7-29-2008

Virginia Bar Exam, July 2008, Section 1

VIRGINIA BOARD OF BAR EXAMINERS

Roanoke, Virginia - July 29, 2008

You MUST write your answer to Questions 1 and 2 in WHITE Answer Booklet A

1. Mr. and Mrs. McCoy purchased a lot from Mr. and Mrs. Davis in Surry County, Virginia, upon which they intended to build a home. During negotiations preceding the sale, the McCoys expressed concern about the suitability of the lot because they feared the soil might not have sufficient percolation for a septic system. The Davises responded truthfully that the lot and an adjoining one had passed the County's percolation tests within the past year, and the owner of the adjoining lot had recently been issued a building permit for a home with a septic system. The McCoys confirmed that information.

On July 1, 2007, the McCoys and Davises signed a real estate purchase contract wherein the sale was expressly conditioned upon their being able to obtain a building permit and percolation clearance for a septic system at such time as they took title. On September 1, 2007, the McCoys paid the contract price, and the Davises conveyed the property by deed. No mention was made in the deed of the conditions upon which the sale was contingent.

Two months after the sale, the McCoys applied for a building permit, but were turned down because, in August 2007, the County had changed its method of determining the suitability of soil for a septic system, and the lot did not pass the new test. The McCoys want to know what their rights are against the Davises. Because they will not be able to use the lot for the intended purpose, they no longer have any use for it**.**

(a) If the evidence is that on September 1, 2007 neither the Davises nor the McCoys were aware of the change in the County requirements, what equitable remedy, if any, is available to the McCoys, and upon what facts would any such remedy be based? Explain fully.

(b) If the evidence is that on September 1, 2007 the Davises *were* aware of the change in the County requirements, knew that the lot would not pass the test under the new requirements, and failed to inform the McCoys, what equitable remedy, if any, is available to the McCoys, and upon what facts would any such remedy be based? Explain fully.

Reminder: You MUST answer Question #1 above in the WHITE Booklet A

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2. Shortly after their marriage, Larry and Connie purchased a home on a residential lot (the "home") in Damascus, Virginia, which is in Washington County. They took title as tenants by the entirety with the right of survivorship. They separated in 2005, by which time the home was fully paid for. A protracted, acrimonious divorce suit followed.

Connie and the two children of the marriage continued to occupy the home pending entry of the final divorce decree. Connie let it be known that she would like to keep the home after the final decree, but only if it were awarded to her free and clear. Larry said he did not want the home but that he opposed awarding it free and clear to Connie as part of the property settlement and that he would refuse to buy out Connie's interest.

On February 29, 2008, Larry took out a $150,000 loan from First Bank (the "Bank") and executed a deed of trust conveying "all my right, title, and interest" in the home to secure the loan. On May 1, 2008, Bank duly recorded its deed of trust.

On May 5, 2008, the divorce court issued a final decree dissolving the marriage and granted Connie a lump sum judgment of $75,000 for delinquent child support, ordering that the judgment be docketed by the Clerk as a lien against any and all of Larry's real estate in Washington County. The Clerk docketed the judgment for delinquent child support on the following day, May 6.

Leaving for later determination issues regarding the division of the marital property, the court commented from the bench that, unless Larry and Connie could agree upon disposition of the home, the court would be unlikely to award it free and clear to Connie.

On May 10, 2008, Larry filed suit for partition of the property by sale. The home had an appraised value sufficient to produce net proceeds of $300,000 after costs of sale. Connie opposes the sale, still hoping to force Larry to relinquish any claim on the home. Bank was permitted to intervene as a party to Larry's suit for partition. Bank claims a right to receive $150,000 from the proceeds of any sale, asserting that the lien of its deed of trust, being prior in time, takes priority over all other liens on the property. Bank bases its claim to priority on the following Virginia statute:

> When a deed purports to convey property, real or personal, which the grantor does not own at the time of the execution of the deed, but subsequently acquires, such deed shall, as between the parties thereto, have the same effect as if the title which the grantor subsequently acquires were vested in him at the time of the execution of such deed . . . .

(a) Do the facts support a *prima facie* case in Larry's suit for partition by sale of the home? Explain Fully.

(b) How should the court rule on Bank's claim that its deed of trust takes priority over all other liens on the home? Explain fully.

(c) If the home is sold, how should the net proceeds of $300,000 be distributed? Explain fully.

Reminder: You MUST answer Question #2 above in the WHITE Booklet A

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➔➔ *Now MOVE to the YELLOW Answer Booklet B* ←←

You MUST write your answer to Questions 3 and 4 in YELLOW Answer Booklet B.

3. VGD, a properly formed and existing Virginia general partnership, produces high-grade plastic injection-molded enclosures for computers and other electronic devices at its plant in Rocky Mount, Virginia. The partners are Vic, Gail, and Dave. Vic is the plant manager and product designer, Gail is the chief financial officer, and Dave is the marketing and sales manager.

Because of significant design changes, VGD recently replaced its injection machines and molds. During a partnership meeting at which all partners were present, they decided as a matter of policy that, although the old molds and injection machines had a market value of about $500,000, they would not sell any of the obsolete equipment to competitors.

While traveling on a sales trip, Dave met the plant manager for Baines Molding Co. (BMC), who offered to pay $1,000,000 for VGD's old molds and machines. Believing that BMC's business was in a line of plastics different from that of VGD and without consulting Vic and Gail, Dave accepted BMC's offer and authorized the delivery of the old injection machines and molds to BMC. It turns out that BMC's acquisition of the VGD equipment enabled BMC to bid successfully against VGD for a lucrative government contract. Vic and Gail angrily confronted Dave, who justified his action on the grounds that he did not believe that BMC was a direct competitor and that the premium price offered by BMC justified the sale.

Dave, who had a disabled child, invented a "joystick" that would allow people with limited manual dexterity to play video games. He developed it at home in his garage, with his own equipment, and in his spare time. He obtained a patent on the device in his own name and then, with Zane, formed a partnership called DZ Partners to produce and sell the special joystick.

When Vic and Gail learned of Dave's involvement with DZ Partners, they chastised him for having obtained the patent in his own name and having entered into partnership with Zane. Dave explained truthfully that Zane was already in the business of manufacturing devices for disabled children and that the new venture in no way competed with VGD.

(a) What duties, if any, did Dave owe to the VGD partners, and did he breach any such duties by selling the obsolete equipment to BMC? Explain fully.

(b) Did VGD have any rights in the patent obtained by Dave for the special joystick? Explain fully.

(c) On what basis, if any, might VGD assert a right to receive any portion of the profits earned by DZ Partners from the sale of the special joystick, and is it likely that VGD would prevail in any such claim? Explain fully.

Reminder: You MUST answer Question #3 above in YELLOW Booklet B

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4. In response to an advertisement in a trade publication, The Green Grocer, Ltd. ("Grocer"), which operates a chain of trendy grocery stores located throughout Northern Virginia, ordered 500 cases of Hanover tomatoes at a price of $50 per case from Bugwamp Vegetable Farms ("Bugwamp").

Grocer phoned in the order by using the toll free telephone number in Bugwamp's advertisement. Bugwamp e-mailed Grocer, thanking it for the order and advising that the tomatoes would be shipped around the second week of July. The next day Bugwamp faxed a confirming letter to Grocer, attaching one of Bugwamp's printed delivery forms containing a description of the goods, the price, and the terms of payment. Among the terms stated on the form was a provision for interest at the rate of 1.5% per month on any invoice not paid within 30 days and a provision disclaiming all warranties (express and implied).

After the order was placed, about one-fourth of Bugwamp's tomato crop was destroyed by a new, virulent insect which attacks and ruins tomato plants. Happily, there is an effective, but very expensive, insecticide which combats the insects and preserves the plants. Bugwamp began using this insecticide and was able to save the remaining three-fourths of its crop, but its cost of production was raised considerably. In order to make its budgeted profit margins, Bugwamp made an unannounced "business decision" to honor only its most lucrative contracts, which are those in excess of $65 per case.

As a result, Bugwamp has refused to ship any tomatoes to Grocer. When Grocer insisted upon compliance with the "deal," Bugwamp asserted that the "deal" was not an enforceable contract and, further, that, because of the now well-known insect problem, it was excused from performance by commercial impracticability as set forth in the following provision of the Code of Virginia:

> (A) Delay in delivery or nondelivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
>
> (B) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
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> (C) The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under paragraph (B), of the estimated quota thus made available for the buyer.

Grocer asks you, as its lawyer, to answer the following questions:

(a) Is there an enforceable contract between the parties and, if so, what are its terms? Explain fully.

(Question continues on next page)

(b) Is Bugwamp excused from performance as a result of the "commercial impracticability" provision cited above? Explain fully.

Reminder: You MUST answer Question #4 above in YELLOW Booklet B

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➔➔ *Now MOVE to Salmon colored Answer Booklet C* ←←

You MUST write your answer to Question 5 in Salmon Answer Booklet C

5. Dan Debtor is the sole proprietor of Dan's Corner Bookstore in Norfolk, Virginia. The bookstore has fallen on hard times in the year since the opening of MegaBooks in the nearby shopping mall. For the past six months, Dan has been legally insolvent, in that he cannot pay his debts as they become due.

Acme Publishing Co., a supplier of Dan's, had earlier obtained a $5,000 judgment against Dan in the Norfolk Circuit Court. Acme has also has made a "final demand" for payment of an additional $75,000 Dan owes, which has not yet been reduced to judgment. Recently, Acme learned of the following actions taken by Dan within the past month:

- He removed a valuable collection of rare books from the bookstore and gave them to his son on the occasion of his son's birthday.
- He paid $50,000 in past due rent to the limited liability company that owns the building in which Dan's Corner Bookstore is located. The building is listed for sale. Dan is the sole member of the LLC.
- He has been negotiating with a collector in Philadelphia, Pennsylvania to sell a valuable antique Revolutionary War printing press to the collector.

Acme asks you to answer the following questions:

(a) On what basis, if any, can Acme challenge the gift of the rare books to Dan's son, and what can Acme do to perfect the challenge? Explain fully.

(b) May Acme file an effective *lis pendens* on the building owned by the LLC or otherwise secure payment from the proceeds of any sale of the building? Explain fully.

(c) What steps, if any, can Acme take to prevent the sale of the antique printing press and eventually have its value applied toward the amounts Dan owes Acme? Explain fully.

Reminder: You MUST answer Question #5 above in Salmon Booklet C

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END OF SECTION ONE