

July 2005 Bar Examination

Question 1.

Mr. U. R. Bigg (Bigg), contacts your law firm in regard to several pending legal matters. The firm assigns Bigg to you and he seeks your advice on the various issues. Bigg, who is an extremely wealthy individual, decided that it was an opportune time to enter into the wholesale liquor business. To keep his new venture separate from his existing business interests, and to protect himself from any personal liability, Bigg hired the firm of Kind & Gentle (K & G) to form a new corporation, the XYZ Liquor Wholesale Distribution Company (XYZ). Bigg was to own 90% of the stock in XYZ and his wife and son would own the remaining 10%.

K & G completed the Articles of Incorporation on March 1, 2004 and by letter dated March 10, 2004, advised Bigg that they were ready for filing with the Secretary of State and enclosed a bill for the work that K & G had done in creating the corporation. However, the certificate of incorporation was not issued until April 1, 2004. Bigg was unaware that the certificate was not issued until that date and assumed from the letter from K & G that the corporation was in existence as of March 10, 2004.

On March 15, 2004, Bigg, signed a contract, only in his capacity as President of XYZ, to purchase a delivery truck from Dooley Ford (Dooley). Dooley financed the purchase of the truck, which included 36 monthly installments of \$3,000 per month. Three months after XYZ was formed, while in the process of making a liquor delivery, Pete, the driver of the truck, an employee of XYZ acting in the scope of his employment, was in a serious motor vehicular accident, in which Pete was at fault. The delivery truck was totally destroyed and four individuals were killed in the other vehicle. At the time of the accident XYZ had a liability insurance policy on the vehicle providing coverage of \$1,000,000. Having lost a portion of its assets and the company being faced with serious liability, Bigg closed XYZ.

The person entitled to bring the four wrongful death claims sues Bigg, individually, and XYZ and alleges that Bigg is the alter ego of the corporation. Dooley Ford has filed suit against Bigg and XYZ and seeks to hold Bigg personally liable for the debt on the truck, because the corporation was not in existence at the time Bigg signed the purchase contract. Discovery shows Bigg made all business decisions for XYZ, including the hiring of Mr. Small, the Vice President and Operations Manager, and Pete, the driver of the delivery truck. Discovery also shows that Bigg utilized the XYZ checking account to pay his personal bills and those of his wife and son.

A few weeks after the accident Bigg was talking to Small about the seriousness of the accident and the potential it had to ruin him financially. He commented that he wished the business had never been in existence. Small decided it would be best if the building and all of the corporate records did not exist. Late one night, he started a fire in the warehouse which completely destroyed the warehouse, the entire inventory, and the corporate records, except for the financial records, which were maintained in Bigg's office. Bigg has been advised by the District Attorney's office that they intend to bring criminal charges for arson against Bigg, Small and XYZ.

IN ANSWERING THE FOLLOWING QUESTIONS, ASSUME THAT THERE ARE NO ISSUES AS TO JURISDICTION OR VENUE IN REGARD TO ANY OF THE LAWSUITS WHICH ARE PENDING OR WHERE THE CRIMINAL CHARGES MAY BE FILED.

1. Discuss the steps and procedures required by Georgia law to create and register with the Secretary of State a valid corporation.
 2. Does Bigg have any personal liability as a result of the motor vehicle accident and/or the contract with Dooley to purchase the truck? What arguments would you anticipate plaintiff's counsel will make in order to attempt to hold Bigg liable for the accident which was a result of the conduct of the employee of XYZ and/or the Dooley contract?
 3. Is it possible for a corporation to be charged with a crime and, if so, under what circumstances? What advice do you give to Bigg as to his potential personal exposure, if criminal charges are brought against him?
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Question 2.

To combat various public problems associated with the consumption of alcohol, the Georgia legislature created the State Board for the Promotion of the Responsible Consumption of Alcohol (the "Board"). The Board's sole purpose is to design and distribute advertisements on television, radio, and in print that emphasize the dangers of underage drinking, warn of the dangers of drunk driving, and discourage excessive drinking. The Board's efforts were very successful. After only two years, the State enjoyed a marked decline in drunk driving arrests, teenage drinking arrests, and arrests for public drunkenness.

Initially, the Board's work was funded by the legislature through a direct appropriation. When budget cuts threatened the Board's funding, however, the Board recommended that the legislature require companies that sell alcohol to fund the Board's work. To this end, the legislature enacted the Alcohol Abuse Prevention Funding Act. The Act provides that every Georgia business engaged primarily in the sale or distribution of alcohol must contribute 0.01% of its annual gross revenues from sales of alcohol within the State of Georgia to the Board.

Identify and discuss at least two, but no more than three, challenges you believe might be made to the Alcohol Abuse Prevention Funding Act under the Constitution of the United States by one of the companies required to contribute a percentage of its revenues to the Board. For purposes of this question, assume that the standing of the challenger is not at issue.

Question 3.

Crosswinds Pianos ("Crosswinds") is an established retail business in Macon engaged in the sale and service of pianos and organs. "Crosswinds Pianos" is actually a trade name used by the corporation Crosswinds Music, Inc., which was incorporated in the State of Georgia, with its only place of business in Macon, Bibb County, Georgia.

Crosswinds' primary lender is BankOne where Crosswinds has a revolving line of credit which allows it to draw down up to \$100,000.00 as needed for the operation of its business. There are certain repayment provisions in the loan documents, one of which requires that Crosswinds pay the line of credit down to zero at least once every calendar year. To secure current and any future indebtedness, BankOne took a security interest in all of Crosswinds' current and future

inventory and equipment as well as a security interest in a Jackson Pollack painting hanging in the showroom. To perfect its security interest in the inventory, equipment and the painting, BankOne filed its financing statement on February 1, 1999 with the Clerk of the Superior Court of Bibb County. That Financing Statement reflected the name of the debtor as "Crosswinds Pianos." To continue its perfection, BankOne filed a Continuation Statement on July 15, 2003, then, after an auditor's review of the loan, filed a second financing statement on February 15, 2004, which was identical in all respects to the original financing statement filed in 1999.

In 2000 Crosswinds expanded its business and thus needed more operating capital. As a small locally owned bank, BankOne did not have the ability to increase Crosswinds' line of credit beyond \$100,000.00, so Crosswinds obtained a loan of \$250,000.00 from BankTwo. BankTwo properly recorded a Financing Statement on December 1, 2000. That Financing Statement identified BankTwo's collateral as "equipment, inventory and accounts receivable," and showed the name of the debtor as "Crosswinds Music, Inc. d/b/a Crosswinds Pianos."

In March 2004, Van's Supply House, a wholesaler of various types of pianos, organs and tuning equipment sold to Crosswinds two Steinway grand pianos which Crosswinds placed in its inventory. As part of the same sales transaction, Van's Supply House also sold Crosswinds one Fancy piano tuner to keep its pianos properly tuned. Van's Supply House, which financed Crosswinds' purchase of these items, properly filed its financing statement on March 10, 2004 and delivered the items to Crosswinds on March 12, 2004. The financing statement described the two Steinway grand pianos and the Fancy piano tuner, and reflected the name of the debtor as "Crosswinds Music, Inc. d/b/a Crosswinds Pianos."

Since Crosswinds has been late several times on its payments to BankTwo, the bank became concerned about Crosswinds' ability to repay its loan. Consequently, BankTwo's loan officer began visiting Crosswinds' showroom to confirm that Crosswinds was maintaining an adequate supply of inventory. Yesterday when the loan officer visited, he noticed that one of the Steinway grand pianos, which retails for approximately \$100,000.00 and which was in Crosswinds' inventory the prior week, was gone. The bank officer's keen eye also observed a blank wall where the Jackson Pollack painting had hung. When he asked about these items, the bank officer was told that Crosswinds had sold both the Steinway grand piano and the painting to John Buyer for \$120,000.00 on unsecured credit terms which gave Buyer 60 days to pay the purchase price. BankTwo has now asked you to review its documents and the recorded UCC filings and give it some advice.

In answering the following questions, assume that where required, Crosswinds Pianos executed a proper security agreement which meets the requirements of the Uniform Commercial Code as enacted within the State of Georgia.

I. BankTwo has asked you to advise it as to whether it would have any grounds to challenge the apparent priority of BankOne's security interest in Crosswinds' pianos and inventory. Explain in detail the basis for your advice.

II. The facts indicate that BankTwo and Van's Supply House each claim a perfected security interest in the two Steinway grand pianos and the Fancy piano tuner. Which of the two lenders security interests has priority and why?

III. BankTwo has asked you whether it can enforce its lien in the Steinway grand piano and the Jackson Pollack painting which John Buyer purchased from Crosswinds Pianos. How would you advise BankTwo? Explain your answer.

IV. IN ANSWERING QUESTION IV ONLY, ASSUME THAT BANKONE'S SECURITY INTEREST IN INVENTORY HAS PRIORITY OVER BANKTWO'S INTEREST IN THE SAME INVENTORY. Advise BankTwo whether it would prevail in litigation with BankOne as to which lender has priority in the \$120,000.00 purchase price which John Buyer owes to Crosswinds Pianos. Explain your answer.

Question 4.

A and B entered into a partnership to form and operate a duck hunting guide service on Lake Seminole, near Donalsonville, Georgia. A, a veteran duck hunter, moved from Arkansas to Georgia to provide guide service and to manage the business. He brought with him decoys and a boat, motor and trailer to use in the business. B, a novice but enthusiastic duck hunter, lived in Atlanta and agreed to provide financial backing for the business. They were to share the profit on a 50/50 basis. Together they purchased, as 50/50 owners, a cabin on the lake to use as a base of operations. The cabin was titled in A's name only. B allowed A to use his dog, Lucky, a champion Labrador retriever, in the guide service.

From the start things did not go well and it was necessary for B to contribute additional money for the business although it appeared to B that the cabin was filled with hunters and that A was "booked up" every time he went to Lake Seminole to hunt and check on his investment. A would never tell B how much had been paid to him by hunters using the guide service. When asked, A always told B they would "settle up" at the end of the season. After several disagreements over this and other matters, B suggested that they each go their separate ways after the season ended. A agreed. A promised to give the cabin, the boat and other equipment to B in return for the additional money B contributed to the business and to return Lucky to B after the season ended.

B did not hear any more from A about winding up their affairs. Two days before the end of the season B decided to go to Lake Seminole to check on A and make arrangements with him about "settling up." On his way to the cabin he happened to stop at a local gas station on the lake and was told by C, the owner of the gas station, that A was leaving to go back to Arkansas and that A had agreed to sell the cabin, boat, motor, trailer and decoys to him. The closing of the sale was scheduled for the day after the season closed. C also said that A had given Lucky to his girlfriend to keep for him and that she and A and were moving to Arkansas, leaving the day of the closing, with Lucky.

What civil remedies might B have available under Georgia Law in order to protect himself and secure his interests, if any, in the property from the proposed actions of A in:

- a. Selling the cabin to C;
- b. Selling the boat, motor and trailer to C;
- c. Preventing Lucky from being taken to Arkansas and,
- d. Determining whether A owes him any money from the guide service?

As to each remedy specified discuss fully and explain what B would have to show in order to be

entitled to such relief.