

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 1

Grounds for Divorce

Pursuant to Family Law section 7-103 (a) (3), Always can file for an absolute divorce if the parties have lived separate and apart without cohabitation for at least 12 months or by mutual agreement. Here, Nevar and Always have been apart since January 2007, which is more than a year prior to the date that Always filed for absolute divorce.

Since Nevar opposes the divorce, Maryland law requires that the couple must be separated for at least two years to get an absolute divorce. However, Always could be entitled to an immediate absolute divorce if she able to prove that Nevar committed adultery and/or desertion pursuant to Family Law sections 7-103 (a) (1) and (2).

The Courts have recognized that evidence of adultery is difficult to obtain. Therefore, the accusing spouse must only show that the adulterous spouse had the opportunity and disposition to commit adultery. *Blankenship v. Blankenship*, 239 Md. 498 (1965).

In order to be granted an absolute divorce on the ground of constructive or actual desertion one must show that the desertion was continuous for a period of 12 months or more prior to filing for an absolute divorce and the desertion was deliberate and final with no expectation of reconciliation. (7-103 (a) (2)).

Here, since Nevar moved in with his lover while still being married more than 12 months prior to the filing of the divorce complaint, Always may be able to meet the burdens for proving adultery and/or desertion.

Custody

When determining child custody the Court uses the "best interest of the child standard." *Montgomery County v. Sanders*, 38 Md. App. 406 (1978), setting out a list, albeit not necessarily exhaustive, of at least ten factors, such as fitness of the parents, character and reputation, desires of the parents, length of separation of the parents, that should be weighed in making such a determination. In this case, the court would consider the fact that Nevar was the primary care giver for the first 5 years of the marriage. However, Always can argue that she quit her job, at Nevar's request, to become the children's primary care giver. She can state that over the years, and certainly during periods of time when Nevar was living with Rebecca, she had the primary custody of the children.

Accordingly, Always should argue that it is in the children's best interest to continue to live with her as the primary care giver. Because of Nevar's involvement with the children,

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

Always should probably agree to joint legal custody and visitation, which will allow Nevar to spend quality time with the children and to be involved in the major parenting decisions. There is nothing in the facts to support a strong argument for full custody for Always or Nevar.

Child Support

Private School

In determining whether child has “particular educational need” to attend private school that should be included in determining noncustodial parent's child support obligation, courts should consider following non-exhaustive list of factors: (1) child's educational history, including number of years child has been in attendance at particular school; (2) child's performance while in private school; (3) whether family has tradition of attending particular school; (4) whether parents had made choice to send child to particular school prior to their divorce; (5) any particular factor that may exist in specific case that might impact upon child's best interests; and (6) parents' ability to pay for schooling. Code, Family Law, § 12-204(i)(1). *Witt v. Ristaino*, 118 Md. App. 155 (Md.App.,1997). Here Always should argue that all of the factors of *Witt* are met and therefore, the children should remain in private school.

Child Support

Contrary to Nevar's threat to withhold child support if Always requested child support, Always cannot negotiate the children's right to child support. In Maryland a parent cannot agree to preclude a child's right to support by the other parent. *Lieberman v. Lieberman*, 81 Md. App. 575 (1990).

Alimony

Alimony is an amount of money paid by one spouse for the maintenance of the other spouse pursuant to a complaint for alimony or as part of a decree for annulment or limited or absolute divorce pursuant to Md. Fam. Law Code Ann. §11-101. Alimony can take the form of *Alimony Pendente Lite*, which is money paid to allow the awarded spouse to sustain themselves during the course of the litigation, permanent or indefinite alimony, which requires periodic payments of money at predetermined intervals for an indefinite period of time or permanently which usually terminates upon the remarriage or the recipient or the death of either party, and/or rehabilitative, which consists of payments ordered for a definite period to allow an economically dependent spouse to develop income-earning skills and qualification.

In this case Always can argue that she should be granted *Pendente Lite* since she was unemployed, at Nevar's request, when Nevar moved out of the house and she will need money to sustain herself during the litigation. She can also make a claim for rehabilitative alimony in order to have an opportunity to find a job or return to school to enhance her earning potential.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

Property division

Here, the Court will find that the Columbia home and the Vacation home in Mexico are marital property since the homes were acquired during their marriage. In addition, Always should request use and possession of the family home for the statutory limit of 3 years, pursuant to Md. Fam. Law Code Ann. §8-210.

Business and professional practices have been held to be marital property subject to equitable distribution. Always can claim an interest in Nevar's medical practice since she supported Nevar and the household while he attended medical school. However, the court in *Prahinski v. Prahinski*, 321 Md. 227 (1990), held that goodwill must be an asset having a separate value from the reputation of the practitioner to be determined marital property.

As a general rule, each spouse can take out of the marriage separate property that he or she owned prior to the marriage, any appreciation such property has earned, plus any additional separate property acquired through gift or inheritance from a third party. Accordingly, the Rolls Royce and the Corvette belong exclusively to Nevar.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 2

Peter's claim for Battery against Screwdrivers' employees was, by the doctrine of Respondeat Superior, imputed to the employer. Peter should succeed on all counts and the decision of the trial court should be upheld. See, *Market Tavern, Inc. v Bowen*, 92 Md. App. 622, 610 A2d 295 (1992). (*The Hammerjacks Case*)

(1) Standard of appellate review is whether, in the light most favorable to Peter, there is sufficient evidence to support the jury's verdict.

(2) Peter did not prove Screwdrivers' employees committed the attack.

It is up to the fact finder to judge the credibility of witnesses. The fact finder believed the witnesses that the assailants were Screwdrivers' employees. Even if specific identification of the employees involved was a requirement to establish vicarious liability for punitive damages on the part of the employer, that requirement was met through the evidence presented at trial.

(3) If the assailants were Screwdrivers' employees, it cannot be held liable for intentional torts of employees committed outside the scope of their employment.

To hold the employer responsible for intentional torts, four factors should be taken into consideration: (1) "the conduct must be of the kind the servant is employed to perform"; (2) the conduct "must occur during a period not unreasonably disconnected from the authorized period of employment"; (3) the conduct must occur in a place "not unreasonably distant from the authorized area"; and (4) the conduct must be, at least in part, to serve the master. *Sawyer v. Humphries*, 322 Md 247, 587 A. 2d 467 (1991).

Furthermore, an act may be within the scope of employment, even though "forbidden or consciously criminal or tortious" *Sawyer v. Humphries*, 322 Md. 247, 587 A2d 467 (1991), 322 Md. at 255, 587 A2d 467 (quoting Wood on Master and Servant § 279 (1877) (and numerous cases cited within)). *Cox v Prince George's County*, 296 Md. at 170, 460 A 2d 1038 (quoting *A & P Co v. Noppenberger*, 171 Md 3 78, 391, 189 A 434 (1937) (and cases cited therein)).

A trier of fact reasonably could find that is precisely what happened here. Screwdrivers benefitted from its security personnel's work keeping the bar safe for patrons. See *Wilson Amusement Co. v Spangler*, 143 Md. 98. 121 A. 851 (1923) (doorkeeper for movie theater who forcibly ejected and then assaulted drunken customer who sought entrance acted in furtherance of his masters service within his duty to eject undesirables).

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

(4) Screwdrivers should not be held vicariously liable for punitive damages for the willful torts of employees when they did not authorize, participate in, or ratify the employees' conduct.

An employer may be held vicariously liable for punitive damages for the willful torts of an employee committed in the scope of employment even where the employer does not authorize, participate in, or ratify the employees conduct. *Embrey v Holly*, 293 Md. 128, 442 A.2d 966 (1982) Specifically, Screwdrivers benefitted by the work of the security employees. An award of punitive damages for an intentional tort may be imposed and would not be held clearly erroneous on appeal:

(1) only where there is "outrageous conduct";

(2) may be awarded only upon a showing of "actual malice" on the part of the defendant, i.e., "the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff" or, "implied malice," i.e., "conduct of an extraordinary nature characterized by a wanton or reckless disregard for the rights of others";

(3) "are to punish the wrongdoer to teach him not to repeat his wrongful conduct, and to deter others from engaging in the same conduct";

(4) "must relate to the degree of culpability exhibited by a particular defendant and that party's ability to pay";

(5) "represent a civil fine, and as such, should be imposed on an individual basis";
and

(6) may be awarded only upon proof of actual loss and thus may *not* be awarded unless there is also an award of compensatory damages.

See, *Pacific Mut. Life Ins Co v Haslip*, U.S. , 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991), and *Alexander v. Evander* 88 Md. App. 672, 596 A. 2d 687 (1991).

Thus, Peter may also succeed in his claim for punitive damages against Screwdrivers. Although in general, to receive punitive damages, one must show actual malice, this is not so for intentional torts.

This case clearly meets all those standards and the judgment will stand.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 3

Daisy - The facts state Daisy has been convicted of perjury. A person convicted of perjury may not testify. CJ 9-104

Applicants will receive partial credit for discussing marital privilege.

Reverend Joe- A minister of an established church of any denomination may not be compelled to testify on any matter in relation to any communication made to him by a person seeking spiritual advice or consolation as long as The Chapel of Love is an “established church of any denomination.” The privilege belongs to the clergyman, not to the congregant. Therefore, Donald’s objection would be overruled if Minister Joe is willing to testify. Privilege can be executed by the minister (not Donald). Arguably, there is no privilege to the communications between Donald and Reverend Joe because Daisy was present.

Family Doctor- may testify as there is no doctor patient privilege.

Psychologist- A patient has a privilege to refuse to disclose and to prevent a witness from disclosing communications relating to diagnosis or treatment of the patient or any record that would, by its nature, show the existence of a medical record of the diagnosis or treatment. Therefore, the licensed psychologist will not be able to testify over Donald’s objection unless Donald waives the privilege.

CJ 9-109

The above Analysis is based on Maryland law. Credit will also be given for Answers based on federal evidentiary rules.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 4

Ames has several defenses against the confessed judgment.

First, she has a defense on the merits of the underlying contract, namely, that Creative did not perform and that she is therefore not obligated to pay Creative's fee. In order to raise this defense, she must file a motion to open, modify or vacate the judgment pursuant to Maryland Rule 3-611(c). This pleading must be filed within 30 days of service upon her. If the court determines that there is a substantial basis for an actual controversy, it will vacate the confessed judgment and permit the defendant to file a responsive pleading, in this case a Notice of Intention to Defend pursuant to Maryland Rule 3-307.

Ames can also raise the defense of failure of service of process. The Clerk's notice of the default judgment is issued in lieu of a summons, Rule 3-611(b). The rules pertaining to service of process apply to service of the notice. Maryland Rule 3-123 prohibits a party from serving process. Smith is the president and sole owner of the plaintiff; arguably, Rule 3-123 prohibits him from attempting to effect service. But see *Palmisano v. Baltimore County Welfare Bd.*, 249 Md. 94, 102, A.2d 251 (1968) (Employee of a party not prohibited from serving process).

Smith's leaving the notice with Bill after determining that Ames no longer lived at her former residence was clearly improper as was Smith's failure to note that Ames no longer lived at the address in his return of service.

Ames received actual notice of the case against her on August 6. If she can get to the courthouse before thirty days expire, she can file a motion to vacate the judgment or a motion pursuant to Maryland Rule 3-311 to dismiss the case for failure of service of process. The motion to vacate the confessed judgment must contain the legal and factual basis for any defense to the plaintiff's claim. The defense here is that the plaintiff did not perform the contract. If she cannot get to the courthouse within thirty days of actual notice, she can file a motion to revise the judgment pursuant to Maryland Rule 3-535. The failure of process and erroneous return of process constitute fraud or irregularity. Ames' actual knowledge of the litigation does not constitute a waiver of her right to object to the service. *Cf. Oxendine v. SLM*, 172 Md. App. 478, 491, 492, 915 A. 2d 1030 (2007)

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 5

As a general rule, shareholders of a corporation are not liable for obligations of a corporation. Md. Annotated code Corporations and Associations Article §2-215; *Starfish Condominium Ass'n v. Yorkridge Service Corp.*, 295 Md. 693, 458 A.2d 805 (1983). A corporation becomes an effective and valid entity upon acceptance of its articles of incorporation by the State. Corporations and Associations Article 2-102(b). Baker's failure to file the articles means that the usual defense of shareholders to a claim by a creditor of the corporation, namely, that the corporation acts to shield shareholders from liability, does not apply. However, two closely related defenses may be of assistance, at least to Able and Carr.

Maryland recognize the doctrines of *de facto* corporations and incorporation by estoppel. The two doctrines have the same effect in that they permit a shareholder to raise the defense of incorporation even though the corporation does not validly exist. The doctrine of *de facto* corporation focuses on the behavior and expectations of the shareholders; the applicability of the defense of incorporation by estoppel is based upon the actions of the creditors.

There are three elements to the defense of *de facto* incorporation:

- there must be a valid law permitting incorporation;
- there must have been a good faith attempt to incorporate;
- the corporate powers must have been exercised.

In this case, the first and third elements are clearly satisfied but there was no attempt to actually file the articles, thus the defense of *de facto* incorporation is not available. *Cranson v. International Business Machines Corp.*, 234 Md. 477, 479-480, 200 A.2d 33 (1964).

The doctrine of incorporation by estoppel operates when the creditor has recognized the corporate existence of an association. under those circumstances, the creditor may be estopped from asserting that there is not a valid corporation. *Cranson, supra at 489; Turner v. Turner*, 147 Md. App. 350, 428, 889 A.2d 18, 63 (2002). Under these facts, Northern States' account representative reviewed the business plan, knew that the venture was capitalized as if it was a corporation and sent invoices in the name of the corporation, many of which were paid. Under the circumstances, Northern States will be estopped from claiming that the debtor was not a corporation. Thus, Northern States will not be successful against Able and Baker. Carr, however is a different story.

Carr has not paid \$15,000 of the \$25,000 he agreed to pay for stock as outlined in the business plan. If the business plan is considered to be a subscription agreement, it can be

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

enforced. A subscription agreement is an undertaking by a potential investor to purchase stock in an existing or future corporation. There are no formal requirements for subscription agreements and, in fact they need not even be in writing. *Wright v. Lewis*, 161 Md. 674, 158 A. 704 (1932).

Clearly, both Baker and Able relied on the business plan in entering into the venture. Corporations and Associations Article 2-202 provides that a subscription agreement can be enforced by the board of directors after notice to the subscriber. In addition, such agreements can be enforced by creditors to the corporation, even without board formalities. Corporations and Associations Article § 2-215; D. Hanks Maryland Corporation Law §4.2 (2006); *Goldstein v. Leitch*, 142 Md. 184, 120 A. 369 (1923). Thus Northern states has the right to collect Carr's unpaid subscription commitment on behalf of the corporation so that it will have assets to satisfy its obligation to Northern States.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 6

Answer should address:

1. Impairment of Contracts: Article I Section 10 of the United States Constitution prohibits the enactment of a law that impairs the obligation of contracts:

“The Supreme Court has ... made it clear that the Contract Clause does impose some limits upon the power of a ...State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.” Consideration of a claim that particular governmental action invalidly impairs contractual obligations involves several steps. First, it must be determined whether a contract existed. If that hurdle is successfully cleared by the claimant, a court next must decide whether an obligation under the contract was changed. Finally, if the second question is answered in the affirmative, the issue becomes whether the change unconstitutionally impairs contract obligation, for it is not every modification of a contractual promise that impairs the obligation of a contract.....” See, *Robert T. Foley Company, et al. v. Washington Suburban Sanitary Commission*, 283, Md. 140, 389 A.2d 350 (1978)

The mortgage companies have existing contracts with the homeowners and may also have contracts with entities who repurchase mortgages on the open market. The State law clearly alters these contracts by diminishing the homeowner's duty to pay the mortgage. Accordingly, the statute may be found to violate the Contracts Clause. See, *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505 (1977)

2. Substantive Due Process Clause of 14th Amendment: Laws such as the one at issue are subject to the Due Process Clause and must, therefore, be rationally related to legitimate governmental interests in furtherance of the public health, safety, morals and general welfare. The law was enacted in furtherance of what appears to be a legitimate governmental interest in furtherance of the public health and welfare- saving homeowners from losing their homes.

However, due process also requires that the law be drafted in a way that is reasonable and substantially furthers said interest. See, *Robert T. Foley Company, et al. v. Washington Suburban Sanitary Commission*, 283, Md. 140, 389 A.2d 350 (1978) Under the facts it is unreasonable to allow a moratorium on foreclosures for all homeowners regardless of financial status (ability to pay their mortgage) and to start this assistance for

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

those whose mortgages increased by 2% when the residents appear to have trouble only when the increase was 5 percentage points.

3. Commerce Clause:

The Commerce Clause of the United States Constitution (Art. 1, Section 8, cl. 3) gives Congress the power to regulate commerce among the several states. If there is no express federal statute on point, the dormant commerce clause may act as a restraint on the State or local legislation. The Supreme Court has supplied a test in determining whether the law violates the Commerce Clause:

Whether the law discriminates on its face against interstate commerce - is there "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste System v. Dept. of Environmental Quality*, 511 U.S. 93, 99 (1994); and

If the law regulates "even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) and *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443 (1960)

The law at issue is even-handed. However, a court would likely find that mortgage lending has such a broad impact on interstate commerce that the infringement supersedes any possible benefit to the State's homeowners.

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

QUESTION 7

I would advise Lucy and Ethel that they probably will not be successful in their attempt to take title to the entire 2 ½ acres and the chocolate factory.

The facts indicate that Willie, Lucy and Ethel entered into a contract to purchase "the property." This contract for the sale of land would be governed by the Statute of Frauds. To render a contract enforceable under the Statute of Frauds, the required memorandum must be (1) a writing (formal or informal); (2) signed by the party to be charged or by his agent; (3) naming each party to the contract with sufficient definiteness to identify him or his agent; (4) describing the land or other property to which the contract relates; and (5) setting forth the terms and conditions of all the promises constituting the contract made between the parties.

Willie and Ruth will argue that the contract did not sufficiently describe the property being conveyed and is, therefore, unenforceable.

Assuming, arguendo, the contract is valid, Willie and Ruth will argue that Willie could not unilaterally sell Hershey Acres (at least that portion located on the two acres purchased in 1950) since it was owned as tenants by the entirety and could not be conveyed except by the joint action of both. *Resthaven Memorial Gardens, Inc. v. Snyder*, 248 Md. 710 (1968).

Lucy and Ethel may be able to request specific performance for the sale of the ½ acre, since this land is, indeed, Willie's property.

If all arguments fail, Lucy and Ethel will be entitled to be reimbursed for the down payment given to Willie.

Abatement of price

Depending on the worth of the ½ acre parking lot, Lucy and Ethel may simply want their money back, or an adjustment in the contract price (abatement of price) that more adequately reflects the worth of the ½ acre. The contract appears to have effectuated a sale in gross since no particular acreage was specified therein, nor was there any warranty, express or implied, as to the quantity of land sold. If so, the Court may hold that they're not entitled to any abatement. See, *Jenkins v. Bolgiano*, 53 Md. 407, 420 (1880) ("In the absence of fraud, or false representations, inducing him to enter into the contract, the complainant is bound by the terms of his lease and deed, and cannot complain if the lot has turned out to be smaller than he supposed."); *Brodsky v. Hull*, 196 Md. 509, 514 (1950) ("It is a firmly established rule in this State that where it appears by definite boundaries, or by words of qualification, such as 'more or less', in a contract of sale that the statement of the quantity of land is mere estimation and description, and not of the essence of the contract, the buyer takes the risk of quantity, and is not entitled to an abatement of price on account of a deficiency, in

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

the absence of fraud.")

If Lucy and Ethel can show that the "essence of the contract" was to purchase the chocolate factory, that the price offered was fair for the chocolate factory and parking lot, and that Willie knew or should have known that he could not convey the full 2 ½ acres, they may convince the court that fraud occurred. If so, they would be able to seek specific performance or a declaratory judgment proclaiming them to be the owners of the ½ acre and get a reduction in the contract amount commensurate with the fair price of the ½ acre.

QUESTION 8

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

The question presented by John to his managing partner requires analysis under the Maryland Lawyers' Rules of Professional Conduct ("Rules") in determining the manner in which a lawyer should respond upon receipt of information that may be beneficial to the interests of one client (Freebee) and simultaneously adverse to the interests of another client (Debit and Credit).

Pursuant to Rule 1.16 (a)(1), a lawyer shall not represent a client, or where the representation has commenced, shall withdraw from the representation, if the representation will result in a violation of the Rules or other law. Withdrawal is mandatory only if John concludes that a violation of the Rules or other law exists.

In the instant matter, John represents two clients, Debit and Credit as its general counsel, and Freebee in a tax planning and sales transaction. In addition, the other employees/partners of Debit and Credit regularly refer clients to John for legal services. As a result of the various relationships among the parties, John now finds himself in the unenviable position of possessing certain information that if revealed to Freebee may subject his client, Debit and Credit, to potential liability.

Comment (1) to Rule 1.7 provides ". . . loyalty and independent judgment are essential elements to the lawyer's relationship to a client." In the conduct of all representations, the lawyer will possess client confidences and secrets. John possesses certain confidences and secrets about Debit and Credit and about Freebee. In this case, John's loyalty is divided, and there is a directly adverse conflict of interest between Freebee and Debit and Credit. In addition, John's actions may be materially limited by his responsibilities to either Freebee or Debit and Credit and by his own personal interests in wanting to encourage Debit and Credit to continue to refer its clients to John for legal advice. Consequently, representation of Freebee and of Debit and Credit can continue only if the firm obtains informed consent of each affected client, and if John reasonably believes that he will be able to provide competent and diligent representation to each of the parties.

The remaining question is whether it is appropriate for informed consent to the conflict of interest to be requested by John. A conflict is nonconsentable if the lawyer involved cannot reasonably conclude that the lawyer will be able to provide the requested representation competently and diligently.

If the material risks and advantages are clearly described in the requested consent, then John should be able to continue his representation of Freebee. However, if John becomes a material witness in any litigation against Debit and Credit, then he must withdraw from the representation. See Rule 3.7.

With regard to the attorney-client privileged matter revealed to John by Doris, John must obtain the consent of Debit and Credit with respect to John's revelation of Doris' admission regarding the inadvertent delivery of the memo to the purchaser's attorney. In obtaining Debit and Credit's consent, John must encourage it to obtain the advice of independent counsel. See Rule 1.6. If Debit and Credit does not give informed consent to the revelation of the attorney client privileged information to Freebee, then John must withdraw from representing both Freebee and Debit and Credit.

QUESTION 9

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

The Bank will obtain a security interest in the collateral through attachment. Attachment occurs when the Bank makes the loan to Ian, the debtor who already owns and has rights in the collateral listed in items A through F, and either a security agreement is entered into by Ian or the Bank has been given possession or control of the collateral. It should be noted that while possession by the Bank of the equipment and inventory will perfect its security interests, this manner of perfection will be impractical because Ian will have difficulty operating his business. Therefore, the Bank should perfect its security interests as follows:

A. To obtain a security interest in the land, Bank must record a mortgage or deed of trust among the land records of Baltimore City, Maryland according to the laws affecting interests in real property. See UCC § 9-102 (a) (56) and §9-109 (d) (11). The building, ovens, signage, refrigerators, HVAC, and built-in display cases are fixtures. See UCC §9-102 (a) (41). Bank can secure its interest in fixtures by filing a fixture filing among the Baltimore City Land Records or by filing a financing statement filed among the records of the Maryland State Department of Assessments and Taxation ("SDAT"). See UCC 9-501 (a) (1) (B) and (a) (2). A deed of trust or mortgage may constitute a fixture filing provided it is recorded among the Baltimore City Land Records and contains sufficient information to identify the real property and fixtures that are serving as collateral to put other creditors on notice of Bank's security interest in both the real property and the fixtures securing its note or loan, as the case may be.

B. The rolling baker's racks, hand mixers, cake pans, spatulas, and cash registers are equipment of the business. See UCC §9-102 (a) (33). A security interest is perfected in equipment by filing a financing statement electronically or in writing with SDAT. See UCC §9-501 (a) (2).

C. The contracts for all orders booked through calendar year 2010 for which deposits have been received, are accounts under UCC § 9-102 (a) (2) (ii). A security interest is perfected in accounts by recording a financing statement with SDAT. See UCC §9-501 (a) (2). The payments received by Cakes upon completion of the contracts are proceeds of the accounts. A security interest in the proceeds is perfected automatically when the security interest in the account is perfected. See UCC §§9-203 (f) and 9-315 (c).

D. The flour, butter, chocolate, sugar, milk, eggs, lemon curd, cake toppers, extracts, flavorings, fruits, nuts, and any already baked and frozen cakes and cookies for tastings and sale to showroom customers are inventory. See UCC §9-102 (a) (48) (D). Bank should perfect its security interest in the inventory (and in after acquired inventory not subject to a Purchase Money Security Interest) by filing a financing statement with SDAT. See UCC §9-501 (a) (2).

E. The money in the cash registers (\$200 each in two registers) can only be perfected by Bank if Bank takes possession of it. See UCC §9-312 (b) (3).

F. The Sir Cakes-A-Lot delivery van is a vehicle, the ownership of which is evidenced by

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

a certificate of title. See UCC §9-102 (a) (10). To perfect its security interest in the equipment covered by a certificate of title, Bank must file an application together with the payment of the fees for the security interest in the vehicle to be indicated on the certificate of title for the vehicle. See UCC §9-311 (a) (2).

QUESTION 10

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

Hall's counsel will argue that the State violated Hall's Fourth and Fifth Amendment rights by taking his DNA sample without his consent. The State, however, was not actually searching for evidence of a crime. The law does not constitute the gathering of direct evidence of a crime. The DNA evidence of the crime already exists prior to the match of any DNA profile in the data bank. The law does not create direct evidence; the direct evidence is the hair and blood samples acquired at the scene from the victim. The Act merely serves to identify the perpetrator similar to the way investigators have used fingerprints for many years. Balancing these factors illustrates the reasonableness of the minimal intrusion of a blood test in light of the profound public interest in identifying the perpetrators of crimes.

The only information obtained from the DNA linked to the individual pursuant to the law is the DNA identity of the person being tested. The DNA profile thus serves the purpose of increasing the efficiency and accuracy in identifying individuals within a certain class of convicted criminals. The purpose is akin to that of a fingerprint. As such, Hall and other targeted convicted persons have little, if any, expectation of privacy in their identity. Therefore, a search like the one authorized by the law in this case, whose primary purpose is to identify individuals with lessened expectations of privacy, is totally distinguishable from search of ordinary individuals for the purpose of gathering evidence against them in order to prosecute them for the very crimes that the search reveals, and is not violative of the Fourth or Fifth Amendments.

Hall's counsel will probably argue that Griffin unlawfully interrogated him without advising him of his *Miranda* warnings and in violation of his Fifth and Sixth Amendment rights. Griffin, however, is not a government law enforcement official. Moreover, under the facts here, it is unlikely that he would be considered to have interrogated Hall.

Hall's counsel will probably also argue that the collection of DNA samples from all persons convicted of a qualifying crime, when the qualifying crime was committed prior to the effective date of the Act, violates the relevant *ex post facto* clauses because the primary purpose of the Maryland DNA Collection Law is punitive in nature, making the statute retributive.

Article I, § 10, clause 1 of the United States Constitution prohibits the States from passing any *ex post facto* law, stating, "No State shall . . . pass any . . . *ex post facto* Law." The Maryland Declaration of Rights, Article 17, provides similar protections, as it states "that retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required."

The provisions of the DNA Law, however, do not make a prior non-criminal act criminal. They do not make a prior criminal act a more serious crime. They do not change the punishment for any crime. They do not alter the rules of evidence or require less evidence in order to support a conviction, than the level of evidence required before the Law. The taking of DNA data does not increase the punishment for any crime. It merely provides information. If no crimes exist to which the data is

**FEBRUARY 2009 MARYLAND BAR EXAMINATION
BOARD'S ANALYSIS**

matched, nothing happens. By itself, the DNA data is data and nothing more. The Law was intended not to elicit a punishment for acts already committed, but to create a sensible regulative scheme in order to protect the public by identifying individuals involved with crimes.