July 2005 Bar Examination Sample Answers

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Question 1 - Sample Answer 1.

1) In order to form a valid corporation in Georgia, there must be a filing of the articles of incorporation with the secretary of state by the incorporators of the incorporation.

Incorporators: The incorporators may be an entity or a natural person.

Articles of incorporation: The articles of incorporation must include the corporate name (to include inc, co, corp, ltd). Additionally, they must include the names and addresses of the incorporators, the name and address of the registered agent, the address of the registered office, the purpose and duration (but if no purpose and duration are included, Georgia law presumes any valid legal purpose and potential unlimited duration). The articles must also state information regarding the amount of authorized stock. The articles may include the names of directors, but it is not required.

Filing:

Once the articles of incorporation are complete, they must be filed with the secretary of state along with any required fees. The incorporators must also request publication of the corporation. Once filed with the secretary of state, it is conclusive proof of a valid corporation and is this a de jure corporation.

After filing the incorporators have the first meeting if the directors were not named in the articles. If there were named the directors meet to determine the bylaws, select officers, and do any other corporation business.

2) Generally a shareholder in a corporation has limited liability for vicarious liability of the corporation. That liability would typically be limited to their capital investment. However, under the court's ability to pierce the corporate veil, it is possible that such an individual could remain personally liable. A court may pierce the corporate veil when the shareholder abuses the corporate form in such a manner that they disregard the corporate identity. If the courts finds such, it must also determine that fairness requires the piercing of the corporate veil.

In the present case, Bigg appears to have disregarded the corporate identity of XYZ rather extensively. He intermingled his personal funds with the corporation's and used the corporation's checking account to pay the personal bills of his family. As a result, it is likely that the court would be willing to look beyond the corporate form to find that XYZ is merely an alter ego for Bigg. Further, the court is much more likely to pierce the corporate veil in tort actions than in

contract actions, where the contracting party may investigate. Therefore, if XYZ is vicariously liable for the actions of Pete, the court may look to pierce the corporate veil and hold Bigg liable.

As to the contract with Dooley, the court may choose not to hold Bigg liable for two reasons. First, as mentioned above, the court is less likely to pierce the corporate veil for contract actions where Dooley could have investigated XYZ. Secondly, under corporation by estoppel, even though the corporation was not ACTUALLY formed as of the date of the accident, Dooley dealt with XYZ as a corporation. Therefore, Dooley may not disregard the corporate status of XYZ for the purposes of a contract claim. Generally, a promoter acting for the purpose of a corporation not yet formed remains liable on any contract entered into on behalf of the corporation (absent a novation), therefore, even if the corporation adopts the contract, the promoter remains liable. Unfortunately for Dooley, the corporation by estoppel doctrine better fits the present situation.

As to the vicarious liability of Bigg/XYZ for the accident and assuming the court pierces the corporate veil. Where an employee is liable for a tort created while acting within the scope of their employment, under agency principles, the employer may also be held vicariously liable for the same injuries. The facts state that Pete was acting within the scope of his employment at the time of the accident. Therefore it is likely that XYZ will be held liable under agency principles. Because Bigg was disregarding the corporate form of XYZ and fairness requires it in this tort claim because XYZ no longer exists, the plaintiff's counsel will seek redress from Bigg himself.

It is possible for a corporation to be charged with a crime under Georgia law. Although under common law, it was not possible to charge corporations with crimes, under Georgia law, the corporation may be charged where statute specifically authorizes such criminal liability against the corporation and the corporate agent acts in accordance with the elements of the crime either knowingly or in reckless disregard.

It does not appear that XYZ should be held liable for the crime of arson vicariously. There is no information in the facts which would state the legislature's intent to hold a corporation liable under the crime of arson in these conditions. In addition, Mr. Bigg's actions do not rise to the level of knowing or reckless disregard to the high probability that the buildings would be burned down. However, Mr. Smalls would likely qualify as an agent in the event that the corporation could be found liable under the statute because clearly he knew and intended to cause the burning of any building.

I would advise Mr. Bigg that even though the corporation may be found criminally liable where the statute clearly portrays such legislative intent, that his own personal liability for the crimes should not be extended to such vicarious liability in the absence of such intent by the legislation.

Question 1 - **Sample Answer 2.**

In order to form a legal corporation in the state of Georgia, an incorporator must comply with the provisions in the Georgia business code. Specifically, a corporation must file the appropriate documents with and receive a certificate from the Georgia Secretary of State (GA SOS). Before filing, the incorporator must reserve a name for the corporation. This is easily accomplished via the Internet at the website for the GA SOS. The name selected by the incorporator must include

“Company,” “Corporation,” “Inc.” or other statutorily permissible identifiers. If the name is available, the GA SOS will hold it for a period of time so that the incorporator has time to file the remaining paperwork.

The incorporator must prepare a form specified by the GA SOS identifying the corporation and providing relevant information requested on that form such as the name of the Registered Agent and his/her location and the location of the new corporation if known. All corporations in GA must have a registered agent for the service of process.

Along with that form, the incorporator must deliver the Articles of Incorporation of the new entity to the GA SOS. In those articles, the purpose of the corporation, its location, registered agent, initial directors and officers, procedures for amending by-laws, and similar matters are disclosed in numbered paragraphs.

Additionally, a cover letter should be included with the form and articles that affirms that the incorporator has prepared a notice of incorporation for publication in the appropriate legal organ. Finally, a check for the filing fee ($100) must accompany all of the above. Upon receipt of those documents by the SOS, the corporation is considered formed pending issuance of its certificate. The certificate will be mailed to the incorporator bearing the seal of the SOS.

If K&G followed the procedures above, XYZ would have been in existence as of the date the documents were received regardless of when those documents were actually processed.

Whether Bigg has any personal liability will depend on whether XYZ is truly an independent entity from Bigg himself. This issue of when incorporation was official is not as much of an issue for personal liability for the injuries arising out of the accident because the corporation certainly existed at that time. In addition, if a corporation is operating in the good faith belief that it is a corporation and holding itself out as such, it will generally be permitted the benefits of that belief but will also be estopped from avoiding penalties.

In general, a shareholder is immune from personal liability for the acts of his corporation. The essence of a corporation, in fact, is to shield its shareholders from ruinous liability resulting from the operation of the business. Personal liability will be imposed on a shareholder, though, under certain extraordinary circumstances. Specifically, if a corporation is actually the alter ego of a shareholder, there is an opportunity to pierce the corporate veil and hold that shareholder liable. Piercing can occur if the business is undercapitalized to a significant extent or if the shareholder(s) in question are failing to observe the corporate formalities necessary for independence and acts in a way that make the corporation’s separate existence doubtful.

Bigg will have some difficulty combating an attempt to pierce as a 90% shareholder. The facts don’t reveal the extent to which Bigg failed to observe the corporate formalities (like holding meetings, etc.) but the fact that he used the checking account of the corp to pay his bills is a sign that he did not keep his and XYZ’s affairs sufficiently separate. The complete ownership of XYZ being between Bigg and his wife also indicates the possibility of an alter ego. The fact that Bigg did make business decisions for XYZ demonstrates a sufficient amount of control over the corporation but not out of line for the job of President.

As for the personal liability on the Dooley note, Bigg signed the contract in his capacity as President of XYZ. In doing so, Bigg put Dooley on notice that Bigg was acting as an agent for XYZ. By disclosing his principal, Bigg does not have personal liability as the person signing the contract. XYZ is responsible for the contract. Again, however, if Dooley pursues a piercing

strategy, he may well recover on the contract directly from Dooley.

Bigg will be personally liable for the accident under the doctrine of repondeat superior only if piercing occurs. Because the driver was acting in the scope of his employment, XYZ, as his employer, is responsible for any tort he commits. Bigg, however, can implead the driver and be indemnified as the driver is still responsible for his own negligence. Also, he may be benefitted by the insurance coverage XYZ carried.

A corporation can be charged and convicted of a crime in GA. If the corporation instructed, encouraged, coerced, or otherwise compelled an employee to commit a criminal act, both the employee and the corporation can be held accountable. Arson is an issue for Bigg in that Small maliciously and deliberately burned the building and all its contents with the intent to burn and commit fraud. Georgia law recognizes three degrees of arson. Because this is a building that is not also a residence, destruction in this situation would generally be considered 2nd degree arson. GA has special provisions when arson is used to prevent a spouse of someone with a security interest from having the property which is burned.

Bigg's responsibility for this arson depends on his relationship with Small. Bigg stated to Small that he wished the business had never been in existence. Without more, Bigg's statement does not suggest that Bigg is giving instruction to Small or in any way suggesting or encouraging Small to commit. . .burn down the building. I would advise him, though, that because Small committed the crime and was an officer of the company, his action could be imputed to XYZ which would then be subject to a fine. It might be appropriate to seek out the prosecutor and offer information in exchange for immunity.

Question 1 - Sample Answer 3.

(1) In Georgia, the following steps must be taken to create and register a valid corporation. First, there must be one or more incorporators, who can be either people or other corporations. Second, the incorporator(s) must file Articles of Incorporation with the Secretary of State. These articles must include the names and addresses of any incorporators, the address of the registered office, and the identity of the registered agent of the corporation. An incorporator may also include a statement of purpose and duration, however if these are omitted, a lawful purpose will be presumed for an infinite duration.

Once the certificate of incorporation issues, a de jure corporation is formed. However, where a corporation has not yet formed but has begun to act as a corporation, the doctrine of corporation-by-estoppel will apply. In this situation, the "corporation" holds itself out as such to others and it should be estopped from denying that it was a corporation at the time of the transaction.

(2) Bigg can only have personal liability for the accident and/or the contract with Dooley if a court would decide to pierce the corporate veil. Because Bigg treated the corporation as his alter ego, and in order to prevent Bigg from evading tort and contract liability, the court here likely would pierce the corporate veil and hold him personally liable.

Generally, a corporation will shield all of its directors, officers, and shareholders from personal

liability; this is one of the main advantages of having a corporation rather than a general partnership. However, in certain circumstances, a court will "pierce the corporate veil" in order to hold a shareholder liable, including: (1) where the shareholder treats the corporation as his "alter ego," to the extent that one is unable to discern whether the shareholder is acting on his own or for the corporation; (2) where a corporation is purposely undercapitalized in order to evade liability. In Georgia, courts will additionally pierce the corporate veil where there is fraud, an evasion of contract or tort liability, or an evasion of public policy. Before piercing the corporate veil, however, the court should determine that the corporation itself would be liable. Under agency principles, the corporation would be liable for any acts committed by its agents in the scope of the employment. Any intentional torts would not be attributed to the corporation unless the corporation ratified the behavior.

Here, Bigg would not ordinarily be personally liable as a shareholder of XYZ. Only XYZ would be liable for tort or contract actions brought against it. Here, plaintiff's counsel will argue that a court should pierce the corporate veil to reach Bigg under both the "alter ego" theory and under Georgia's broad theory of preventing shareholders from evading contract or tort liability. Bigg was 90% shareholder, and was treating the company's assets as his own by using the money in the XYZ checking account to pay his personal bills, as well as those of his family. Additionally, Bigg was running this corporation as though it were only under his management, without giving any deference of his wife and son who owned the remaining 10% of the stock. Thus, Bigg was treating the corporation as his "alter ego." Because he was so much in control of the business's activities, it would seem unjust to allow him to escape personal liability for tort/contract actions by hiding behind his shareholder status.

However, in order to fully hold Bigg liable, it must first be determined whether XYZ would be liable. Plaintiff's counsel will argue that for the accident, XYZ would certainly be liable because Pete was an employee or agent of the corporation and was clearly acting within his scope of employment at the time of the accident. However, the corporation had liability insurance of $1,000,000 which would have to be reached first before piercing the corporate veil to reach Bigg's assets. Only if the $1M were insufficient to cover the four wrongful deaths claim would the court pierce the corporate veil under the theories mentioned above.

For the breach of contract action, two situations must be addressed. First, Dooley has argued that Bigg should be liable because he signed the contract before the corporation was formed. This action in and of itself would not be sufficient to pierce the corporate veil. As mentioned in the answer to Question 1, a corporation can be found to exist through the estoppel theory where the corporation has entered into agreements under the corporate name and has held itself out as a corporation. Here, Bigg entered into the contract as an agent of the corporation, not in his individual capacity, and the corporation presumably adopted these contracts once it was officially formed. Thus, this fact alone would not be enough to pierce the corporate veil. However, if the court finds that the corporation was purposely undercapitalized to avoid contractual liability, or because Bigg was treating the corporation as his "alter ego," the court would pierce the corporate veil.

Under modern law in Georgia, a corporation can be charged with a crime, under the same general agency principles of tort liability. Under common law, a corporation was not considered a "person," and because it could not have the requisite mens rea or be imprisoned, it could not be held criminally liable. However, modernly, where a corporate agent engages criminal acts which were committed in the scope of employment, a corporation could be held criminally liable for those acts.

Bigg can avoid his personal exposure by arguing that any criminal liability of Small could not be imputed to Bigg. Bigg's vague words were not sufficient to invoke solicitation or accomplice liability, because he did not specifically ask or induce Small to commit the crime, nor did he encourage Small to commit the crime with the specific intent for Small to do so. Bigg should argue that because Small acted entirely on his own behalf, no criminal liability can be imputed to Bigg.

Question 2 - Sample Answer 1.
(disclaimer)

1. The most apparent problem arising out of the instant facts is the constitutionality of the proposed funding scheme under the First Amendment of the U.S. Constitution as applied to the states via the due process clause of the 14th Amendment. While on its face the clause protects "freedom of speech", the court has long held that free speech also includes the freedom not to speak (see ***West Virginia v. Barnett***). At issue here is whether requiring a person to pay for advertising which seems to be largely against his business interests constitutes compelled speech volatile of the First Amendment. The U.S. Supreme Court has dealt with such issues before and has generally forbidden government to require individuals to fund speech they disagree with. However, the court has allowed Governments to compel payments to support "comprehensive" programs where the defendant only objects to some of the message conveyed in the program (this typically arises in the context of mandatory union dues). Accordingly the issue will likely turn on whether the ads are a "comprehensive program" or scheme to which the defendant objects to only a part; or whether the entire message is disliked by the bars. It is reasonably certain that this constitutes a comprehensive program designed to eliminate a host of issues dealing with irresponsible drinking. If the bar objects, however, to the ads precisely because of the element that unites them into a comprehensive program, this would seem to weigh heavily in favor of the bar owner. It should be noted, however, that in this claim and all the claims discussed hereafter that the court might be a little more lenient on the states than is typically the case due to the states power to regulate alcohol within its borders granted by the amendment repealing prohibition (states have won claims regarding alcohol and adult entertainment on this basis. Finally, I believe that even if the plan is one of comprehensive character and the bar only object to some statements, it still must pass constitutional scrutiny under the First Amendment. However, it is difficult to determine which test to apply. On the one hand, the state is clearly supporting a viewpoint here which hints at strict scrutiny, but on the other the compelled speech is of a commercial nature and is compelled from a commercial company. This decision would also likely be outcome determinative as well, because the strict scrutiny test's requirement of narrow tailoring is not met here (they could always find another way), while the commercial speech test does not require narrow tailoring and nobody can dispute on the facts that responsible alcohol use is a compelling governmental interest served by this decision. The court, here likely, however, will apply strict scrutiny because the Government is taking a subject matter and viewpoint stance, and will invalidate the law.
2. The bar might bring a challenge to the law based on the equal protect clause of the Fourteenth Amendment because the bar discriminates against bar owners. But because

there is no protected class, there is only rational basis scrutiny to apply [the law is valid if rationally related to a legitimate government interest]. Here the legitimate interest is alcohol safety and making alcohol providers pay the costs for it is clearly rationally related.

3. (The state might also have to face the argument that this law is invalid as a taking under the Fifth Amendment to the Constitution. This is not like a tax, but more like an exaction of land because it deprives defendant of a use and possession of a tangible property interest Court like interest from attorney Iolta accounts). This court might apply the Nolan-Dolan reason.

Question 2 - Sample Answer 2.

(disclaimer)

1. An Equal protection challenge can be asserted businesses based on the classification of businesses that are "primarily in the sale or distribution of alcohol". The standard in which the court will apply will be a rationale basis standard. The court will apply a rationale basis standard. The court will apply a rationale basis standard because the classification is not a suspect class (race, alienage or involve a fundamental right, such as family, travel, and etc.), it does not fall within the quasi suspect classification (gender, illegitimacy), so therefore it falls to the lowest level of review. The test the court applies is to determine whether legislation is rationally related to a legitimate state interest. The burden rests with the challenger to show that the state does not have a legitimate state interest.

   The court will likely rule that the state does in fact have a legitimate interest and that the legislation is rationally related. The imposition of the contribution is used to lower the driving arrest for intoxication, teenage drinking, arrest, and also arrest for public drunkenness. This is clearly a legitimate interest of the state, to save the lives of its citizens. The use of the funds is to increase awareness of the dangers of drinking through media outlets, such as TV, radio, and print media the court will likely hold that this is a rationale means of raising awareness and thus hold the statute constitutional.

2. The Georgia companies that would be required to contribute to the Board could raise a First Amendment claim to the freedom of speech. Inherent in the freedom to speak is the freedom to refrain from speaking. This challenge would be reviewed on a strict scrutiny standard to determine whether Georgia has a compelling interest and that the required contribution is narrowly tailored to meet the compelling interest. Under a strict scrutiny test, the state has the burden of proof of establishing that the legislation is narrowly tailored to meet its compelling interest.

   Under a strict scrutiny analysis the act will probably be declared unconstitutional. The sole purpose is to fund advertisement on television, radio, and print media. The state would not be able to show that it is narrow enough. The contribution could be used for intervention programs, speaker's in seminars, teenage driving course, harsher fines and punishments for those businesses that sale alcohol to teens or harsher penalties to the teens that violate the drinking laws. For businesses to speak through advertisements is probably not narrow enough to withstand strict scrutiny. Although, the State of Georgia has a compelling state interest it would probably not withstand the narrowly tailored portion of the test and be held

unconstitutional.

3. Another challenge could be under the commerce clause using the aggregate effect to establish that the state regulation poses an undue burden on interstate commerce, although it involves only Georgia companies. This would be a losing argument, but is possible challenge to the act.

   The companies would need to show that the regulation cumulatively poses undue burden on interstate commerce and should be held to volatile of the constitution of the U.S. This will be unavailing because the corporation was only required to contribute 0.019% of its gross sales and was only subject to Georgia companies. This probably will not be sufficient to establish an undue burden on interstate commerce by the cumulative effect doctrine derived from Wickard.

Question 2 - Sample Answer 3.
(disclaimer)

1. The first possible claim is whether the Boards advertising would violate the Georgia business's First Amendment rights of speech. A state can not require a specific group to pay for advertising that may be against the groups interest. Essentially freedom of speech is to say or refrain from saying things that are protected by the First Amendment. The state can restrict commercial speech if done in a manner that is not to broad. However, in this fact pattern the state is the entity that is advertising. The state is unconstitutionally requiring the Georgia businesses engaged in beer distribution to support a specific view point. Because this is an unlawful freedom of speech violation which deals with commercial speech the state will have to show that it is narrowly tailored to advance an important government interest. The state will likely not be able to do this because they are specifically targeting one group of businesses and requiring them to pay for a speech that they may not agree.

   The purpose of the Board is fine, the message that the Board is advancing is fine, the funding measures are improper because they unconstitutionally (abridge the freedom of speech by) requiring the Georgia businesses, who deal with alcohol, to portray an image or statement by requiring an unlawful funding process.

2. The next possible constitutional issue deals with equal protection. A state cannot discriminate against one group of individuals and afford another group unequal protection of the law. The idea behind equal protection is that tall individual/groups should be treated fairly and equally. If a state is going to treat one group differently, then they must have a reason for that difference.

   The two groups that are being treated differently are individuals whose business is engaged in the sale of beer and all other businesses individuals. The individuals who compose these two groups of business are the actual ones who are injured by the new legislature. Since this action does not deal with a suspect class of individuals; individuals who have beer businesses are not a suspect class thus they will have to show that the law is not rationally related to a government interest. This test is almost impossible for a plaintiff to show because all legislative will be rationally related if the legislature gives some reason that

somehow relates to the purpose.

This cause of action would be unlikely to succeed because the classification of the two groups will depend on how they were brought in order for them to fall into the equal protection realm.

3. Interstate commerce:

   The next possible violation would be one that offends the commerce clause of the constitution. The taxation of businesses with in a state can only be to the extent that it does not substantially effect interstate commerce. Essentially a state could not tax a particular interstate business out of existence.

   The argument that must be made is that the tax is a substantial burden on interstate commerce. Anytime a state law burdens interstate commerce substantially the law will be found unconstitutional. Taxing a company that acts in an interstate business by selling, distributing, trucking and using the communication systems, does not necessarily substantially burden interstate commerce. However, if the tax is high enough then it may be found to substantially burden.

   In this fact pattern the state is only taxing the business .01% of their annual gross revenue. This amount of taxing is probably not enough to substantially burden interstate commerce. A tax of this small degree would likely be constitutional. The businesses are not financially burdened by this small a tax.

Question 3 - Sample Answer 1.

(disclaimer)

1. The issue is whether Bank Two has grounds for asserting priority over Bank One's security interest in Crosswinds' pianos. The general rule is that the first to file or perfect has priority. Since Bank One had an after acquired property clause and a future advance clause, Bank One is entitled to the inventory when it is exchanged for other inventory and may claim this collateral any time it issues a new loan to Crosswinds Pianos. Here, under the general rule, Bank One has priority because it was the first to file or perfect the security interest when it filed the financing statement on 2/1/99. The financing statement filed on December 1, 2000 was too late so Bank One has priority. The discrepancy in the name, when Bank One filed under "Crosswinds Pianos" rather than ""Crosswinds Music, Inc. d/b/a Crosswinds Pianos," would not prevent the financing statement from being perfected because the name "Crosswinds Pianos" is not materially misleading. The purpose of this rule, allowing for name discrepancies, is to ask if someone would likely still find the security interest if they were to look under the appropriate name. Here, there is no doubt that someone coming across "Crosswinds Pianos" would investigate further to see if they had the right party. The continuation statement of July 15, 2003 and the second financing statement, however, were not sufficient to maintain Bank One's priority.

2. Bank Two will have priority over the pianos and Van's will have priority over the tuner. The pianos would be classified as inventory. Although Van's issued a Purchase Money Security Interest ("PMSI") in the inventory, Van's had to perfect before Crosswinds took possession (which they did) and notify all prior creditors of the security interest. Van's failed to notify Bank Two so Bank Two has priority. However, the piano tuner would be classified as equipment, as it is used in the business to maintain pianos. A PMSI in equipment may be perfected within 20 days of the buyer taking possession. Van's filed on March 10, 2004, two days prior to delivery, so Van's PMSI in equipment would have priority.

3. An authorized sale or a buyer in the ordinary course would have priority over a prior perfected security interest. John Buyer is a buyer in the ordinary course of the piano because Crosswinds is in the business of the sale and service of pianos. Thus, Buyer prevails. For the painting, however, this would likely be classified as inventory and thus not sold in the ordinary course of the business and an unauthorized sale. It is not consumer goods because you look at how the person is using it, and here it is being used to increase the aesthetics of the business. Thus, Bank Two can enforce its lien on the painting.

4. Bank One would prevail because the purchase price consists of identifiable cash proceeds from the sale of the assets and Bank One will remain perfected as to the cash proceeds. Although they are now accounts receivable, in which Bank Two has an interest, Bank One was the first to file or perfect and would be entitled to the identifiable cash proceeds. One remains perfected if the filing of the financing statement would be made in the same office ("the same office rule") or if the inventory is identifiable cash proceeds. Here the latter applies.

Question 3 - Sample Answer 2.

(disclaimer)

1. Can Bank Two challenge the apparent priority of Bank One's security interest in Crosswinds" pianos and inventory?

   The general rule between two perfected secured creditors is that priority is governed by the first to file or perfect. However, while Bank One did file first, Bank Two can challenge because the filing may be Seriously Misleading.

   In order to properly perfect a security interest by filing, the secured party must file an appropriate financing statement (FS). The FS is filed under the name of the debtor. When the debtor is a corporation, the filing must be filed under the name of the Corporation and NOT under a DBA or trade name. Therefore, Bank One's filing was filed using the wrong name because it filed its FS under "Crosswinds Pianos" and not "Crosswinds Music, Inc."

   When a FS is filed under the wrong name, it will not be effective if it is "seriously misleading." A FS is seriously misleading if a search under the correct name does NOT produce the filing under the incorrect name. Here the facts do not indicate whether Bank Two's search yielded Bank One's filing. If it did, the FS is not seriously misleading and Bank

One is properly perfected. However, if it did not, then Bank Two, because it filed under the proper name, Crosswinds Music, Inc., will have priority because its FS covered equipment and inventory. Because the pianos are sold in the ordinary course of Crosswinds' business, they are inventory.

Bank Two can also challenge Bank One priority on the grounds that its FS lapsed on February 1, 2004. Under the UCC, a FS is effective for 5 years. However, it may be continued by filing a continuation statement. However, the continuation statement must be filed no earlier than 6 months before the FS will expire.

Here Bank One filed its first FS on Feb 1, 1999. Thus, they could not file a continuation statement until August 1, 2003 – six months before the expiration on Feb 1, 2004. Therefore, because the FS was filed on July 15, 2004, it was ineffective.

While Bank One did file a second FS on Feb 15, 2004, it was unperfected for a period of 2 weeks (this FS may also have been seriously misleading). As such, Bank Two can argue that because it filed a FS in 2000 that was effective when Bank One's FS lapsed, that it moved into first position.

2. Based on the facts, Van's Supply House will have priority on the Fancy piano tuner and Bank Two will have priority over the Steinway grand pianos.

   As between a secured party who is perfected by filing and a party that has a purchase money security interest (PMSI), the PMSI will prevail if he perfected by filing either before the debtor received the goods or within 20 days thereafter (for equipment). A PMSI occurs where the secured party finances part or all of the purchase price of a good. Therefore, because Van's "financed" the purchase, it does have a PMSI. Here, Van financed the purchase of two grand pianos and a tuner. The tuner was used to tune the pianos in the store, so it is equipment. Therefore, Van will prevail over Bank Two provided it perfected by filing within 20 days of Crosswinds' possession. Because Van filed its FS on March 10 and delivered the goods on March 12, it was properly perfected. Thus, it has priority on the tuner.

   However, a special rule applies to PMSI's in Inventory. In order for a PMSI in inventory to prevail, the lender must perfect before the debtor has possession AND notify a conflicting holder of a perfected security interest in the inventory of its intent to take a PMSI in the inventory. Here, while Van did properly file its FS before delivering the goods, it did NOT provide Bank Two with the proper notice. Therefore, Bank Two will prevail over Van for priority in the two Steinway grand pianos.

3. No, Bank Two cannot enforce its lien in the Steinway grand piano provided Buyer purchased the piano in the ordinary course of business; however, it may be able to do so over the painting if it was not sold in the ordinary course of business.

   Under the UCC, a buyer in the ordinary course of business takes free and clear of a security interest created by his seller. Thus, a buyer in the ordinary course of business takes free of a security interest created by his seller, here Crosswinds, in inventory.

   Here Crosswinds is in the business of selling pianos and organs. By paying roughly $100,000 it appears that Buyer paid value and there is no indication that he purchased other than in the ordinary course of business. Therefore, because the security interest was created by

Crosswinds and purchased in the ordinary course of business, Buyer took free of the security interest (Bank Two can still go after the proceeds).

Conversely, because Crosswinds was NOT in the business of selling paintings, Buyer probably did not buy in the ordinary course of business. Therefore, because Bank Two was properly secured, he took subject to their security interest.

4. Bank One probably has priority over the $120,000 purchase price as proceeds. A secured party automatically is also secured in proceeds - here the money/account receivable from the sale. While Bank Two has already filed a FS that covers accounts receivables - which the $120,000 is, Bank One was previously secured with respect to the inventory - both the piano and painting. Under the UCC, a perfected party remains perfected in proceeds for a period of 20 days if the proceeds are not in a category that the party already has covered under a valid FS. Here Bank One has no such FS on record. Therefore, it will only prevail if it files an amended FS before its interest in proceeds expires. Because Bank Two noticed the items missing yesterday it is not clear whether the 20 days has passed. However, if the time does expire, then Bank Two has priority under its properly filed FS.

Question 3 - **Sample Answer 3.**
(disclaimer)

1. The issues here are whether Bank Two may challenge Bank One's apparent priority in Crosswinds' Pianos and inventory because of the defective financing statement or because the name "Crosswind Music, Inc." is seriously misleading. A security interest in inventory or equipment may be perfected by filing a financing statement with the Superior Court clerk of any court of the state in which the debtor resides. A financing statement is valid for 5 years but may be renewed by filing a continuation within six months of its expiration. If not filed within this time, the once perfected security interest loses its priority.

   Here, Bank One properly perfected its security interest in Crosswinds' Pianos and inventory by filing the financial statement with the Bibb County Superior Court clerk. To continue a perfected interest in this collateral, Bank One was required to file its continuation statement after July 31, 2003 but before February 1, 2004. Because Bank One filed its continuance statement on July 15, 2003, it had no effect of perpetuating its prior perfection and will lose priority to Bank Two's perfected interest, filed December 1, 2000.

   Also, Bank Two would take priority over Bank One if the use of Crosswinds' trade name made the financing statement seriously misleading. To be seriously misleading, the Debtor's name would not put those searching on notice. Since Bank Two used the trade name on its financing statement, it would be on notice and not prevail on that issue.

2. Generally, the first to file a financing statement ("FS") or perfect its security interest ("SI") has priority over a competing interest. The issue here is who has priority when two competing SI are perfected. An exception to the general rule stated above is that a purchase money security interest ("PMSI") has priority over the preferred SI. Van's has a PMSI in the two pianos and tuner because it extended credit for the purchase. Thus, Van's PMSI has

priority over Bank Two's perfected SI. Even if Bank Two's SI is deemed to be a PMSI as an enabling loan, Van's would still have priority as a seller over a lender.

3. I. Bank Two will not be able to enforce its interest in the painting but will be able to as to the piano. A buyer in the ordinary course of business takes free of any SI created by the seller. Here, Crosswinds is a seller of pianos but not paintings, so buyer's purchase of the painting was not in the ordinary course of business because Crosswinds was not a merchant of paintings.

4. Bank One has priority over the $120,000. At issue here is who has priority over the proceeds of the pianos. The question stipulates Bank One had priority over the inventory, of which the piano was a part. If a party has a perfected SI in the inventory, then it also has a perfected SI in identifiable proceeds. Because Bank One has priority in the inventory, it also has priority over the proceeds resulting from the sale of such inventory.

Question 4 - **Sample Answer 1.**
(disclaimer)

B has several remedies under Georgia law. First, regarding all the assets which were or potentially remain assets of the partnership, B can ask the court to govern or look over the dissolution process. A and B formed a partnership sharing profits. A partnership is formed when an association of 2 or more people conduct business for profit. They have a partnership at will which can dissolute when the partners want to leave. The partnership owned the cabin because it was bought with the partnership's money even though it was only in one partner's name. The other items at issue were brought in by either A or B. A brought in the boat, motor, and trailer. C brought in the dog, Lucky. When the partnership ends, the partners can decide how to wind down and split the items. Here, A agreed to give B the cabin, boat, and other equipment in exchange for the contribution and to return Lucky to B. The facts do not say whether the agreement was in writing. Assuming that it was validly entered into, then B may have legal remedies to enforce the contract. B can file with court to determine his damages and whether the contract is enforceable. He can get compensatory relief from his contract claim.

a. B would have to go to court to stake his claim in the cabin and ask the court to halt the sale until the partnership assets are sorted out. Because the cabin is real property, B would be able to get specific performance because land is always considered unique. If A improperly put title in his name even though he was supposed to put both names, then B can ask the court to grant constructive trust in that A is holding title for B, and all proceeds from the sale would go to B, B would have to prove that A got title through fraud.

b. However, it is unlikely that B can prevent A from selling the boar, motor and trailer to C because legal remedies are sufficient to compensate for those items. If legal damages are enough then B would not be able to get other equitable relief, such as an injunction. The facts do not suggest that the boat, motor and trailer are unique such that specific performance is necessary. Generally, for goods, specific performance are not granted unless the goods are unique. In addition to arguing that he is the rightful owner, B can file a claim

with the court stating that as a partner he has the right to these items and prevent A from disposing the items without his permission.

B can probably file a replevin with the court, and if he actually has rights over the items, he can employ self-help first to make sure the goods do not leave the state, and then the court can determine whether a replevin is granted. B must prove that he has rights and also that A is taking the items out of the state, which is evidenced by C's statements.

B can try to get other equitable relief. Equitable relief is based on fairness. If Lucky was his dog and has serious sentimental value, then the court may direct A not to take Lucky and turn him. B would have to show that legal remedies are not sufficient, and out of fairness Lucky should not be taken away.

c. Legal remedies is also likely sufficient to compensate for Lucky. To actually prevent A from bringing Lucky to Georgia would require B to go to court and first determine that he is the rightful owner and then file for a form for the personal property to stay in the state. However, the process would certainly take longer than 2 days. To get a more immediate remedy, B would have to get an injunction and an expedited injunction. B's desire for his dog is not what the expedited injunctions are used for. B can probably also get a replevin and try to get the dog before it leaves the state.

d. A violated his duty as a partner because he refused to provide accounting to B. The facts show that the partnership could have been making a large profit that was not accounted for. Thus, the partnership agreement provided for 50/50, and the court can grant B relief for his portion of the profits and for breach of the partnership agreement.

   If there was no contract, then the court may be able to grant a quasi-contract relief based on unjust enrichment to A. B would have to show that A got these benefits that he did not deserve from B. B would probably be able to show it because B contributed all the money, did not get any profit, and did not get any items from the partnership.

Question 4 - **Sample Answer 2.**
(disclaimer)

B may be able to have the court issue an injunction to stop A from selling the cabin to C. Because an injunction is an equitable remedy, it may be granted by the Superior Court, where Donalsonville is located. For the court to grant an injunction the following factors must be met: (1) the prevention of future harm is great; (2) irreparable harm; (3) likelihood of success on the merits; (4) no adequate remedy at law; and (5) no defenses. There are three types of injunctions: (1) temporary (TRO); (2) interlocutory; and (3) permanent. A TRO in Georgia is valid for 30 days. It may be issued with a Rule Nisi (Unless A shows up to court after being issued Rule Nisi, the court will automatically enter the TRO)

Here, B provided the financial backing needed for the partnership to perform. A promised B that he would give the cabin to B as a result of the money that B contributed to the business. If A sells the cabin to C, B will be without a remedy because there will be no property to satisfy his

partnership debts. He would not have anything to show for his contribution. A breached his duty of good faith as a partner to B and B should be protected. The court should issue a TRO under a Rule Nisi because A is getting ready to sale the cabin within 3 days. Even if the court later finds that B could be made whole through the sale of the proceeds of the cabin to C, the sale must be stopped now in order for the court to make the determination. If A violates the injunction, he could go to jail.

The court may also have to issue a writ quia timent to quiet title to the cabin. The partnership purchased the cabin in both of their names. However, the title to the cabin was only titled in A's name. Property that is used for partnerships is usually titled in the name of the partnership or is purchased through the funds of the partnership. Here, if the cabin is in A's name, then the sale could not go through. There is an issue because they purchased the cabin together as 50/50 owners. The court may have to find out who has proper ownership of the cabin. Because this may be an action to declare who's cabin this is, the court may need in personum jurisdiction which is satisfied here because A is still in Georgia and A may have the deed to the property. With a quia timet against the whole world only in rem jurisdiction is needed.

B could also argue for specific performance of the agreement because land is unique. For the court to issue specific performance, there must have been a valid contract and performance should be rendered. Here, A agreed to give B the cabin as an accord for the money that B put in the partnership.

It could be argued that because B could be satisfied with money, then the sale of the cabin should be allowed but B should receive an equitable lien or a constructive trust on the proceeds. This would allow the sale to go forward but not allow A to benefit from his mis-deeds. B could be made whole by the sale of the cabin to C and get punitives against A for violation of the breach.

B could ask the court to issue an injunction from selling the boat, the motor, and the trailer to C because it would be unfair for A to profit from his actions. A owes a fiduciary duty to B because they were partners. A should not be able to sell the goods without B's notice. He also told B he would give him those goods in exchange for what B put into the partnership. Like (a), money damages could make B whole. If the court did allow the sale to go forward, B could secure an equitable lien on the property or have the proceeds go into a constructive trust.

A may have no defense to argue against the injunction in wither (a) or (b) because he has unclean hands. A tried to sneek the sale by B in order to make a profit instead of honoring what he told B he would do. The court will try to make B whole.

B can prevent Lucky from being taken away to Arkansas through a writ ne exeat, an equitable remedy that stops parties or potential parties to a litigation from leaving the state. With the writ, the party who it is against must post a bond. This bond should be enough to equate to the amount owed for the potential damages. The party wanting the ne exeat issued must also post a bond, This bond is to ensure that if they proceeded against the other party and were wrong, the bond act as a damage reward. Here A & A's girlfriend are wanting to go back to Arkansas with B's dog. B only allowed A to use the dog as part of the services. He was not bought with partnership funds. Thus, title of the dog should remain in B. The court should stop A & the girlfriend from exiting the state with Lucky by issuing the writ.

B could ask for an equitable accounting in determining whether or not A owes him any money. An equitable accounting is a harsh remedy because a receiver must come in and look through the books. The accounting should be awarded because A led B to believe that the cabin was filled

with hunters and that he was “booked up” all the time. A never would tell B how much had been paid to him by the hunters using the guide service. It will necessary for the court to intervene using the equitable accounting in order to decide how much money from the guide service should be owed to B.

Question 4 - Sample Answer 3.
(disclaimer)

A is going to take action in three days that would adversely affect B. B needs to seek a temporary restraining order (TRO) to keep A from taking such action. A TRO sounds in equity, so to qualify for one legal remedies must not be adequate and performance must be feasible. To get a TRO, one also needs to show that they will be harmed if the court does not take immediate action and a likelihood of success on the merits. A TRO would stop the impending sale, and give B time to sort out what he needs to do to protect his interests. If the sale goes through, B could be irreparably harmed.

This is a valid contract, because there is offer (A offering his interest in the cabin to B), acceptance (B agreeing), and consideration (the interest in the cabin from A, discharge the debt that was not due was disputed from B). The time for performance of the contract is the end of the season.

When B talked to C and found out that A had promised C the cabin, this amounts to anticipatory repudiation. Anticipatory repudiation is when one party unequivocally says they will not perform even though time for performance has not yet occurred. Anticipatory repudiation allows the other party to immediately sue for breach. The appropriate amount of damages for breach of contract is expectation damages, which puts the nonbreaching party in as good a position as he would have been in if the other party did not breach. So B can get the value of the property promised to him by A.

Land is unique, and therefore specific performance is usually available. This is an interest in land for over a year, so the statute of frauds applies. The statute of frauds requires a writing for interest in land for over a year or full performance. Neither appears to be here. However, if B can show promissory estoppel, A may be denied from claiming no contract exists. To show promissory estoppel, there must be reliance by one party that is reasonable and foreseeable, and unfairness must result if the contract is not enforced. There is no specific instance of reliance here, but possibly the fact that B did not bring any action against A shows that B was relying on promises they made about settling up. Unfairness would result if the contract is not enforced because B is getting nothing in return for his significant investment.

Selling the boat, motor, and trailer to C

These items were actually A’s property to begin with; however, he offered them to B to make up for the extra capital that B had to invest in the partnership. The same type contract exists here as did for the cabin. If the value of these goods is over $500, which it probably is because there is a

boat, motor, and trailer, then there has to be a writing to satisfy the statute of frauds. There is no indication in the facts that there is such a writing. However, if promissory estoppel could be shown, the contract may be enforceable.

Preventing Lucky from being taken to Arkansas

B could seek specific performance to prevent Lucky from being taken back to Arkansas. Specific performance sounds in equity and is available when legal remedies are not adequate and specific performance is feasible. Though there is no contract here, specific performance may be appropriate. The value of animals is usually reduced to chattel value. There is no room for sentimental value in the law of contracts. However, B should still argue that Lucky is unique and as such, no amount of money damages would be appropriate. If he is successful in asserting this, he will probably win because specific performance is feasible. A and his girlfriend have not left for Arkansas yet, so she can give Lucky back. B could also try to get replevin, which would make A return Lucky.

Possibly B could sue for conversion of Lucky if they refuse to return him. Then the value of Lucky (which would probably be high since he is a champion Labrador retriever) would be appropriate or they could be compelled to give Lucky back. The plaintiff gets to choose which remedy he wants for conversion of property.

Determining whether A owes him any money from the guide service

A and B formed a partnership. Unless otherwise agreed on, profits are split 50/50 in a partnership. Here, A and B decided to split 50/50. B will be entitled to half the profits from the endeavor. The guide service is clearly within the purpose of the partnership, so these are profits of the partnership. B should order an accounting of the records, though A probably does not have any records. He at least would have some idea of how much money the partnership had made because he was giving the tours.

B should also sue for breach of duty of care and loyalty or breach of fiduciary duty because partners owe each other such a duty, and A was not telling B anything about the partnership or how profitable it was, though B was making a good faith effort to try to find out.

MPT 1 - Sample Answer 1.

(disclaimer)

Dear Ms. Clarke:

This letter addresses whether Clarke Corporation (“Clarke”) may be liable for the death of Mr. Reagan due to PureView, assuming it is defective. The general rule shielding successor companies from liabilities of their predecessors may apply. However, a relatively new exception may impose

liability.

ISSUE: Can the product line successor rule be invoked to impose liability on Clarke for the PureView related death of Mr. Reagan?

SHORT ANSWER: A court is unlikely to use the product line successor ruler to impose liability on Clarke.

STATEMENT OF FACTS: Clarke purchased the assets of Santoy in 1990 and continued manufacturing one possibly defective product for a short time. Decades later, the product was found to likely lead to malignant tumors.

GENERAL RULE:

Under the general rule of successor liability for asset purchase transactions, the successor in an arm's length transaction is not liable for the debts and liabilities of the predecessor. Gray v. Ballard Corp. (1987). This rule protects commercial creditors and shareholders.

Here, the transaction was clearly an asset purchase of Santoy Enterprises, Inc. by Clarke Corporation. It was defined as such by the Asset Purchase Agreement ("Agreement") and fits the requirements of the general rule. The transaction between the two companies was at arm's length. Prior to the Agreement, they had never transacted business before, competed, and had no interest in each other.

As noted above, the four traditional exceptions to the general rule are inapplicable in the present case.

PRODUCT LINE SUCCESSION RULE:

The court in Gray, found the general rule protecting creditors and shareholders did not account for the public policy of strict liability for defective products which imposes the costs of injury on manufacturers who can spread risks and costs of compensation. Thus, the court created a new exception imposing liability on a successor to the original manufacturer where: plaintiff's remedy against the predecessor is virtually destroyed by the successor's acquisition, the successor has obtained the ability to assume the original risk-spreading role of the manufacturer, and it is fair to require the successor to assume liability as a consequence of enjoying continuation of the business and goodwill of the original manufacturer.

The product line successor rule will raise several issues in the present case.

VIRTUAL DESTRUCTION OF PLAINTIFF'S REMEDY

In Gray, the court found that the plaintiff's remedy against the original manufacturer "vitiated" by the purchase of the original's assets because the injury did not occur until six months after the original manufacturer dissolved. Thus, the plaintiff would be faced with "formidable and probably

insuperable obstacles" in seeking to satisfy any judgment against former directors or shareholders. Further, in Shatner v. Burger Co. (App 1999), the Franklin Court of Appeals found a virtual destruction of plaintiff's remedy where the original manufacturer dissolved two months after the asset purchase and where the dissolution of the original manufacturer was dictated by the terms of the asset purchase agreement.

In the present case, the dissolution of Santoy, the original manufacturer was not required by the Agreement, and the original manufacturer did not end up dissolving for two years after the asset purchase. This weighs in favor of our client because the asset purchase did not directly require or lead to the dissolution of the original manufacturer along with the plaintiff's remedy.

However, in Kramer v. Macintosh Inc. (App 1995), the court detailed that where the asset purchase "substantially contributed to the predecessor's demise," the first condition of the product line succession exception is satisfied. In Kramer, "substantially contributed" consisted of purchasing nearly all assets such that the predecessor was left financially strapped because the successor has financial and managerial control.

Arguably, in the present case our client substantially contributed to the demise of Santoy because Clarke purchased 80% of the company. However, Santoy still had entire control over the remaining 20% and had $2.5 million to invest into this remaining enterprise. Its eventual demise can be attributed to its own investment failure, not the purchase of the 80% by Clarke.

SUCCESSOR'S ABILITY TO ASSUME THE RISK-SPREADING ROLE

In Gray, the court found that the predecessor had basically transferred the ability to meet the responsibilities of defective products by the successor's purchase of the plant, equipment, inventory, and know-how consisting of manufacturing designs, continued employment of personnel, and consulting of the general manager. In Rollins v. Hardy Systems (App. 1997), the court found the successor in "a position to protect itself" from loss by continuing the same general business, despite the fact that it did not continue to make the specific defective product.

Likewise, Clarke, by the terms of the Agreement, all facilities, equipment, inventory, supplies, and most importantly, research materials (the know-how) to protect itself and spread risk. Further, that it only continued to manufacture PureView for a short time will not be helpful under Rollins, because despite the PureView cancellation, Clarke essentially continued the Santoy business.

FAIRNESS IN IMPOSING SUCCESSOR LIABILITY

In Gray, the court found a substantial benefit in the successor's deliberate exploitation of the predecessor's established reputation in the acquisition of its trade name, good will, and customer lists. Accordingly, the court found it fair to impose the burden of potential liability.

In the present case, Clarke did enjoy some benefits, but did not seek or use the predecessor's name, and thus did not have the benefit of its good will and established reputation.

Finally, in Shatner, the court based its finding that imposing liability would not be fair in part on technology and a substantial time between the manufacture and injury. Shatner involved a

predecessor that took over and then discontinued asbestos manufacturing long before the risks were known. Thus, the court found it unfair to impose liability where the successor could not reasonably anticipate the injuries and calculate the health risks imposed.

Likewise, presently, Clarke could not reasonably anticipate the future health risks of PureView. Coupled with the decades past since manufacture, it would not be fair to impose liability on Clarke.

Sincerely,

MPT 1 - Sample Answer 2.
(disclaimer)

The primary issue in determining Clarke Corporation's liability as a corporate successor to Santoy Enterprises is whether the product line successor exception applies to its acquisition of Santoy's Drug Manufacturing Division (DMD) and the substance PureView. The dominant case law indicates liability, though possible, is not likely.

Clarke Corporation (Clarke) acquired DMD, which was 80% of Santoy's operations, in 1990 for adequate cash consideration. No stock was transferred, and no officers, directors, or shareholders became affiliated with Clarke. As part of the Asset Purchase Agreement, Clarke acquired all manufacturing facilities, machinery, and equipment; all items of inventory; all customary lists and goodwill; all trade secrets, royalty rights, work notes, market studios, and consultants' reports; and only those liabilities incurred through Santoy's leases, contracts, and other agreements. Clarke did hire most of Santoy's employees, although that was not a part of the Asset Purchase Agreement. Santoy agreed to change its name and not to compete with Clarke, but Santoy was permitted to continue operating and developing the remaining 20% of its operations. Clarke informed all of its customers that it, not Santoy, was now the manufacturer of PureView. Clarke then discontinued production of PureView after six months due to declining sales. Not until April of this year did studies conducted by the Journal of American Medicine indicate PureView could cause cancer.

Mr. Regan was exposed to PureView manufactured by Santoy in 1983 and died in November 2004. His wife is bringing suit for his death.

Ordinarily corporations are not liable for products manufactured by their predecessors. Gray v. Ballard developed one notable exception to this rule - the product line successor exception. The court established three conditions that all must be met for the exception to apply. These include (1) the virtual destruction of plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume responsibility for defective products as a consequence of the successor enjoying the original manufacturer's goodwill in its continued operation of the business. None of these conditions are met in this case.

In Gray, the successor corporation purchased the predecessor in its entirety, including all of its

corporate stock, and required the predecessor to dissolve upon acquisition. Shatner v. Burger indicates this requirement was an essential element in the disposition of the case. Because Burger did not require its predecessor to dissolve, the fact that the predecessor did so of its own volition 15 months later was inconsequential. Likewise, in Kramer v. Macintosh Inc., the successor not only purchased the predecessor's assets but exerted financial and managerial control, thus directly causing the predecessor's demise. Clarke did not require Santoy to dissolve and paid adequate consideration for the purchase. Santoy, then called Sentinel, continued to operate for another two years before eventually becoming insolvent due to no fault of Clarke's. While Clarke did contribute in some ways to Santoy's demise, through purchasing the majority of its assets, mere contribution seems insufficient. Santoy was left with significant assets due to the high price obtained from its sale of DMD, and its inability to spur the growth of its remaining operations was not caused by any action by Clarke. Therefore, the first condition is not met in this case.

The second condition is Mr. Regan's strongest claim but can also not be definitively established. Clarke did acquire much of the knowledge of its predecessor through its employees, manufacturing processes, and consultants' reports. However, these in themselves could not convey the truth of PureView's dangers. The first study to indicate such risks was not published until this year, more than fifteen years after this transaction. Therefore, Clarke was not in a position to "calculate the health risks posed by (PureView) and incorporate those risks into its pricing and insurance decisions." Furthermore, Clarke expressly did not assume liability for any tort actions; it only assumed liability for leases, contract, and other agreements. This is unlike the agreement in Gray, which did not mention liability. On the other hand, Clarke may have been in the same position as Santoy to evaluate and control for the risks, like the situation in Gray, and drugs are more widely known to be harmful than asbestos was at the time (as was the situation in Shatner). However, even if the court happens to find in favor of Santoy on this condition, the failure of conditions 1 and 3 still preclude liability.

Clarke's situation with respect to condition 3 is substantially dissimilar to Gray and similar to Shatner. In Gray, the successor corporation held itself out as the same enterprise to its potential and existing customers. Clarke, though it took the PureView name, informed all of its customers that Clarke, not Santoy, manufactured the product, thereby obliterating much of Santoy's goodwill. Further, the situation is not one like the court described, where the predecessor deliberately sold its assets at an inflated price not reflecting liability and then liquidated in order to avoid liability. Santoy did not intend to liquidate and, according to the agreement, did intend to maintain its own liability as to any product failures. This transaction was not a deliberate attempt to avoid the liability of a dangerous product. Rather, like in Shatner, substantial time has passed since Clarke was involved in the production of PureView (here: 14 years, there 35 years), Clarke did not spend much time producing PureView (here: 6 months, there 39 months), Clarke could not have appreciated the risks involved in producing PureView because the reports had not yet been published, Clarke paid adequate consideration, and Santoy continued as a corporate entity with substantial assets until it dissolved without Clarke's involvement. Therefore, the equities balance against imposing liability on Clarke with respect to condition 3.

Because the three conditions are not met, the product line successor rule does not apply to this situation. Therefore, Clarke should not be found to be liable as a corporate successor to Santoy.

MPT 1 - Sample Answer 3.
(disclaimer)

Ms. Jasmine Clark

President, Clark Corporation

Re: Mr. Regan

Dear Ms. Clark:

The purpose of this letter is to address whether or not a specific product liability exception called the "product line successor rule" will apply to the lawsuit pending against Clark Corporation via Ms. Mary Regan and impose liability on your corporation.

While there are many factors that suggest liability, I don't believe your subsequent purchase of Santoy's Drug Manufacturing will impose liability for Mr. Regan's injury.

Clark Corporation

Brief Statement of relevant facts

In order for Clark to be liable for Mr. Regan's death, the court would have to find it liable under the "product line successor" rule. This rule was devised by the court system in Gray v. Ballard Corporation, a 1987 Supreme Court case, to provide remedy to tort victims and ensure that the cost of injuries resulting from defective products were borne by the companies that made them and not the less-powerful customers. In Gray, the court found that imposing liability on a successor company such as Clarke is justified where the plaintiff can demonstrate the following three conditions: (1) the "virtual destruction" of the original manufacture; (2) the successor's (Clarke) ability to assume the original manufacture's risk-spreading role; and (3) the fairness of requiring the successor to assume responsibility for defective products as a consequence of the successor's enjoying the original manufacturer's goodwill in its continued operation of the business.

Under the first condition, the Supreme Court in Gray and a later Court of Appeals in Shatner v. Burger (1999), explain that virtual destruction entailed the idea that the plaintiff will not be able to sue the original manufacturer because they have all but disappeared from the marketplace. The court looks at the arrangement between the original manufacturer and the successor and considers such things as whether the successor purchased all the manufacturer's assets, trade name, goodwill, obtained financial and managerial control of the manufacturer, and substantially contributed to the manufacturer's demise in accordance with the purchase agreement. In Gray, the court found virtual destruction where the successor company purchased all the tangible assets, trade name, and goodwill and specifically requested dissolution of the original manufacturer in their purchase agreement. Clarke has a similar agreement but it is distinguishable. The Clarke acquisition agreement specifically provides that Clarke will purchase all inventory and supplies and research material, however, Clarke did not substantially contribute to

the demise of Santoy Enterprises. While the agreement did require Santoy to change its name, Clarke did not require Santoy cease existence. Santoy continued to manufacture chemicals for an additional two years as Sentinel Enterprises. This is distinguishable from Gray where the agreement specifically provided that Gray would be dissolved as soon as practical. Additionally, this distinction was recognized by the court of appeals in Shatner. There, original manufacturer stayed in existence for an additional 15 months under a different corporate name just as Santoy had done. “To conclude that the first condition (was) satisfied,” the court explained “...would essentially eviscerate the general rule of successor non-liability by potentially exposing successors liability in every case....” Thus, condition one cannot be met.

The second condition is more troublesome but conclusive to liability. The court in Gray explained that where the original manufacturer transfers all of the resources used to meet its responsibilities to those injured by its products to the purchaser, liability may be found in the purchaser. Those resources include: the physical plant, manufacturing equipment, inventories, the know-how available through the records of manufacturing designs, the continued employment of factory personnel, and the consultation services of the original manufacturer’s general manager. In Shatner, the court upheld Gray and explained where a successor has acquired all these things, the court will conclude that the successor has “essentially the same capacity as its predecessor to estimate the risks of claims against it for injuries caused product defects and to make appropriate arrangements for insurance.” With the exception to hiring the general manager, Clarke has acquired a majority of the items listed above: the manufacturing facilities, machinery, equipment, all items of inventory, all laboratory supplies and research material, all “know-how” materials including trade secrets, work notes, market studies, and consultant reports, and continued employment of all active employees. Shatner, again, limits Gray. In Shatner, the court looked at whether the defendant successor was still an ongoing business and its own notice to the detrimental and harmful effects of its products, in that case asbestos. In Shatner, the successor left the business long before the injury surfaced and the health risks of its products were known and any studies were done. There, the successor left the business 30 years before known risks of asbestos and its cancer-causing effects. Thus, the court in Shatner, concluded that the successor could not have known or reasonably anticipated injuries to those products. Similarly, Clarke has left the business many years before the injury to Mr. Regan, an injury he suffered more than 24 years ago. The government study done on Pure View was not completed until after Clarke left the business and therefore Clarke had no way to know or reasonably anticipate injury.

The third and final condition the court in Gray discussed is presented as a fairness balancing test and whether or not it is fair to require the successor to assume responsibility for their defective products. The court considers a number of factors such as passage of time, short period in the business, impossibility at the time of envisioning the need to spread an enormous but unknown risk, payment of adequate consideration, and whether or not the successor continues without the help of the original manufacturer. The court in Shatner felt the factors weighed in favor of the successor where the passage of time was so great, 30 years, the time in the business was so short, 39 months, that the original manufacturer stayed in business. Here, you have 24 years pass, and a short time of continuing to. . .

Therefore, I do not feel Clarke will be liable.

Sincerely,

MPT 2 - Sample Answer 1.
(disclaimer)

July 26, 2005

Cooper City Zoning Board of Adjustment

RE: 2050 Maple Street, Cooper City

Dear Sirs:

I am writing on behalf of Len and Barbara Brigham, owners of property located at 2050 Maple Street, Cooper City, presently zoned R-1 single-family residential. I respectfully submit a request for variance of the zoning code as permitted by Section 35(D) of the Cooper City Zoning Code ("Code"). I submit that the best use of this property for the Cooper City community is for Dr. Brigham to be allowed to relocate her dental practice to the existing structure, thereby enabling her to properly serve the dental needs of low-income elderly patients who will be housed nearby at the soon-to-be constructed garden apartment complex.

Factual Background and Proposed Use of the Property:

Dr. Brigham's practice has long satisfied the needs of the elderly community in Cooper City. She is the only specialist in geriatric dentistry in Cooper City and between 20-25% of her practice is committed to pro bono dental care. Her current practice is located approximately three blocks from 2050 Maple Street, so her elderly patients are accustomed to traveling to the area for dental needs. Further, with the future construction of 134 moderately priced garden apartments in the area, the need for low-cost geriatric dental care is only going to increase in the future.

Unfortunately, due to unforeseen circumstances, unless the Board permits this variance, the senior citizens of Cooper City will face tremendous hardship in satisfying their dental needs. In the absence of a variance, Dr. Brigham will be forced to relocate her office to another location almost ten miles away. Given the limited mobility of many seniors and the "unreliable mass transit system" in Cooper City, it is imperative that Dr. Brigham be allowed to maintain her practice in Rollingwood neighborhood.

If granted the variance, Dr. Brigham will create within the existing structure at 2050 Maple Street a fully wheelchair accessible office to provide necessary dental services to patients of all ages. Further, there will be enough off-street parking available at the Brigham property to accommodate all patients and staff.

Satisfaction of Section 35(D) of the Code:

The granting of a variance in this instance complies with each evidentiary requirement of Section 35(D). I will address each in turn:

35(D)(1)- The Variance Will Not Create a Detriment to Adjacent and Nearby Properties

The Rollingwood neighborhood will not be detrimentally harmed by the location of Dr. Brigham's practice at 2050 Maple Street. Attached are letters from nine property owners in the immediate area, all of whom have no objection to the granting of this requested variance. Also attached are the letters of two nearby property owners who have no objection to Dr. Brigham's operating a dental practice in the neighborhood, but are somewhat concerned about the possibility of a substantial increase in traffic.

This concern is legitimate, but will be addressed in this instance. David White, nearby property owner and sergeant in charge of the Traffic Control Division, concludes in a letter of support for the granting of the variance that "excess speed, not the amount of traffic, is the primary cause of vehicular injuries to children." Paul Heinz, a certified traffic engineer, estimated that this variance will only increase the traffic in the area from "light" to "light moderate." To address this concern, Dr. Brigham is willing to install speed bumps in the area at no cost to Cooper City (a value of $3,750.00). Heinz estimates the installation of these speed bumps will reduce average automobile speed in the area from 28.5 MPH to 23.5 MPH (see attached letter).

Finally, Rob Zukor, the owner of Cooper City Realty, believes that the remodeling of the Brigham residence will cause the values of property in the area to rise about 10% while only marginally increasing property taxes.

35(D)(2)- The Variance Will Not Substantially Alter the General Character of the Area

The area is primarily residential, however, the Rollingwood Community Church is located only one block away at 400 2nd Street. The Church property also has an accessory structure and a parking lot for 40 vehicles. Further, 134 garden apartment units are scheduled to be constructed nearby in the immediate future. An interior renovation of the existing structure at 2050 Maple Street will not alter the landscape of the community. It will retain its residential facade, and any signage will be discreet and fully compliant with the Code.

35(D)(3)- The Effect of the Variance is in Harmony With the Provisions and the Overall Intent of the Zoning Code

Similar to the evidence presented above, the variance will not create a structure that is substantially different from the surrounding area. The structure will remain a single-family home with a small portion dedicated to the dental needs of the community. A stated purpose of residential districts is to provide "complimentary uses that conform to the density requirements" of the Land Use Plan. Dr. Brigham's practice is not only complementary to the Rollingwood neighborhood, but is vital to the substantial senior community in the area. It also conforms to the density requirement.

35(D)(4)- The Public Interest Will be Served by the Variance

The needs of the senior citizen community have been well documented in the Cooper City Daily News (March 16, 2005 article attached). With the upcoming construction of 134 moderately priced garden apartments for senior citizens in the Rollingwood neighborhood, it is critical that the area remain the "geographic center of services needed by senior citizens." Granting a variance in this instance will ensure that Dr. Brigham can continue to serve the dental needs of low-income senior citizens. Otherwise, a vital aspect of senior living will be absent, with no foreseeable solution (see attached case, VanEvery v. Windsor Township, permitting placement of a homeless shelter in a nonconforming district where substantial evidence of local need).

Thank you for your time. We look forward to the opportunity to address any questions or concerns you may have.

Stubbs, Friedland & Oglethorpe, P.C.

MPT 2 - Sample Answer 2.
(disclaimer)

Dear ZBA:

We write to you on behalf of Barbara Brigham, DDS. Dr. Brigham requests that her property in Rollingwood be granted a variance. At present, the Rollingwood neighborhood is zoned as R-1 single-family residential. Dr. Brigham asks that a variance be granted allowing her to move her dental practice into her home.

As you know, the Cooper City Zoning Code includes variance provision §35, that allow you, the ZBA, to authorize an owner to use property in a way other than permitted by the existing zoning classification. A variance is granted under §35 if the landowner shows that it is more likely than not that each of these factors has been satisfied: (1) the variance will not create a detriment to the neighboring properties, (2) the variance will not substantially alter the general character of the area, and (3) the effect of the variance is in harmony with the provisions and overall intent of the Zoning Code. In addition to this, (4) the ZBA must vote by a 2/3 majority that the public interest will be served by the variance.

Dr. Brigham's suggested variance meets all of the criteria required by the Code:

(1) Allowing Dr. Brigham to use her home as her dental office will not create a detriment to the neighboring properties, make the traffic pattern unsafe, nor clutter the street with parked cars.

According to both David White, sergeant in charge of Traffic Control Division, and Rob Zuker, the owner of Cooper City Realty, the proposed variance and remodeling of the Brigham home will increase property values in the Rollingwood neighborhood. Zuker estimates that the values in the area will rise about 10% as a result of the remodeling and including the dental office will not diminish that rise.

White also asserts that increased traffic to the neighborhood can be easily made safe by a simple plan to control the speed of neighborhood traffic (see letter). Taking White's advice, Dr. Brigham requested from Certified Traffic Engineer Paul Heinz an analysis of the traffic patterns and possible safety measures that could be taken to ensure the safety of the neighborhood children. Mr. Heinz's analysis shows that the addition of a dentist office in the neighborhood may increase traffic, at most, from light to light moderate. The addition of five bumps on Maple, 20th and 21st Streets would control the speed of any increased traffic to the present level or lower. Dr. Brigham and her husband volunteer to pay the full cost of installing such speed bumps.

Finally, the addition of a small office would not increase the amount of cars parked on the street in the neighborhood. Dr. Brigham has shown, and the neighbors agree, that the Brigham property is

sufficiently large to accommodate the cars of both the patients and the staff. As such, a variance allowing a small dental practice to operate from the home of Dr. Brigham would not create a detriment to the neighboring properties.

Nine landowners in the area have already expressed their unequivocal consent to the issuance of the variance. Two other neighbors, who have no other objections regarding the variance, have expressed some concern over potentially increased traffic and danger to the neighborhood children. Dr. Brigham shares these concerns and has adequately addressed them by the proposed addition of speed bumps at her own expense (see letters).

(2) The addition of a dental office in the Brigham residence will not alter the general character of the area.

Dr. Brigham's practice is a solo dental practice of family and geriatric dentistry. She works only four hours a day and does not anticipate expanding her business. The dental practice will produce no harsh smells, loud noises, or unpleasant sights. Such a minimal and low-impact professional office, contained exclusively on the Brigham's property can certainly have no effect on the general character of the area.

Further, the Rollingwood neighborhood is already far from solely single-family residential. There is a house of worship on the same block as the Brigham property. Also, one block over has been recently re-zoned as R-R multi-family for a new elder enclave. Two blocks from the Brigham property is a block zoned B-1 for businesses (see map). The multiplicity of zoning and variances allowed within a three-block radius of the property shows that the actual character of the area would not be altered by the inclusion of a dental office.

(3) Allowing a dental office would be in harmony with the provisions and overall intent of the Zoning Code.

According to §276, the purpose of the Residential Districts is to "provide a variety of residences and complimentary uses that conform to the density requirements, policies, and objectives of the Land Use Plan." The proposed variance will not hinder this worthwhile goal.

(4) Finally, Dr. Brigham also shows that her dental practice, which caters to the elderly and offers a generous amount of free dental services, serves the public interest.

Very recently, you re-zoned a block of the Rollingwood area to allow a low-cost home for the elderly. This commitment to the needs of the community is admirable and would be furthered by allowing a variance for Dr. Brigham. Between 20%-25% of Dr. Brigham's practice is done for free and she specializes in geriatric dentistry. Her practice could serve the needs of the elderly and needy in the neighborhood. The availability of such nearby services was a key factor in choosing a site for the enclave (see article). If not allowed, she will be forced to move her practice far from the needy residents of the enclave.

As required by the Code, Dr. Brigham has shown by a preponderance of the evidence- which simply means that it is more likely than not- that she has met all the requirements to receive a variance. She also asks that you continue your commitment to the elderly in our community and vote by a 2/3 margin that the variance will serve the public interest.

MPT 2 - Sample Answer 3.
(disclaimer)

July 26, 2005

Cooper City Zone Board of Adjustment

Cooper City, Franklin 33024

Re: Brigham Variance Petition

Dr. Barbara and Leonard Brigham request a zoning variance for 2050 Maple Street in the Rollingwood neighborhood, a subdivision of Cooper Cove. 2050 Maple Street is currently zoned R-1 single-family residential. The Brigham's request a variance to allow Dr. Barbara Brigham to relocate her dental practice to her home at 2050 Maple Street by building a dental office in the home.

The Cooper City Zone Code §35(D) states: a party requesting a variance must satisfy the ZBA by a preponderance of the evidence that (1) the variance shall not create a detriment to adjacent and nearby properties, (2) the variance will not substantially alter the general character of the area, (3) the effect of the variance is in harmony with the provisions and overall vision of the Zoning Code, and (4) the variance meets one of the following criteria: (a) unique and peculiar circumstances create practical difficulties or unnecessary hardship that would be alleviated by the variance; or (b) the public interest will be served by the variance. A variance under the subsection, (D)(4)(6), shall be granted out by the affirmative vote of two-thirds of the full membership of the ZBA.

The Brigham's request for a variance should be accepted because allowing Dr. Brigham to include a dental office to her house shall not create a detriment to adjacent or nearby property. As a matter of fact, Rob Zukor, owner of Cooper City Realty, estimates that values in the area will rise about 10% because of the substantial remodeling of the Brigham home. The Brigham's have gone to great lengths to get the neighborhood's approval for their plan before coming to the ZBA.

Len Brigham has garnered wide support from his neighbors in favor of this variance. The owners of all five contiguous properties and two properties directly across Maple Street have written letters to you stating they will not object to the granting of the requested variance. You have received nine letters in all that whole-heartedly support the Brigham's efforts.

You have received two other letters in support of the variance that allude to fears of "substantial additional traffic". While it is true that "substantial additional traffic" could be a detriment to nearby property, theoretically, this will not be the case in actuality. A study of Traffic Control, Inc., a transportation company from Lakeland, shows that the addition of "five medium-sized speed bumps on Maple, 20th, and 21st Streets" would control speed problems in the area. Traffic Control, Inc. and Sgt. David White of the Cooper City Police Department agree that speed is more of a concern than the amount of traffic from the Brigham's dental office. The Brigham's have offered to pay the estimated cost of installing the speed bumps - the speed bumps will not cost the city one penny!

The variance will not substantially alter the general character of the area either. The general area currently contains a Church and will soon have "up to 134 one-bedroom, moderately priced garden

apartments" (Cooper City News, March 16, 2005). The Brigham's proposed dental office will consist of a waiting room with the office area plus two patient treatment rooms, a small bathroom, and a storage room totaling 800 square feet. Importantly, all of this will be inside the 5000 square foot home already purchased, and already being renovated by the Brigham's. The only potential problem would be off-street parking, but the Brigham house has ample space to accommodate the patients and staff.

The variance is also in harmony with the provisions and overall intent of the Zone Code. §276 of the Zoning Code states: "Residential districts are intended to provide a variety of resources and complementary uses that conform…" Allowing Dr. Brigham to operate a dental office from her home is without a doubt a "complementary use" as used in the Zoning Code. Dr. Brigham does a great deal of pro bono dental work, especially for the elderly. With the garden apartments complex catering to senior citizens to be built in the area soon, it is imperative that Dr. Brigham have an office nearby these patients to help them with their dental care. The effect of the variance would be in harmony with the provisions and overall intent of the Zoning Code.

Finally, the public interest would be served by allowing Dr. Brigham to operate her dental practice from an office on 2050 Maple Street. In Anron v. Cooper City Zone Board of Adjustment (Franklin Court of App 1998), the courts held that "the public interest requirement of subsection (4)(b)(of §35(D)(4)(6)) permits a variance where such variance furthers an important public interest that would otherwise go unmet without the variance." With the addition of the apartment complex catering to seniors, the need for a dentist in Cooper City catering to seniors is imperative. Dr. Brigham employs two full-time employees and a part-time dental hygienist. Dr. Brigham brings jobs to the community as well as serving the dental needs of the elderly, many times pro bono. The burden on neighbors is virtually non-existent, especially in light of the public interest served by Dr. Brigham's practice if it were to be located on 2050 Maple Street.

In conclusion, we have shown by a preponderance of the evidence that granting this variance would create no detriment to nearby property, nor would it substantially alter the general character of the area. It is in harmony with the Zoning Code and, most importantly, it would serve the public interest to grant this variance. Dr. Brigham's pro bono dental practice is a great help to Cooper City. The ZBA can help protect small business owners by granting this variance to Dr. Brigham.