

TOTAL = 41.5/50
83%



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 2024. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2024. 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 2024 or by 23:00 (11 pm) BST (GMT +1) on 31 July 2024. If you elect to submit by 1 March 2024, you may not**

submit the assessment again by 31 July 2024 (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

Car Corp, incorporated and headquartered in Michigan, owes Parts Inc, incorporated and headquartered in Mexico, USD 10,000 on a past-due invoice for components used to build Car Corp vehicles. May Parts Inc file an involuntary petition to place Car Corp into chapter 11 bankruptcy proceedings?

(a) Yes, regardless of the circumstances.

(b) Yes, if Car Corp has fewer than 12 non-contingent, non-insider creditors.

(c) Yes, if other creditors owed at least USD 5,775 join in the petition.

(d) No, because Parts Inc does not know whether Car Corp is insolvent.

(e) No, because Parts Inc is not a US company.

Question 1.2

Answer this question with reference to the set of facts set out in question 1.1 above: Which of the following is likely to be a party in interest in the bankruptcy of Car Corp?

(a) A shareholder in Parts Inc, to which Car Corp is indebted.

(b) A journalist writing about Car Corp's bankruptcy.

(c) A shareholder in Investment Corp, Car Corp's parent company.

Commented [FV1]: 0, correct answer is C

Commented [FV2]: 1, correct

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

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

Question 1.3

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) Options (a) to (c) above satisfy the minimum requirement for presence in the United States.

Commented [FV3]: 1, correct

(e) None of the above (options (a) to (d)) satisfy the minimum requirement for presence in the United States.

Question 1.4

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

(a) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.

(b) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.

Commented [FV4]: 1, correct

(c) An insolvency professional appointed by the court overseeing the foreign proceeding.

(d) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.

(e) All of the above.

Question 1.5

Which of the following regarding executory contracts is false?

(a) *A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.*

(b) Executory contracts are clearly defined by the Bankruptcy Code.

Commented [FV5]: 1, correct

(c) *In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.*

(d) *Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign 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 1.6

Which of the following is not a requirement to confirm a "cramdown" plan?

(a) *That the plan is fair and equitable to dissenting classes of creditors.*

(b) *Acceptance of the plan by at least one class of impaired, non-insider creditors.*

Commented [FV6]: 1, correct

(c) Acceptance of the plan by all classes of secured creditors.

(d) *That the plan does not discriminate unfairly against dissenting classes of creditors.*

(e) *That the dissenting creditors receive no less than they would under a liquidation scenario.*

Question 1.7

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.*

Commented [FV7]: 1, correct

(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 1.8

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

- (a) The manufacturer has a claim for damages for breach of contract.*
- (b) The manufacturer must immediately stop using the trademark.*
- (c) The manufacturer can continue using the trademark for the remaining period of the license.*
- (d) Both options (a) and (b).*

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

Commented [FV8]: 1, correct

Question 1.9

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.

Commented [FV9]: 0, correct answer is C

Question 1.10

Which of the following regarding substantive consolidation is true?

- (a) It respects the boundaries of corporate separateness.
- (b) If a creditor can show it extended credit on the basis of corporate separateness, it has a valid objection to substantive consolidation.
- (c) It is the treatment of two or more creditors as a single creditor to simplify the claims process.
- (d) Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.
- (e) Authority for substantive consolidation comes from the Bankruptcy Code.

Commented [FV10]: 1, correct

QUESTION 2 (direct questions) [10 marks]

Question 2.1 (1 mark)

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

A creditor may have a claim against a debtor and at the same time owe money to the debtor. Setoff is the process where the creditor can net out the two (or more) obligations¹. Setoff will reduce the obligation to the estate by the full amount which is owed by the debtor and not by the lesser amount the debtor would have paid on the unsecured claim². Setoff reduces or even extinguishes the amount of the debtor's claim. Setoff is not permitted in many circumstances because setoff rights can improve a creditor's position vis-a-vis other unsecured creditors who are not owed any money by a debtor.

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Question 2.2 [2 marks]

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

In the US, the estate pays on an ongoing basis for a debtor's post-petition business expenses and various other costs, including its lawyers and advisors³. In order to try and maximise the chances of a successful reorganisation, the Bankruptcy Code provides lenders and counterparties in the US incentives to extend credit to a debtor. This is known as debtor in possession (DIP) financing⁴. There are several ways in which the estate may obtain credit, especially if the estate has substantial unencumbered assets. If financing cannot be obtained,

Commented [FV12]: 2, correct

¹ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 59

² Ibid.

³ Ibid., p 29

⁴ Ibid.

the court may grant a "priming lien". This is a lien which is "senior or equal to a pre-petition lien on estate property to secure post-petition financing."⁵ It should be noted that a priming lien "is only available as a last resort when the debtor is unable to obtain any other type of financing"⁶. It is a requirement for the debtor to demonstrate that the interests of the secured creditor who is being primed are adequately protected.⁷

Question 2.3 [2 marks]

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

The automatic stay is effective immediately on the filing of any plenary petition.⁸ The automatic stay puts all creditors on an even footing and prevents multiple claims being issued that would otherwise occur in the absence of any bankruptcy rules. The automatic stay protects the debtor by providing them with "breathing space"⁹ from creditors, as well as protects creditors from each other.¹⁰ There are consequences of a violation of the automatic stay. Two potential consequences of a violation of the automatic stay are:

- 1) Debtor action against violator of automatic stay – if a creditor were to willfully violate the automatic stay and such a violation injures the debtor, the debtor may be permitted to recover legal fees incurred in stopping the violation of the automatic stay and litigating a claim for damages for such violation¹¹; and
- 2) Contempt of court - an act which is taken that violates the automatic stay, even when taken without any notice of the petition being filed, will constitute contempt of court and is void or voidable (this is dependent on the circuit where the bankruptcy is pending)¹².

It should be noted that parties in interest may apply "to lift the stay prospectively to permit or retroactively to validate an act that would otherwise be a stay violation"¹³.

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Question 2.4 [2 marks]

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

Classes of claims or interests held by creditors are the basis of voting on a plan of reorganisation¹⁴. Classes are either impaired or unimpaired. Section 1124 of Title 11 of the United States Code provides that a class of creditors is impaired under a plan unless the plan "leaves unaltered the legal, equitable, and contractual rights"¹⁵ to which each creditor in the class is entitled or cures any default that occurred (with limited exceptions)¹⁶, "reinstates the

⁵ Ibid., p 30

⁶ Practical Law, "Priming Lien", [https://content.next.westlaw.com/practical-law/document/lbb09e9a3ef0511e28578f7ccc38dcbee/Priming-Lien?viewType=FullText&transitionType=Default&contextData=\(sc.Default\)](https://content.next.westlaw.com/practical-law/document/lbb09e9a3ef0511e28578f7ccc38dcbee/Priming-Lien?viewType=FullText&transitionType=Default&contextData=(sc.Default)), accessed on 10 February 2024

⁷ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 30

⁸ Ibid., p 22

⁹ Professor John D. Ayer, Michael Bernstein and Jonathan Friedland, "An Overview of the Automatic Stay" (2004) American Bankruptcy Institute Journal 22

¹⁰ Ibid.

¹¹ American Bar Association, "The Automatic Stay in Bankruptcy: An Overview" (reprinted from Thomson Reuters Practical Law Bankruptcy & Restructuring and Practical Law Finance, 2022), https://www.americanbar.org/groups/qpsolo/publications/qpsolo_ereport/2022/september-2022/automatic-stay-bankruptcy-overview/, accessed on 10 February 2024

¹² Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 22

¹³ Ibid., p 22-23

¹⁴ Ibid., p 38

¹⁵ Title 11 of the United States Code, section 1124(1)

¹⁶ Ibid., section 1124(2)(A)

maturity of such claim or interest"¹⁷ and compensates each creditor in the class for resulting losses¹⁸.

Deemed acceptance of plan

In a vote on a plan of reorganisation, the class of creditors who are deemed to have accepted the plan are the holders of unimpaired claims, i.e. the unimpaired classes¹⁹. Section 1126(f) states clearly that each holder of a claim or interest of a class that is unimpaired under a plan of reorganisation "are conclusively presumed to have accepted the plan, and solicitation of acceptances with respect to such class...is not required. [emphasis added]"²⁰

Deemed rejection of plan

The class of creditors who are deemed to reject the plan of reorganisation are the class(es) that will receive nothing. Section 1126(g) states that "a class is deemed not to have accepted a plan if such plan provides that the claims or interests of such class do not entitle the holders of such claims or interests to receive or retain any property under the plan...[emphasis added]"²¹

Class permitted to vote on plan

The class of creditors who are permitted to vote on a plan of reorganisation are the impaired classes. In light of this, the distinction between impaired and unimpaired class of creditors becomes "important because only impaired classes have the ability to vote to accept or reject a plan."²² The balance of decision-making power therefore lies in the impaired classes, i.e. the class who have the most to gain or lose on the planned reorganisation²³.

Voting

The vote necessary for a class of creditors to accept a plan of reorganisation is set out in section 1126(c) and section 1126(d). Under section 1126(c), an entire class of creditors has accepted a plan of restructuring if the plan has been voted in favour of by creditors in the class who hold at least two-thirds in amount and more than one-half in number of the allowed claims in such class²⁴. In terms of equity interests, pursuant to section 1126(d), a class of interests will have accepted a plan if such plan has been accepted by at least two-thirds of holders in the amount of interests of such class²⁵.

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Question 2.5 [3 marks]

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

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

¹⁷ Ibid., section 1124(2)(B)

¹⁸ Ibid., section 1124(2)(D)

¹⁹ Ibid., section 1126(f)

²⁰ Ibid.

²¹ Ibid., section 1126(g)

²² Jones Day, Business Restructuring Review, "Unimpaired Unsecured Creditors in Solvent-Debtor Chapter 11 Case Entitled to Postpetition Interest, Presumably at Contract or Default Rate" (2022), <https://www.jonesday.com/en/insights/2022/12/unimpaired-unsecured-creditors-in-solventdebtor-chapter-11-case-entitled-to-postpetition-interest-presumably-at-contract>, accessed on 13 February 2024

²³ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 41

²⁴ Title 11 of the United States Code, section 1126(c)

²⁵ Ibid., section 1126(d)

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

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

(a) A preference claim is the cause of action which applies only to transfers made on account of antecedent debt. A preference is when there is a transfer of a debtor's property during a suspect period before the filing of the petition that must be returned to the estate in the event that it exceeds the amount the recipient would have received in a chapter 7 liquidation²⁶ had such a transfer not occurred²⁷. The various elements of a preference claim are set out in section 547(b) of Title 11 of the United States Code. The elements include a transfer of an interest of the debtor in property:

- 1) "*to or for the benefit of a creditor*"²⁸ - such a transfer could be of funds, property or an interest in property²⁹. The recipient must be a creditor of a debtor prior to the transfer in question, otherwise such transfer cannot constitute a preference³⁰; and
- 2) "*for or on account of an antecedent debt owed by the debtor before such transfer was made* [emphasis added]"³¹ - a preference claim is only available if the debtor is paying a creditor for a pre-existing debt (so a contemporaneous exchange of value will not constitute a preference)³². Further, a preference claim does not arise in the situation where there is a prepayment for goods and services because debt (if any) does not arise until the debtor receives the product³³.

(b) Constructive fraudulent conveyance is the cause of action which 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 in question "*received less than a reasonably equivalent value in exchange for such transfer or obligation*"³⁴ and any one of the conditions in section 548(a)(1)(B)(ii) are met. One of the conditions in section 548(a)(1)(B)(ii) is that the debtor "*was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation* [emphasis added]"³⁵.

(c) Actual fraudulent conveyance is the cause of action which requires that the debtor be proven to have intended to frustrate creditors' recoveries. Section 548(a)(1)(A) states that actual fraudulent conveyance is proven by showing that the debtor had made the transfer (or incurred the obligation) "*with actual intent to hinder, delay, or defraud any entity to which the debtor was or became...indebted* [emphasis added]"³⁶. Such transfer includes transfers which are "*made in anticipation of any money judgment, settlement, civil penalty, equitable order, or criminal fine incurred by, or which the debtor believed would be incurred by...any violation of the securities laws*³⁷...or fraud, deceit, or manipulation in a fiduciary capacity or in connection with the purchase or sale of any

²⁶ Ibid., section 547(b)(5)(A)

²⁷ Ibid., section 547(b)(5)(B)

²⁸ Ibid., section 547(b)(1)

²⁹ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 51

³⁰ Ibid., p 52

³¹ Title 11 of the United States Code, section 547(b)(2)

³² Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 52

³³ Ibid.

³⁴ Title 11 of the United States Code, section 548(a)(1)(B)(i)

³⁵ Ibid., section 548(a)(1)(B)(ii)(I)

³⁶ Ibid., section 548(a)(1)(A)

³⁷ Ibid., section 548(e)(2)(A)

Commented [FV15]: 2, the answer to be is also preference.

security...³⁸. The threshold of intent may be proven circumstantially³⁹ with references to "badges of fraud". "Badges of fraud" are a list of circumstantial factors that a court may use to infer fraudulent intent (a court will normally infer fraud by considering circumstantial evidence as direct evidence of fraud is rare)⁴⁰. These factors include: before the transfer or obligation in question, the debtor had been sued (or threatened with legal action), the transfer in question was of substantially of the debtor's assets and the debtor was insolvent (or became insolvent shortly after the transfer was made or obligation was incurred)⁴¹.

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

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Question 3.1 [3 marks]

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Describe the circumstances in which a bankruptcy court may enter a final order consistent with the US Constitution, who reviews appeals from bankruptcy court orders and how orders that are not constitutionally final are reviewed.

Background to jurisdiction of bankruptcy courts

Federal judicial power is set out in section 1 of Article III of the US Constitution ("Article III"). These judges hold office during good behaviour and receive compensation that will not be reduced whilst in office.⁴² Bankruptcy judges are not Article III judges – bankruptcy courts are created by legislation.⁴³ Due to the nature of how bankruptcy courts are established, they have a limited jurisdiction to enter final orders, other than on core bankruptcy issues.⁴⁴

Section 1334(a) of Title 28 of the United States Code states that "*the district courts shall have original and exclusive jurisdiction of all cases under title 11*"⁴⁵. Each district court may (but need not) refer a matter under Title 11 of the United States Code to the bankruptcy judges of that district.⁴⁶

"Core" and "non-core" proceedings

Section 157 makes a distinction between "core" and "non-core" proceedings⁴⁷ and provides that bankruptcy judges "*may hear and determine all cases under title 11 and all core proceedings...and may enter appropriate orders and judgments* [emphasis added]"⁴⁸. Section 157 further provides a non-exhaustive list of core proceedings, which include matters concerning the administration of the estate.⁴⁹ The bankruptcy court's jurisdiction to determine core proceedings can be contrasted with its jurisdiction to determine non-core proceedings. The bankruptcy court can hear non-core proceedings where it is related to a bankruptcy

³⁸ Ibid., section 548(e)(2)(B)

³⁹ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 57

⁴⁰ *Ritchie Capital Management, LLC v. Stoebner* 779 F.3d 857 (8th Cir. 2015) at 863

⁴¹ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 57-58

⁴² Samuel Henninger, "Bankruptcy Courts and the Constitution" (2020), https://www.americanbar.org/groups/business_law/resources/business-law-today/2020-december/bankruptcy-courts-and-the-constitution/, accessed on 11 February 2024

⁴³ United States Constitution, section 8 of Article I

⁴⁴ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 6

⁴⁵ Title 28 of the United States Code, section 1334(a)

⁴⁶ Ibid., section 157(a)

⁴⁷ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 17

⁴⁸ Title 28 of the United States Code, section 157(b)(1)

⁴⁹ Ibid., section 157(b)(2)(A)

proceeding⁵⁰. However, the bankruptcy court does not have jurisdiction to determine non-core proceedings. Instead, the bankruptcy judge shall submit their proposed findings of fact and conclusions of law to the district court. The district judge shall enter any final order upon consideration of the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has objected to⁵¹.

US Supreme Court ("Supreme Court") decisions

Notwithstanding the above, *Stern v Marshall*⁵² held that, even in core proceedings, a bankruptcy court did not have jurisdiction to issue a final order that would infringe on Article III's jurisdiction⁵³. The Supreme Court ruled, 5-4, that a bankruptcy judge did not have constitutional authority "to issue a final ruling on state law counterclaims by a debtor against a claimant".⁵⁴ Even though *Stern* held that Article III prohibited Congress from vesting bankruptcy judges with authority to finally adjudicate certain claims categorised as "core", it did not address how the bankruptcy courts should proceed in this situation.

In 2014, *Executive Benefits Ins Agency v. Arkison*⁵⁵ partially resolved the procedural uncertainty created in *Stern*. The Supreme Court (with Justice Thomas delivering the court's opinion) held in *Executive Benefits* that where the bankruptcy court is not permitted by Article III to enter final judgment on a core bankruptcy claim, the bankruptcy court may issue proposed findings and conclusions which are to be reviewed *de novo* by a district court⁵⁶ (i.e. deal with such claims as they would in "non-core" proceedings). However, the Supreme Court did not address whether Article III permitted a bankruptcy court (with the consent of the parties) to enter final judgment when it could not do so in the absence of consent⁵⁷.

Consent for bankruptcy court to adjudicate claim normally reserved by an Article III court

It was held by the Supreme Court in *Wellness International Network Ltd v Sharif*⁵⁸ that so long as the parties knowingly and voluntarily consented, Article III allowed bankruptcy courts to adjudicate claims normally reserved by an Article III court. As Congress created the bankruptcy courts (with limited purpose and limited powers), there is no separation of powers problem with the bankruptcy courts exercising the powers which Congress delegated to them (including adjudicating non-bankruptcy claims if the parties consent to it)⁵⁹. It was also further held that judicial history relating to the right of an Article III judge clearly states that such a right could be waived. A bankruptcy judge could therefore adjudicate the state law at issue so long as Article III courts retained supervision⁶⁰. Nothing in the US Constitution required an express waiver - so long as the litigant was aware of the right to an Article III judge, the litigant proceeding voluntarily with a case before a non-Article III judge would constitute a waiver⁶¹. In *Wellness*, the Supreme Court's "breezy pragmatism skirted several rigid, formalist approaches

⁵⁰ *Ibid.*, section 157(c)(1)

⁵¹ *Ibid.*

⁵² 564 US 462 (2011)

⁵³ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 18

⁵⁴ Cadwalader, Wickersham & Taft LLP, "Stern v. Marshall: How Big Is It?" (2011), <https://www.cadwalader.com/resources/clients-friends-memos/stern-v-marshall-how-big-is-it>, accessed on 12 February 2024

⁵⁵ 134 S. Ct. 2165 (2014)

⁵⁶ Faegre Drinker Biddle & Reath LLP, "Supreme Court Decides *Executive Benefits Insurance Agency v. Arkison*" (2014), <https://www.faegredrinker.com/en/insights/publications/2014/6/supreme-court-decides-executive-benefits-insurance-agency-v-arkison>, accessed on 13 February 2024

⁵⁷ Paul Hessler, Aaron Javian and Robert Trust, Columbia Law School, The CLS Blue Sky Blog, "Linklaters discusses Supreme Court's Ruling in *Executive Benefits Insurance Agency v. Arkison*" (2014), <https://clsbluesky.law.columbia.edu/2014/07/11/linklaters-discusses-supreme-courts-ruling-in-executive-benefits-ins-agency-v-arkison/>, accessed on 13 February 2024

⁵⁸ 135 S Ct. 2165 (2014)

⁵⁹ Oyez, "*Wellness International Network v. Sharif*", <https://www.oyez.org/cases/2014/13-935>, access on 13 February 2024

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

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Commented [la19]: Correct, 1/2 mark; also, the bankruptcy court can enter final judgments with respect to core proceedings that are specific to the Bankruptcy Code (e.g., a challenge to a petition)

to defining the contours of Article III, suggesting that the Court will adopt a more flexible approach in considering future challenges to the constitutionality of non–Article III tribunals.”⁶²

The Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”) reflect these rulings. They require litigants in adversary proceedings to state in their respective pleadings whether they “consent to entry of final orders or judgment by the bankruptcy court.”⁶³ Should such requirement not be complied with, the non-complying party may be deemed to have consented to the exercise of the court’s jurisdiction⁶⁴. Further, the Bankruptcy Rules states at Rule 8018.1 that if on appeal, a district court adjudicates that a bankruptcy court did not have jurisdiction (under Article III) to enter an order, the district court “may treat it as a proposed findings of fact and conclusions of law.”⁶⁵

Review of appeals from bankruptcy court orders

Appeals from decisions of the bankruptcy court will generally be heard by the district court for the district in which the bankruptcy court sits. However, further to section 158(b), the First, Sixth, Eighth, Ninth and Tenth Circuits have elected to form the Bankruptcy Appellate Panel (“BAP”) - bankruptcy appeals are heard by a BAP which will be convened from the judges of the bankruptcy courts within that circuit⁶⁶. Within those circuits, a party can request that the appeal is heard by the district court instead.

There is a further appeal of right to the circuit court of appeals (from the district court or BAP)⁶⁷. It is possible (although rare) that an appeal from the bankruptcy court goes directly to the court of appeals, where the bankruptcy court or district court certifies that:

- (i) the appeal raises “a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court...or involves a matter of public importance”⁶⁸;
- (ii) the order “involves a question of law requiring resolution of conflicting decisions”⁶⁹; or
- (iii) an immediate appeal from the order “may materially advance the progress of the case or proceeding in which the appeal is taken”⁷⁰.

Question 3.2 [3 marks]

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 of Title 11 of the United States Code (i.e. the Bankruptcy Code) is a new chapter added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The purpose of Chapter 15 (and the UNCITRAL Model Law on Cross-Border Insolvency which Chapter 15 is based on) is to provide effective mechanisms when dealing with insolvency cases which involve debtors, assets and other parties of interest in more than one country.⁷¹

⁶² Harvard Law Review, “Wellness International Network, Ltd. v. Sharif” 129 Harv. L. Rev. 201 (2015), <https://harvardlawreview.org/print/vol-129/wellness-international-network-ltd-v-sharif/>, accessed on 13 February 2024

⁶³ Federal Rules of Bankruptcy Procedure, rule 7008(a)

⁶⁴ Laura R Hall, “INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024”, p 18

⁶⁵ Federal Rules of Bankruptcy Procedure, rule 8018.1

⁶⁶ Laura R Hall, “INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024”, p 20

⁶⁷ Ibid.

⁶⁸ Title 28 of the United States Code, section 158(d)(2)(A)(i)

⁶⁹ Ibid., section 158(d)(2)(A)(ii)

⁷⁰ Ibid., section 158(d)(2)(A)(iii)

⁷¹ United States Courts, “Chapter 15 - Bankruptcy Basics - Ancillary and Other Cross-Border Cases”, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics#:~:text=An%20ancillary%20case%20is%20commenced,U.S.%20courts%20for%20this%20purpose>, accessed on 16 February 2024

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Section 1521(a) states that upon recognition of a foreign proceeding, the court may (at the request of the foreign representative) grant any appropriate relief, including staying the commencement or continuation of an individual action or proceeding which concerns the debtor's assets, rights, obligations or liabilities⁷² and "any additional relief that may be available to a trustee, except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a). [emphasis added]"⁷³ The reliefs listed in section 1521(a)(7) that are not available to a foreign representative in a Chapter 15 proceeding are:

- Section 522 - "Exemptions";
- Section 544 - "Trustee as lien creditor and as successor to certain creditors and purchasers";
- Section 545 - "Statutory liens";
- Section 547 - "Preferences";
- Section 548 - "Fraudulent transfers and obligations";
- Section 550 - "Liability of transferee of avoided transfer"; and
- Section 724(a) which relates to the trustee avoiding a lien that secures a claim of a kind specified in section 726(a)(4).

Chapter 15 therefore excludes from the rights which are granted to a foreign representative the use of the avoidance powers available in the Bankruptcy Code⁷⁴. Notwithstanding this, the two ways in which the foreign representative can obtain equivalent relief are:

- 1) Asserting an avoidance claim under applicable US or foreign law - section 1521(a) has been interpreted to only apply to the use of the Bankruptcy Code's powers of avoidance of preferences (section 547) and fraudulent conveyances (section 548) and not to preclude the foreign representative from applying to avoid pre-petition transactions under other applicable US law or foreign law⁷⁵.

Case law interpreting section 1521(a)(7) has permitted a foreign representative to prosecute avoidance actions under foreign law in Chapter 15 proceedings (without the need to commence either a Chapter 7 or Chapter 11 action). In *Re Condor Ins. Ltd*⁷⁶, Higginbotham CJ stated that the question before the court was whether the exceptions listed in section 1521(a)(7) to the relief available in the ancillary proceeding exclude avoidance actions under US law and also excludes reliance upon domestic law of the foreign main proceeding. It was held in *Re Condor Ins Ltd* that as Chapter 15 was intended to facilitate cooperation between US courts and foreign bankruptcy proceedings, section 1521(a)(7) must be interpreted in light of Chapter 15. This meant that a court has authority to permit relief under foreign avoidance law.

In light of the above, the restrictions in section 1521(a)(7) on a foreign representative's use of certain provisions of the Bankruptcy Code does not necessarily bar them from pursuing an avoidance claim under applicable foreign law.⁷⁷

- 2) Actions to avoid acts detrimental to creditors - section 1523(a) provides that, upon recognition of a foreign proceeding, a foreign representative has "*standing in a case concerning the debtor pending under another chapter...to initiate actions under sections 522, 544, 545, 547, 548, 550, 553, and 724(a)*". [emphasis added]⁷⁸ Under

⁷² Title 11 of the United States Code, section 1521(a)(1)

⁷³ Ibid., section 1521(a)(7)

⁷⁴ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 66

⁷⁵ Ibid.

⁷⁶ 601 F.3d 319 (5th Cir. 2010)

⁷⁷ Jones Day Publications, "Foreign Representative Lacks Standing to Assert State-Law Avoidance Claims in Chapter 15 Case" (2015), <https://www.jonesday.com/en/insights/2015/03/foreign-representative-lacks-standing-to-assert-state-law-avoidance-claims-in-chapter-15-case>, accessed on 16 February 2024

⁷⁸ Title 11 of the United States Code, section 1523(a)

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1523(a), a foreign representative can invoke the avoidance powers in the Bankruptcy Code in a plenary proceeding under either Chapter 7 or Chapter 11. Plenary proceedings commenced by a foreign representative would be an option for the foreign representative in the event that relief is unsatisfactory under other applicable law (such as where the statute of limitations has expired)⁷⁹.

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Question 3.3 [4 marks]

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

The rules that one should review when preparing a filing for a bankruptcy court are:

- 1) The Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") – the Bankruptcy Rules governs the processes and procedures that are followed by a bankruptcy court in bankruptcy proceedings in order to implement the Bankruptcy Code (i.e. Title 11 of the United States Code).⁸⁰ The Bankruptcy Rules are to be applied "by the court and the parties to secure the just, speedy, and inexpensive determination of every case and proceeding."⁸¹ They are split into 9 parts. Part I deals with the commencement of a case and proceedings relating to a petition⁸². The Bankruptcy Rules govern the process of commencing a case - a petition commencing a case shall be filed with the clerk⁸³ and shall be accompanied by the filing fee⁸⁴ except as provided for in Rule 1006. Given that the Bankruptcy Rules govern the bankruptcy procedure from the beginning, they should be reviewed by a practitioner when preparing a filing for a bankruptcy court.

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Rule 1001 further states that "Rule 81(a)(1) F.R.Civ.P. provides that the *civil rules do not apply to proceedings in bankruptcy, except as they may be made applicable by rules promulgated by the Supreme Court, e.g., Part VII of these rules.* [emphasis added]"⁸⁵ Part VII relates to Adversary Proceedings. Rule 7001 sets out Part VII's scope - adversary proceedings include proceedings to recover money or property (other than in limited situations)⁸⁶. It is further stated in the "Notes of Advisory Committee on Rules - 1983" to Rule 7001 that the rules either incorporate or are adaptations of most of the Federal Rules of Civil Procedure⁸⁷ ("Civil Rules"). The connection between the Bankruptcy Rules and Civil Rules highlighted in Rule 7002. Rule 7002 states that whenever the Civil Rules applicable to adversary proceedings refers to another Civil Rules, such reference shall be read as a reference to the Civil Rules as modified⁸⁸ in Part VII of the Bankruptcy Rules.

- 2) Civil Rules – another set of rules that should be reviewed when preparing a filing for a bankruptcy court are the Civil Rules (which are the civil law counterpart to the Bankruptcy Rules). The Civil Rules "govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81."⁸⁹ Similar

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⁷⁹ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 66

⁸⁰ The National Court Rules Committee, "Federal Rules of Bankruptcy Procedure" (2021), <https://www.federalrulesofbankruptcyprocedure.org/>, accessed on 15 February 2024

⁸¹ Federal Rules of Bankruptcy Procedure, Rule 1001

⁸² Ibid., Part I

⁸³ Ibid., Rule 1002(a)

⁸⁴ Ibid., Rule 1006(a)

⁸⁵ Ibid., Rule 1001

⁸⁶ Ibid., Rule 7001(1)

⁸⁷ Ibid., Rule 7001, Notes of Advisory Committee on Rules - 1983

⁸⁸ Ibid., Rule 7002

⁸⁹ Federal Rules of Civil Procedure, Rule 1

to Rule 1001 of the Bankruptcy Rules, the Civil Rules are to be applied "by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."⁹⁰ The Civil Rules apply to bankruptcy proceedings to the extent provided by the Bankruptcy Rules.⁹¹

The link between the Bankruptcy Rules and Civil Rules is demonstrated in Rule 9032 of the Bankruptcy Rules. Rule 9032 sets out the effect of amendments to the Civil Rules. The Civil Rules which are incorporated by reference and made applicable by the Bankruptcy Rules shall be the Civil Rules which are in effect on the effective date of the Bankruptcy Rules and as thereafter amended.⁹²

In light of the above, it would be helpful to review the Civil Rules (together with the Bankruptcy Rules) when preparing a filing for a bankruptcy court.

- 3) Local rules and procedures and personal practices issues by each judge - every bankruptcy court in the US will have local rules of procedure⁹³, and each judge will issue personal practices (which are periodically updated)⁹⁴. These are available on the bankruptcy court's website. It should be noted that local rules and practices will contain the judges' preferred working procedures. The local rules and practices can also modify deadlines for filing and responding to pleadings⁹⁵.

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For example, the local rules of the Bankruptcy Court for the District of Delaware ("Local Rules") state at Rule 1001-1(b) that the Local Rules shall be followed to the extent that they are not inconsistent with the Bankruptcy Code and the Bankruptcy Rules⁹⁶. Rule 7008-1 of the Local Rules reinforces Rule 7008(a) of the Bankruptcy Rules. Rule 7008-1 requires the pleader in pleadings to state whether they consent to the entry of final orders (or judgments) by the court and that in the event no such statement is included, the pleader is deemed to have waived their right to contest the court's authority to enter final orders (or judgments).⁹⁷

Local rules and procedures and personal practices which are issued by judges should therefore be reviewed when preparing a filing for a bankruptcy court.

- 4) Consult local practitioner – given the complexity and diverse nature of US bankruptcy law, it would also be prudent for a practitioner who does not practice regularly in the jurisdiction to consult a local practitioner for advice on unwritten local practices (if any).⁹⁸ This should ensure that the filing for a bankruptcy court is without any issues from the outset.

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?

⁹⁰ Ibid.

⁹¹ Ibid., Rule 81(a)(2)

⁹² Federal Rules of Bankruptcy Procedure, Rule 9032

⁹³ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 5

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Local Rules for the United States Bankruptcy Court District of Delaware, 2023, Rule 1001-1(b)

⁹⁷ Ibid., Rule 7008-1

⁹⁸ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 73

In the US, director liability is reserved for the state law of the state where the corporation is incorporated.⁹⁹ Delaware has become the most prominent state in the US for corporate law. Indeed, 68% of Fortune 500 companies and 93% of all US based initial public offerings are registered in Delaware¹⁰⁰ which has made the state a “corporate paradise”.¹⁰¹

Fiduciary duties owed

Directors of Delaware corporations owe fiduciary duties of **care** and **loyalty**, which include the subsidiary duties of good faith, oversight and disclosure.¹⁰²

- 1) Duty of care - directors are required to make informed, deliberative decisions based on all material information reasonably available to them¹⁰³. For example, the director should take time to evaluate corporate actions, take advice from experts and review management’s performance¹⁰⁴; and
- 2) Duty of loyalty - this requires directors to act (or not to act) “*on a disinterested and independent basis, in good faith, with an honest belief that the action is in the best interests of the company and its stockholders. [emphasis added]*”¹⁰⁵ A director must refrain from self-dealing and put the corporation’s interests and shareholders ahead of their own¹⁰⁶.

The fiduciary duties of a director of a Delaware corporation cannot be waived, disclaimed or modified by an agreement. However, it is possible under Delaware law for the corporation to indemnify its directors for certain breaches of fiduciary duties and to provide a waiver for a director to take a course of action that would otherwise be impermissible¹⁰⁷.

Business judgment rule (“BJR”)

The BJR protects directors from liability for errors in judgment if they are sued for breaching their fiduciary duty.¹⁰⁸ The board of directors are, under the BJR, presumed to have acted in good faith. This is a rebuttable presumption - the burden is on the plaintiff to present “*evidence that directors were at least grossly negligent in not becoming adequately informed or were motivated by interests other than those of the company’s stockholders*”.¹⁰⁹ If the presumption is not rebutted, the directors will not be liable unless there is a showing of gross negligence¹¹⁰. It is worth noting that in *Cinerama, Inc. v. Technicolor, Inc*¹¹¹, it was held that “*the breach of any one of the board’s fiduciary duties is enough to shift the burden of proof to the board to demonstrate entire fairness*.”¹¹² If the BJR is rebutted (by showing either a breach of the duty of care or loyalty), the board’s action will be reviewed using the entire fairness standard¹¹³. Under the entire fairness standard, the directors are put to proof that the challenged decision

⁹⁹ Ibid., p 60

¹⁰⁰ Chauncey Crail, Rob Watts and Jane Haskins, “Why Incorporate In Delaware? Benefits & Considerations” (2023), <https://www.forbes.com/advisor/business/incorporating-in-delaware/>, accessed on 10 February 2024

¹⁰¹ Ibid.

¹⁰² Skadden, Arps, Slate, Meagher & Flom LLP, “Directors’ Fiduciary Duties: Back to Delaware Law Basics” (2020), p 1

¹⁰³ Ibid., p 2

¹⁰⁴ Morrison & Foerster LLP, “What Fiduciary Duties Do I Have as a Director of a Delaware Corporation?” (2023), <https://www.mfo.com/resources/insights/230628-fiduciary-duties-director-of-a-delaware-corporation>, accessed on 10 February 2024

¹⁰⁵ Skadden, Arps, Slate, Meagher & Flom LLP, “Directors’ Fiduciary Duties: Back to Delaware Law Basics” (2020), p 2

¹⁰⁶ *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) at 510

¹⁰⁷ Morrison & Foerster LLP, “What Fiduciary Duties Do I Have as a Director of a Delaware Corporation?” (2023), <https://www.mfo.com/resources/insights/230628-fiduciary-duties-director-of-a-delaware-corporation>, accessed on 10 February 2024

¹⁰⁸ Laura R Hall, “INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024”, p 60

¹⁰⁹ Skadden, Arps, Slate, Meagher & Flom LLP, “Directors’ Fiduciary Duties: Back to Delaware Law Basics” (2020) p 2

¹¹⁰ Laura R Hall, “INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024”, p 60

¹¹¹ 663 A.2d 1156 (Del. 1995)

¹¹² Ibid., 1164

¹¹³ William M. Lafferty, Lisa A. Schmidt and Donald J. Wolfe, Jr, “A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law” (2012) Penn State Law Review 837, 842

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or transaction is “entirely fair” to the corporation and its stockholders. This is a more onerous burden – under such circumstances, the board has to “*establish to the court’s satisfaction that the transaction was the product of both fair dealing and fair price.*”¹¹⁴

To whom fiduciary duties owed to in ordinary course of business

In the ordinary course of business, directors of Delaware corporations owe fiduciary duties of loyalty and care to the corporation and its shareholders¹¹⁵ (and not to creditors). Under Delaware law, when the corporation in question is solvent, directors’ duties will “*run to the corporation and the corporation should be managed for the benefit of its shareholders.*”¹¹⁶ Even though there is some discussion that during solvent times directors should consider the interest of other stakeholders, fiduciary duties are not owed to creditors of a solvent corporation. Creditors of a solvent corporation would instead have other forms of legal protection, including contracts and fraudulent conveyance laws¹¹⁷.

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To whom fiduciary duties owed to when corporation is potentially insolvent

The fiduciary duties of directors of Delaware corporations will remain the same when the corporation in question approaches insolvency. The Delaware Supreme Court in *North American Catholic Education Programming, Inc v Gheewalla*¹¹⁸ held that the fiduciary duties of directors do not shift from the shareholders to the creditors when a corporation operates in the “zone of insolvency”. Holland J stated that Delaware corporate law provided for the separation of control and ownership of a corporation. Even if a corporation was “*navigating in the zone of insolvency, the focus... 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.*”¹¹⁹ It was further held in *Gheewalla* that to recognise directors as owing direct fiduciary duties to creditors would create uncertainty for the directors (who have a fiduciary duty to exercise their business judgment which is in the best interest of the corporation). Any new right for creditors to bring direct fiduciary claims against directors would create a conflict. Such conflict would be between those directors’ duties to maximise the value of the corporation (for the benefit of the shareholders) and any newly recognised direct fiduciary duty to the individual creditors.

To whom fiduciary duties owed to when corporation is actually insolvent

The situation is different when the corporation is actually insolvent. Directors’ duties change in this situation. When a corporation is insolvent, the directors’ fiduciary duties are owed to all of the insolvent corporation’s residual claimants (which includes both shareholders and creditors). The directors must continue to manage the corporation according to what they believe is in the corporation’s best interest but with the additional consideration of the interest of the creditors, as well as that of the shareholders (which is a pre-insolvency duty).¹²⁰

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Gheewalla held that there is no right for a creditor to directly assert against directors a breach of fiduciary duty claim (whether the corporation is solvent or insolvent). This is because the directors do not owe a fiduciary duty to the creditors. Notwithstanding this, a creditor has standing to bring a derivative claim when the corporation becomes insolvent (on behalf of the

¹¹⁴ *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)

¹¹⁵ Morrison & Foerster LLP, “What Fiduciary Duties Do I Have as a Director of a Delaware Corporation?” (2023), <https://www.mofo.com/resources/insights/230628-fiduciary-duties-director-of-a-delaware-corporation>, accessed on 10 February 2024

¹¹⁶ Brad Eric Scheler, Gary L. Kaplan, and Jennifer L. Rodburg, Fried, Frank, Harris, Shriver & Jacobson LLP, Harvard Law School Forum on Corporate Governance, “Director Fiduciary Duty in Insolvency” (2020), <https://corpgov.law.harvard.edu/2020/04/15/director-fiduciary-duty-in-insolvency/>, accessed on 29 February 2024

¹¹⁷ *Ibid.*

¹¹⁸ 930 A.2d (Del 18 May, 2007)

¹¹⁹ *Ibid.*

¹²⁰ Brad Eric Scheler, Gary L. Kaplan, and Jennifer L. Rodburg, Fried, Frank, Harris, Shriver & Jacobson LLP, Harvard Law School Forum on Corporate Governance, “Director Fiduciary Duty in Insolvency” (2020), <https://corpgov.law.harvard.edu/2020/04/15/director-fiduciary-duty-in-insolvency/>, accessed on 29 February 2024

corporation) against the directors for breach of fiduciary duties to the residual claimants. This is because during a corporation's insolvency, creditors are "the principal constituency injured by any fiduciary breaches that diminish the firm's value".¹²¹ A director's fiduciary duties are to the corporation and all of its residual claimants (which, during insolvency, includes the creditors). There is no particular fiduciary duty owed to the creditors¹²² - indeed *Gheewalla* held that the directors "must retain the freedom to engage in vigorous, good faith negotiations with individual creditors for the benefit of the corporation."¹²³ The directors must use their business judgment (taking into account the interests of all the residual claimants) in deciding what action is in the best interest of the corporation.

Another case of importance to directors' duties in insolvency is *Quadrant Structure Products Co. Ltd v. Vertin*¹²⁴. Directors of a corporation that was insolvent were still permitted to pursue business strategies which were aimed at maximising the value of the enterprise.¹²⁵ Directors did not breach their fiduciary duties where they pursued a risky investment strategy that would have maximised value for the whole corporation if it was successful (in the situation where the creditors would have borne the full risk of the strategy failing). *Quadrant* reinforced the point that Delaware corporate law did not recognise the concept of "deepening insolvency". Directors of Delaware corporations "cannot be held liable for continuing to operate an insolvent entity in the good faith belief that they may achieve profitability, even if their decisions ultimately lead to greater losses for creditors."¹²⁶ Further, directors will not breach their fiduciary duties if, as a matter of business judgment, they favour certain creditors (if non-insiders) over other creditors with similar priority.

In light of the above, creditors may protect their interest only by bringing a derivative claim (on behalf of the insolvent corporation). Creditors of an insolvent Delaware corporation, as a matter of law, do not have standing to assert direct claims for breaches of fiduciary duties against the corporation's directors. Further, there is no redress for creditors if the directors of an insolvent corporation pursue a business strategy that causes loss to the creditors if such decision was made in good faith.

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

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Question 4.1 [5 marks]

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iWork Ltd leases office space from office building owners and sublets the space to small businesses. Due to the increases in the numbers of businesses operating remotely, iWork Ltd has suffered a decline in revenues. As a result, it has failed to pay rent on some of its office space leases. What protections does the Bankruptcy Code provide to lessors of office space to iWork Ltd?

Section 365 of Title 11 of the United States Code (i.e. the Bankruptcy Code)

¹²¹ 930 A.2d (Del 18 May, 2007)

¹²² Brad Eric Scheler, Gary L. Kaplan, and Jennifer L. Rodburg, Fried, Frank, Harris, Shriver & Jacobson LLP, Harvard Law School Forum on Corporate Governance, "Director Fiduciary Duty in Insolvency" (2020), <https://corpgov.law.harvard.edu/2020/04/15/director-fiduciary-duty-in-insolvency/>, accessed on 29 February 2024

¹²³ 930 A.2d (Del 18 May, 2007)

¹²⁴ 115 A.3d 535 (Del. Ch. 2015)

¹²⁵ Ryan Philp, Ronald J. Silverman and Matthew Ducharme, Hogan Lovell, Bloomberg Law, "Fiduciary Duties for Directors of Distressed, Insolvent, and Bankrupt Companies" (2021), p 3

¹²⁶ 115 A.3d 535 (Del. Ch. 2015)

Section 365(a) states that “the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor. [emphasis added]”¹²⁷ Even though section 365(a) is a debtor-friendly feature of the Bankruptcy Code,¹²⁸ the Bankruptcy Code provides protections to the lessors of the office space to iWork Ltd (“iWork”). Lessors have rights which can maximise their recoveries and protect their position.¹²⁹

In iWork’s situation, there is an unexpired lease of nonresidential real property under which the debtor (i.e. iWork) is the lessee. Under section 365(d)(4)(A), the unexpired lease “shall be deemed rejected, and the trustee shall immediately surrender that nonresidential real property to the lessor, if the trustee does not assume or reject the unexpired lease by the earlier of the date that is 120 days after the date of the order for relief; or the date of the entry of an order confirming a plan. [emphasis added]”¹³⁰ Prior to the expiration of the 120-day period, the court may extend the period for 90 days on the motion of the trustee or lessor¹³¹. Section 365(d)(4)(A) provides iWork, as debtor-tenant of nonresidential real property, with the right to decide what to do with the lease (within the timeframe stipulated). The lease could be:

- a) rejected by iWork;
- b) assumed by iWork; or
- c) assumed and assigned to a third party.

Business judgment of iWork

The bankruptcy court will defer to iWork’s business judgment and will likely grant iWork’s motion to reject, assume or assign and assign the unexpired lease unless it is made in bad faith or there is an unreasonable exercise of iWork’s business discretion. A debtor’s ability (including iWork’s) to reject a burdensome lease (or contract) and retain those that are important to its reorganisation process are in line with the policy objective of rescuing struggling businesses but not at the expense of the creditors¹³². iWork should therefore use the flexibility granted to it by the Bankruptcy Code and its business judgment to abandon burdensome assets or obligations (and retain favourable ones) in order to maximise the value of the estate and benefit creditors, such as its lessor.

Options available

As stated above, iWork can:

- 1) Reject the lease - iWork can reject the lease outright. iWork could also ask the lessors to renegotiate the lease or to market favourable leases to third parties¹³³. Notwithstanding this, the strict deadlines set out in section 365(d)(4) provides important leverage to lessors¹³⁴ including iWork’s lessor. If iWork fails to decide what to do within the timeframe stipulated, then the lease is deemed to be rejected (section 365(d)(4)(A)).

Any rejection of the unexpired lease will constitute a breach of such a lease immediately before the date of the filing of the petition¹³⁵. iWork’s lessor will then be entitled to damages for the breach (which will be treated as an unsecured pre-petition claim).¹³⁶ Further, iWork’s lessors are unlikely to be required to file an eviction action

¹²⁷ Title 11 of the United States Code, section 365(a)

¹²⁸ Laura R Hall, “INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024”, p 31

¹²⁹ John Delnero, Pedersen & Houpt, “Lessor Rights in Retail Bankruptcy Cases” (2020), <https://www.pedersenhaupt.com/newsroom-alerts-60.html#:~:text=>, accessed on 17 February 2024

¹³⁰ Title 11 of the United States Code, section 365(d)(4)(A)

¹³¹ Ibid., section 365(d)(4)(B)

¹³² Kyriaki Christodoulou, KI Legal, “Executory Contracts and Leases in Bankruptcy” (2023), <https://www.kilegal.com/blog/2023/july/executory-contracts-and-leases-in-bankruptcy/>, accessed on 17 February 2024

¹³³ Kimberly Black and Daniel A. Lowenthal, Patterson Belknap Webb & Tyler LLP, “What to Do If Your Tenant Is Bankrupt” (2022), <https://www.pbwt.com/bankruptcy-update-blog/what-to-do-if-your-tenant-is-bankrupt>, accessed on 17 February 2024

¹³⁴ Ibid.

¹³⁵ Title 11 of the United States Code, section 365(g)(1)

¹³⁶ Kimberly Black and Daniel A. Lowenthal, Patterson Belknap Webb & Tyler LLP, “What to Do If Your Tenant Is Bankrupt” (2022), <https://www.pbwt.com/bankruptcy-update-blog/what-to-do-if-your-tenant-is-bankrupt>, accessed on 17 February 2024

Commented [la39]: Correct, 1 mark. Also, the debtor has to pay rent as an administrative priority claim post-petition, prior to assumption or rejection. Also, if the debtor assumes and then rejects a lease, it is liable for 2 years’ rent as an administrative expense.

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against iWork.¹³⁷ As stated in section 365(d)(4)(A), upon the rejection of the lease, the debtor-tenant is to “*immediately surrender that nonresidential real property to the lessor*”¹³⁸. Many bankruptcy courts will exercise the power under section 365(d)(4)(A) to require the debtor-tenant to leave the premises under a rejected lease without the need for the lessor to file a state court eviction action.¹³⁹

In light of the above, the lessors will be protected by the Bankruptcy Code even if iWork elects to reject the lease as the lessors will be entitled to damages for the breach and there will be the immediate surrender of the office space to the lessors.

- 2) Assume the lease - the situation would be different if iWork assumed the lease. iWork is in default of the unexpired lease as it has failed to pay rent on some of its office space leases. Section 365(b)(1) states that where there has been a default in an unexpired lease of the debtor, the trustee may not assume the lease in question unless, at the time of doing so, the trustee:
 - a) “*cures, or provides adequate assurance that the trustee will promptly cure, such default*”¹⁴⁰;
 - b) compensates, or provides adequate assurance that the trustee will promptly compensate, a non-debtor party, for any actual pecuniary loss caused by the default¹⁴¹; and
 - c) “*provides adequate assurance of future performance under such contract or lease.*”¹⁴²

In terms of curing existing defaults, this means any amounts due to the lessors (including for pre-petition rent) must be paid promptly upon assumption¹⁴³. It is therefore prudent for iWork’s lessors to thoroughly assess any defaults and calculate accurately any amounts due so that they can demand the correct amount of cure. Further, iWork’s lessor ought to check the terms of the lease for provisions enabling them to seek reimbursement of costs and expenses (including attorneys’ fees) which should be included in the amount of cure. A failure by the lessor to assert any existing defaults is likely to bar them from seeking payments for such defaults in the future. This is a harsh but avoidable situation¹⁴⁴.

The lessor can also demand adequate assurance of future performance. The fact pattern states that iWork has failed to pay rent on some of its office space leases as a result of a decline in revenue. As iWork has already defaulted, the lessor has the right to receive (and indeed should demand) evidence that iWork can comply with the obligations in the lease in the future.

- 3) Assume and assign the lease - iWork could also assume and assign the lease to a third party. Notwithstanding a provision in the unexpired lease, or in applicable law that prohibits, restricts or imposes conditions on the assignment, the lease may be assigned¹⁴⁵. The unexpired lease may only be assigned if iWork assumes the lease¹⁴⁶

¹³⁷ John Delnero, Pedersen & Houpt, “Lessor Rights in Retail Bankruptcy Cases” (2020), <https://www.pedersenhaupt.com/newsroom-alerts-60.html#:~:text=> accessed on 17 February 2024

¹³⁸ Title 11 of the United States Code, section 365(d)(4)(A)

¹³⁹ John Delnero, Pedersen & Houpt, “Lessor Rights in Retail Bankruptcy Cases” (2020), <https://www.pedersenhaupt.com/newsroom-alerts-60.html#:~:text=> accessed on 17 February 2024

¹⁴⁰ Title 11 of the United States Code, section 365(b)(1)(A)

¹⁴¹ *Ibid.*, section 365(b)(1)(B)

¹⁴² *Ibid.*, section 365(b)(1)(C)

¹⁴³ Kimberly Black and Daniel A. Lowenthal, Patterson Belknap Webb & Tyler LLP, “What to Do If Your Tenant Is Bankrupt” (2022), <https://www.pbwt.com/bankruptcy-update-blog/what-to-do-if-your-tenant-is-bankrupt>, accessed on 17 February 2024

¹⁴⁴ *Ibid.*

¹⁴⁵ Title 11 of the United States Code, section 365(f)(1)

¹⁴⁶ *Ibid.*, section 365(f)(2)(A)

and adequate assurances of future performance by the assignee of the lease is provided¹⁴⁷. The existing defaults also need to be cured¹⁴⁸.

To cure the existing defaults, iWork's lessors should thoroughly assess any defaults and calculate accurately any amounts due as well as check the terms of the lease with iWork for provisions enabling them to seek reimbursement of costs and expenses (including attorneys' fees). This is similar to when the lease is assumed (as above).

The Bankruptcy Code overrides all anti-assignment provisions that would, ordinarily prevent a debtor-tenant from assigning a lease unilaterally – therefore the right to receive “adequate assurance is a critical bargaining chip for landlords who can, among other things, demand additional guaranties from the debtor or assignee.”¹⁴⁹ iWork's lessor should therefore seek assurances from any prospective assignee that they will comply with the terms of the lease including financial records of the assignee.

Section 365(b)(2)

A further protection afforded to iWork's lessor by the Bankruptcy Code is section 365(b)(2). The value of iWork's ability to assign the unexpired leases is increased by the nullification of *ipso facto* clauses¹⁵⁰ that would permit rights to be terminated or altered solely because iWork (as the debtor) was insolvent¹⁵¹ or had commenced bankruptcy proceedings under the Bankruptcy Code¹⁵². iWork, as debtor-tenant, therefore has less contractual or legal restrictions to assign any lease in order to maximise the value of the estate for creditors.

Question 4.2 [5 marks]

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Skin Luxe is incorporated and has a principal place of business in France where it develops and manufactures high end skincare products. Skin Luxe sells its skin care products through its own boutiques in many international cities, including Paris, Las Vegas, London and Hong Kong. Skin Luxe's English law-governed bonds are due to mature in one year, but it is unable to repay or refinance them. Skin Luxe 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 English scheme of arrangement (“**Scheme of Arrangement**”) which Skin Luxe is considering could be granted recognition under Chapter 15 of the Bankruptcy Code (i.e. Title 11 of the United States Code) as a foreign non-main proceeding.

Recognition

The starting point is applying for recognition. Section 1515(a) sets out the requirement for the debtor's (i.e. Skin Luxe) foreign representative to apply to the US court for recognition of the foreign proceeding in which they have been appointed (i.e. the Scheme of Arrangement) by filing a petition for recognition¹⁵³. A foreign representative is a person or body who is “authorized in a foreign proceeding to administer the *reorganization* or the *liquidation* of the

¹⁴⁷ Ibid., section 365(f)(2)(B)

¹⁴⁸ Ibid., section 365(b)(1)(A)

¹⁴⁹ Kimberly Black and Daniel A. Lowenthal, Patterson Belknap Webb & Tyler LLP, “What to Do If Your Tenant Is Bankrupt” (2022), <https://www.pbwt.com/bankruptcy-update-blog/what-to-do-if-your-tenant-is-bankrupt>, accessed on 17 February 2024

¹⁵⁰ Laura R Hall, “INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024”, p 33

¹⁵¹ Title 11 of the United States Code, section 365(b)(2)(A)

¹⁵² Ibid., section 365(b)(2)(B)

¹⁵³ Ibid., section 1515(a)

debtor's assets or affairs or to act as a representative of such foreign proceeding. [emphasis added]"¹⁵⁴ "Foreign proceeding" is defined in section 101(23) as "collective judicial or administrative proceeding in a foreign country...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. [emphasis added]"¹⁵⁵

The Scheme of Arrangement considered by Skin Luxe is essentially a compromise or arrangement between Skin Luxe and its members or creditors (or any class of them) under Part 26 of the United Kingdom's Companies Act 2006. Scheme of arrangements such as the one considered by Skin Luxe "can be used to effect a solvent reorganisation of a company...as well as to effect insolvent restructurings such as by a debt for equity swap"¹⁵⁶. The English court's permission will be needed to convene the meetings of the members and creditors to vote on the scheme proposed. The English court will decide whether to sanction the scheme approved by the members and creditors.¹⁵⁷

The Scheme of Arrangement would, pursuant to section 101(23), be classified as a "foreign proceeding". Skin Luxe's foreign representative must establish that the English (foreign) proceeding is pending and that they are empowered to act in the proceedings (further to section 101(24)). From the fact pattern, it is unlikely that the Scheme of Arrangement and application for recognition by Skin Luxe's foreign representative will be refused¹⁵⁸ as they are not contrary to US public policy¹⁵⁹.

Foreign main and foreign non-main proceedings

After notice and a hearing¹⁶⁰, the court is authorised under section 1517 to issue an order recognising the foreign proceeding as either:

- 1) "foreign main proceeding"¹⁶¹ if the foreign proceeding is pending in a country where the debtor has its centre of main interest¹⁶² ("COMI"); or
- 2) "foreign non-main proceeding"¹⁶³ if the foreign proceeding (which is not a foreign main proceeding) is pending in a country where the debtor has an establishment¹⁶⁴ but not its COMI¹⁶⁵.

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The classification of whether the foreign proceedings will be "foreign main" or "foreign non-main" is important as it determines the scope of relief available to the debtor following the recognition of the foreign proceedings¹⁶⁶ (see below).

Granting recognition of Scheme of Arrangement as a foreign non-main proceeding

Applying section 1517 to Skin Luxe's scenario, the Scheme of Arrangement cannot be granted recognition as "foreign main proceeding". Section 1516(c) contains a rebuttal presumption concerning recognition – in the absence of contrary evidence, a debtor's registered office is

¹⁵⁴ Ibid., section 101(24)

¹⁵⁵ Ibid., section 101(23)

¹⁵⁶ Thomas Reuters Practical Law, "Scheme of arrangement", [https://uk.practicallaw.thomsonreuters.com/0-107-7201?contextData=\(sc.Default\)&transitionType=Default&firstPage=true](https://uk.practicallaw.thomsonreuters.com/0-107-7201?contextData=(sc.Default)&transitionType=Default&firstPage=true), accessed on 18 February 2024

¹⁵⁷ Ibid.

¹⁵⁸ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 63

¹⁵⁹ Title 11 of the United States Code, section 1506

¹⁶⁰ Ibid., section 1517(a)

¹⁶¹ Ibid., section 1517(b)(1)

¹⁶² Ibid., section 1502(4)

¹⁶³ Ibid., section 1517(b)(2)

¹⁶⁴ Ibid., section 1502(5)

¹⁶⁵ United States Courts, "Chapter 15 - Bankruptcy Basics - Ancillary and Other Cross-Border Cases", <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-15-bankruptcy-basics#:~:text=An%20ancillary%20case%20is%20commenced,U.S.%20courts%20for%20this%20purpose>, accessed on 16 February 2024

¹⁶⁶ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 63

presumed to be its COMI¹⁶⁷. From the fact pattern, we are informed that Skin Luxe “is incorporated and has a principal place of business in France”. The location of incorporation and location of primary assets are relevant factors in determining a debtor’s COMI¹⁶⁸. There is no evidence from the fact pattern that Skin Luxe’s COMI is anywhere other than France. We are further informed that the bonds in question are governed by English law and an English scheme of arrangement is being considered. The Scheme of Arrangement, if proceeded with in England, would not be pending in France which is the country where the debtor Skin Luxe has its COMI. Therefore, Skin Luxe’s situation does not fulfill the requirement set out in section 1502(4) to be a “foreign main proceeding”.

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Notwithstanding the above, the Scheme of Arrangement could be granted recognition under Chapter 15 as a “foreign non-main proceeding”. This is because of section 1502(2) and section 1502(5). Section 1502(2) defines “establishment” as “any place of operations where the debtor carries out a nontransitory economic activity”¹⁶⁹. Section 1502(2) and section 1502(5) means that (foreign) proceedings in a jurisdiction different from that of the debtor’s COMI can be recognised as a “foreign non-main proceeding” if the debtor has an establishment in the jurisdiction where the (foreign) proceeding is pending. An “establishment” denotes a degree of permanency in the economic activity in question. For example, in *re Bear Stearns High-Grade Structured Credit Strategies Master Fund*¹⁷⁰ it was held that proceedings in the Cayman Islands for a Cayman-incorporated hedge fund could not be recognised as foreign non-main proceedings (or foreign main proceedings) as there was a lack of establishment (or COMI) in the Cayman Islands.

Applying section 1502(2), section 1502(5) and section 1517(b)(2) to Skin Luxe’s situation, Skin Luxe has an “establishment” in England – we are informed that Skin Luxe sells its skin care products through its own boutiques in many international cities, including London. We are further informed that the proceeding in question, the Scheme of Arrangement, is governed by English law. In light of the above, the Scheme of Arrangement could be granted recognition under Chapter 15 as a “foreign non-main proceeding”.

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Scope of relief

As stated above, the classification of the foreign proceeding as either “foreign main” or “foreign non-main” is important as it determines the scope of relief which is available to Skin Luxe following the recognition of the foreign proceeding. Upon recognition of the Scheme of Arrangement as a foreign non-main proceeding, certain reliefs set out in the Bankruptcy Code can be granted on a discretionary basis¹⁷¹ to Skin Luxe’s property within the US including an automatic stay¹⁷². The test for granting relief on a discretionary basis in a foreign non-main proceeding is set out in section 1521(c) – the court has to be satisfied that the relief relates to assets that (under US law) should be administered in the foreign non-main proceeding.¹⁷³ Any (discretionary) relief granted would only apply to the assets that Skin Luxe has located within the US - this would include Skin Luxe’s own boutiques in Las Vegas.

Question 4.3 [5 marks]

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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

¹⁶⁷ Title 11 of the United States Code, section 1516(c)

¹⁶⁸ Laura R Hall, “INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024”, p 63

¹⁶⁹ Title 11 of the United States Code, section 1502(2)

¹⁷⁰ 374 BR 122 (Bankr SDNY 2007)

¹⁷¹ Title 11 of the United States Code, section 1521(c)

¹⁷² *Ibid.*, section 1521(a)(1)

¹⁷³ *Ibid.*, section 1521(c)

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 has been sued in civil suit by a former employee alleging she was fired due to gender bias.

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

A Chapter 11 case is commenced by the filing of a petition with the bankruptcy court. If Speculation Inc ("**Speculation**"), as the debtor, files the petition, this would be a voluntary petition¹⁷⁴. The automatic stay¹⁷⁵ that comes into effect immediately on the filing of a Chapter 11 petition provides breathing space for Speculation and a window to negotiate and resolve the difficulties it has in its financial situation¹⁷⁶. The automatic stay in a Chapter 11 filing is one of the most central debtor protections¹⁷⁷.

A Chapter 11 petition being filed by Speculation has different effects on the Department of Justice ("**DOJ**") investigation, the margin loan default, the delinquent lease and the employment discrimination lawsuit. Taking each of these in turn:

- (i) **There will be no effect on the DOJ investigation.** The automatic stay that applies to Chapter 11 proceedings are applicable "*to any interference with the property of the estate anywhere in the world*" and therefore its scope is extremely broad¹⁷⁸. However, there will be no effect on the DOJ investigation. The reason for this is because the filing of a petition will not operate as a stay of the actions which are listed under section 362(b) of Title 11 of the United States Code ("**Bankruptcy Code**"). The list of exceptions to the automatic stay include section 362(b)(1) which provides that the filing of a voluntary petition under section 301(a) "*does not operate as a stay...of the commencement or continuation of a criminal action or proceeding against the debtor*"¹⁷⁹.

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From the fact pattern, the DOJ has announced an investigation into whether the (previous) success of Speculation was the result of illegally trading on insider information. The DOJ's mission includes upholding the rule of law¹⁸⁰ and its work includes prosecuting corporate crime¹⁸¹. The Criminal Division's Fraud Section leads the DOJ's work against sophisticated economic crime and "*focuses on the prosecution of complex corporate, securities, commodities, procurement, and other financial fraud cases*"¹⁸². As stated above, the commencement or continuation of a criminal action or proceeding against a debtor is an exception to the automatic stay. The rationale for this is that the right of certain parties should take precedence over the need for the debtor in question to have breathing space¹⁸³. The DOJ investigation will not be subject to the automatic stay and will therefore proceed as normal.

¹⁷⁴ Ibid., section 301(a)

¹⁷⁵ Ibid., section 362(a)

¹⁷⁶ United States Court, "Chapter 11 - Bankruptcy Basics", <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics>, accessed on 19 February 2024

¹⁷⁷ Professor John D. Ayer, Michael Bernstein and Jonathan Friedland, "An Overview of the Automatic Stay" (2004) American Bankruptcy Institute Journal 22

¹⁷⁸ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 22

¹⁷⁹ Title 11 of the United States Code, section 362(b)(1)

¹⁸⁰ US Department of Justice, "About DOJ", <https://www.justice.gov/about>, accessed on 19 February 2024

¹⁸¹ US Department of Justice, "Corporate Crime", <https://www.justice.gov/corporate-crime>, accessed on 19 February 2024

¹⁸² Ibid.

¹⁸³ Professor John D. Ayer, Michael Bernstein and Jonathan Friedland, "An Overview of the Automatic Stay" (2004) American Bankruptcy Institute Journal 22

- (ii) The effect of the Chapter 11 petition on the margin loan default will be that there will be a plan of reorganisation. There will be an automatic stay¹⁸⁴ of any litigation against Speculation by its broker in relation to the default on the margin loan.

Section 1121 provides Speculation with an exclusivity period¹⁸⁵ of 120 days from the date of the petition to propose a reorganisation plan¹⁸⁶. The plan “sets out a proposed compromise of its debts and/or reorganisation of its business.”¹⁸⁷ Once Speculation proposes the plan, there will be a further 60 days for creditors (taking the exclusivity period to 180 days), including the broker, to consider the plan¹⁸⁸. Speculation’s plan must provide “adequate information”¹⁸⁹ in the disclosure statement which would assist creditors in making an informed judgment about the plan.

If Speculation does not file a reorganisation plan within 120 days after the date of the petition¹⁹⁰ or if such a plan is proposed but is not accepted within the 180 day exclusivity period¹⁹¹, the broker (as a creditor) may propose a reorganisation plan (without Speculation’s agreement) after the exclusivity period terminates.¹⁹² Similar to a debtor proposed plan, the broker’s proposed plan must also provide “adequate information” to assist creditors in determining how they will vote on a proposed plan¹⁹³.

After the disclosure statement to accompany the proposed reorganisation plan has been approved by the court, the court will set a timeframe for the creditors to vote on the plan¹⁹⁴. The plan will be approved by a class of creditors if a simple majority of the creditors in the class (who hold at least two-thirds of the value of the claims in the class), vote in favour¹⁹⁵. If the plan is accepted by creditors, the court must determine whether to confirm the plan¹⁹⁶.

We are informed that Speculation funded its trading through a margin loan from its broker. However, it is not known what is the value of its claim and whether it will be designated as an unimpaired or impaired¹⁹⁷ class of creditor for the purpose of the right to vote on any plan proposed.

- (iii) The delinquent lease may entitle the lessor of Speculation to lift any automatic stay. The automatic stay may be lifted on creditor request which would “permit otherwise prohibited creditor actions in certain circumstances.”¹⁹⁸ Section 362(d) states that the court can terminate, annul, modify or condition a stay (on the request of a party in interest and after notice and a hearing) if:

- 1) there is a “lack of adequate protection of an interest in property of such party in interest”¹⁹⁹; or

¹⁸⁴ Title 11 of the United States Code, section 362(a)

¹⁸⁵ Laura R Hall, “INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024”, p 39

¹⁸⁶ Title 11 of the United States Code, section 1121(a) and section 1121(b)

¹⁸⁷ Thomas Reuters Practical Law, “Chapter 11”, [https://uk.practicallaw.thomsonreuters.com/4-107-5889?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/4-107-5889?transitionType=Default&contextData=(sc.Default)&firstPage=true), accessed on 22 February 2024

¹⁸⁸ Laura R Hall, “INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024”, p 39

¹⁸⁹ Title 11 of the United States Code, section 1125(a)(1)

¹⁹⁰ Ibid., section 1121(c)(2)

¹⁹¹ Ibid., section 1121(c)(3)

¹⁹² Ibid., section 1121(c)

¹⁹³ Laura R Hall, “INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024”, p 39

¹⁹⁴ Ibid., p 40

¹⁹⁵ Title 11 of the United States Code, section 1126(c)

¹⁹⁶ Ibid., section 1129

¹⁹⁷ Ibid., section 1124

¹⁹⁸ Laura R Hall, “INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024”, p 24

¹⁹⁹ Title 11 of the United States Code, section 362(d)(1)

Commented [la50]: Incorrect, the margin loan is a securities contract that is exempt from the automatic stay so the broker can sell the shares despite the filing of the petition.

Commented [la51]: True, but the initial effect of the filing of the petition is to prevent the landlord from filing eviction proceedings.

2) "the debtor does not have an equity in such property and such property is not necessary to an effective reorganization"²⁰⁰.

Applying section 362(d)(1), Speculation's lessor can apply for relief from the stay if the value of the property may decline during the course of the Chapter 11 proceedings and result in Speculation's lessor making less than a full recovery of the debts due to it²⁰¹. From the fact pattern, it is not known what the value of the leased office space is or how much rent is due from Speculation to the lessor. These may require an assessment to determine whether there is adequate protection. Even if it is determined that there is a lack of adequate protection, Speculation (as debtor) may be able to avoid the stay being lifted. Speculation could provide adequate protection by, for example, making cash payment or periodic cash payments which results in a decrease of the value of the lessor's interest in the property²⁰².

An alternative to section 362(d)(1) is section 362(d)(2). From the fact pattern, it is likely that Speculation does not have equity in the leased office space. It should not be difficult for the lessor to demonstrate its interest in the property (and the lack of equity that Speculation has). However, it is likely that the leased office space is necessary for the reorganisation of Speculation's affairs. Speculation, to avoid any stay being lifted, would have to demonstrate that there is a reasonable prospect that there will be a reorganisation within a reasonable timeframe²⁰³.

(iv) A Chapter 11 petition filed by Speculation will effect the employment discrimination lawsuit initiated by the former employee. Section 362(a)(1) provides that a petition filed operates a stay of "the commencement or continuation...of a judicial, administrative, or other action or proceeding against the debtor"²⁰⁴. The former employee's civil lawsuit constitutes a proceeding against the debtor (Speculation) that was commenced before the Chapter 11 filing. The filing of the Chapter 11 petition therefore acts as a stay to the continuation of the proceedings initiated by the former employee. The lawsuit cannot proceed any further if the automatic stay is still in place. The automatic stay will maximise the going-concern value of Speculation's estate (as well as ensure the equal distribution among similar creditors)²⁰⁵. Any act which violates the automatic stay will constitute contempt of court and will be void (or voidable depending on the circuit)²⁰⁶. To avoid violating the automatic stay, the lawsuit should not proceed any further until the stay is lifted or at least modified by an order of the court.

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*** End of Assessment ***

²⁰⁰ Ibid., section 362(d)(2)

²⁰¹ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 24

²⁰² Title 11 of the United States Code, section 361(1)

²⁰³ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 24

²⁰⁴ Section 362(a)(1), Title 11 of the United States Code

²⁰⁵ Professor John D. Ayer, Michael Bernstein and Jonathan Friedland, "An Overview of the Automatic Stay" (2004) American Bankruptcy Institute Journal 22

²⁰⁶ Laura R Hall, "INSOL International, Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Insolvency System of the United States 2023/2024", p 22