court must consider whether the EU Insolvency Regulation 2 or the EU Judgments Regulation 3 would limit the ability of the English court to exercise its jurisdiction in respect of the scheme company.

Chapter 15 was primarily designed to promote the fair and efficient administration of cross-border insolvencies; however, it can be used to recognize foreign proceedings under not only insolvency laws but also laws (such as schemes of arrangement) relating to the adjustment of debts.⁴⁴

In terms of Chapter 11 U.S.C. Section 1516(c) a debtor's COMI is presumed to be the location of the debtor's registered office. Stella's company was incorporated in France.

Commented [la72]: Correct, 1 mark

Chapter 15 in the U.S. Bankruptcy Code was added in 2005 to provide for cooperation between U.S. courts and foreign courts when foreign bankruptcy proceedings touch upon U.S. financial interests. It has been designed to be in line with the 1997 UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"), which has been enacted in some form by more than 50 countries. The stated purpose of Chapter 15's is "to provide effective mechanisms for dealing with cases of cross-border insolvency" with the objective of, among other things, cooperation between U.S. and non-U.S. courts.⁴⁵

Subject to the company meeting the requirements of scheme of arrangement, the US Courts will consider the application.

This relief will include an automatic stay within the territorial jurisdiction of the US. It the type of recognition granted by the recognising court under the UNCITRAL Model Law will depend on whether the originating proceedings are 'foreign main' or 'foreign non-main' proceedings, which in turn hinges on the centre of main interests (COMI) of the insolvent entity.

⁴³ <https://legalvision.co.uk/corporations/scheme-of-arrangement/#:~:text=Schemes%20of%20arrangement%20refer%20to,to%20its%20creditors%20and%20shareholders.>

⁴⁴ <https://www.clearygottlieb.com/-/media/files/alert-memos-2018/english-schemes-of-arrangement-points-to-note-from-a-recent-example.pdf>

⁴⁵ <https://www.jonesday.com/en/insights/2022/05/florida-district-court-foreign-debtor-need-not-have-us-residence-assets-or-place-of-business-to-be-eligible-for-chapter>

Under section 1515 of the Bankruptcy Code, the representative of a foreign debtor may file a petition in a U.S. bankruptcy court seeking "recognition" of a "foreign proceeding."⁴⁶

The basic requirements for recognition under chapter 15 are outlined in section 1517(a), namely:

- (ii) the proceeding must be "a foreign main proceeding or foreign nonmain proceeding" within the meaning of section 1502;
- (iii) (ii) the "foreign representative" applying for recognition must be a "person or body"; and
- (iv) (iii) the petition must satisfy the requirements of section 1515, including that it be supported by the documentary evidence specified in section 1515(b).

"Foreign proceeding" is defined in section 101(23) of the Bankruptcy Code as:

*"A collective judicial or administrative proceeding in a foreign country, including an interim proceeding, 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."*⁴⁷

Chapter 15 contemplates recognition in the United States of both a foreign "main" proceeding—a case pending in the country where the debtor's center of main interests ("COMI") is located⁴⁸. Should the English court grant the Scheme of arrangement based on the jurisdictional requirements on COMI, subject to the company meeting the requirements of scheme of arrangement in the English Court, the US Courts will consider the application. that would be the foreign main proceeding and in light of Stella having retail stores in North America and therefore it may be recognised as a foreign non main proceeding.

Commented [la73]: Incorrect, the English court's view of COMI or sufficient connection for English law to apply is irrelevant to the US Court's analysis of COMI. On these facts, the presumption in favor of France is unlikely to be rebutted.

Commented [la74]: Incorrect, the relevant establishment is the one in England where the foreign proceedings are pending

Question 4.3 [5 marks]

Commented [la75]: Total marks 1/5

ToyCo is an American toy company that has created a popular line of folding robot toys called Xblox. The toys are covered by several US patents. Currently, GameMart Inc (GameMart) has a 10-year exclusive license to manufacture Xblox and pays ToyCo monthly royalties. GameMart operates a factory in California that it leases from Land Corp on a longer term lease with seven years to go; the lease prohibits assignment without Land Corp's consent. The Xblox toys are selling well, but GameMart's other toy lines are doing poorly, so it is considering a Chapter 11 bankruptcy. Answer the following questions:

- (i) ***Is the license to manufacture Xblox an executory contract?***

⁴⁶ United States Bankruptcy Code

⁴⁷ The Bankruptcy Code

⁴⁸ (11 U.S.C. § 1502(4))—and foreign "nonmain" proceedings, which may be pending in countries where the debtor merely has an "establishment" (11 U.S.C. § 1502(5))

An executory contract (written agreements that ensure each party is clear about their own and the other's responsibilities. is an ongoing agreement) between two parties who are responsible for completing certain obligations over a set period of time.

Unexpired license agreements are regarded as executory contracts, which may be assumed or rejected by the bankrupt debtor, as the licensor or licensee, under the U.S. Bankruptcy Code.

In the most common formulation, the "Countryman test" because it derives from an influential law review article by Professor VernCountryman,⁴⁹ a contract is said to be executory if there are material unperformed obligations on both sides.

GamesMart has a 10 Year exclusive license to manufacture Xbox and pay royalties to ToyCo on a monthly basis which is complies with being an executory contract.

Commented [la76]: Correct, 1 mark

(ii) **Can GameMart transfer the Xbox license as part of 363 sale without ToyCo's consent? Why or why not?**

Commented [la77]: It cannot because intellectual property law requires ToyCo to consent to the transfer of a license

[Type your answer here]

The advantage of using chapter 11, as compared to chapter 7, for this process is that the purchase price is likely to be higher because of the ability to continue operating the business during the bankruptcy proceedings. Both the debtor and potential purchasers may also prefer a 363 sale over an out-of-court sale because the bankruptcy sale is free and clear of creditor interests⁵⁰ and a good faith purchaser may retain the property notwithstanding a subsequent reversal of court approval for the sale on appeal.⁵¹ The debtor can transfer its interests in key contracts that are required to operate the business (eg supply and employment contracts), even where they contain contractual restrictions on assignment or purport to terminate upon a bankruptcy filing.⁵²

Commented [la78]: This is copied from the course text.

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.⁵³

Commented [la79]: This is not relevant because the debtor is the licensee, not the owner of the patents

A debtor in possession is free to use, sell or lease estate property in "the ordinary course of business". Court decisions have developed a two-prong test that considers a particular transaction is in the ordinary course only if both prongs of the test are met:-

1. the "vertical dimension" being the expectations of a hypothetical creditor of the debtor
2. the "horizontal dimension" on how business is conducted by other businesses similar to the debtor.⁵⁴

A debtor in possession must establish that it is proposing the transaction in its business judgment (as it owes a fiduciary duty to consider the interests of creditors) and that the transaction is in the best interests of the estate as a whole. The UCC will usually be closely involved in scrutinizing proposed transactions and is authorized to retain financial advisors at the estate's expense to assist it.

⁴⁹ Guidance Text, Insolvency system of the United States, Page 30

⁵⁰ 11 USC, Section 363(f)

⁵¹ 11 USC Section 363(m)

⁵² 11 USC Section 365(c) and (e).

⁵³ 11 USC Section 365(n).

⁵⁴ *In re Dant & Russell, Inc*, 853 F.2d 700 (9th Cir 1988).

(iii) Can GameMart transfer the factory lease as part of 363 sale without Land Corp's consent? Why or why not?

[Type your answer here]

In a chapter 11 case, the debtor has until the confirmation of its plan of reorganization to make this election about assumption and assignment or rejection of executory contracts, but a deadline can be imposed by the bankruptcy court on the request of a counterparty for cause. One exception is that decisions about unexpired leases of non-residential property are required to be made within 120 days of the order for relief. In terms 11 USC, Section 365(d)(4), this period can be extended to 90 days for cause, any subsequent extension requires the consent of the lessor, giving landlords of commercial premises substantial leverage.

- Assume and assign the contract – To assume a contract, the debtor must cure defaults and give the counterparty sufficient assurances of its future performance.⁵⁵ Thereafter transfer the debtor's rights under the contract to a third party. Such transferee must give the counterparty adequate assurances of future performance.⁵⁶

The lease of office space is assignable without consent, notwithstanding the landlord approval provision therefore GameMart will require Land Corps consent to proceed and the purchaser to provide adequate assurances for future performance.

The ability to assume, reject or assume and assign executory contracts is another debtor-friendly feature of Bankruptcy Code section 365.

Commentary and Feedback on Self-Assessment Exercise 9

*** End of Assessment ***

In a Chapter 11 bankruptcy proceeding, if a company or individual filer (the "debtor") is unable to pay its creditors in full, the absolute priority rule bars owners from retaining their interests unless the owners contribute "new value" to the business

Commented [la80]: Here you say both assignable without consent and that consent is required. The correct answer is that consent is not required because the Bankruptcy Code abrogates contractual restrictions on assignment

Commented [INS 181]: This does not make sense here, and suggests copy and paste, once again.
Course Leader

Commented [INS 182]: This does not make sense here, and suggests copy and paste, once again.
Course Leader

⁵⁵ 11 USC Section 365(b)(1).

⁵⁶ 11 USC Section 365(f).