

ESSAY QUESTION NO. 6

Answer this question in booklet No. 6

Bob and Carl decide to go into business together to buy old homes in Alaska, fix them up, and sell them for a profit. They meet with Attorney on Monday to discuss their plans. Attorney advises Bob and Carl that they should form an Alaska corporation for purposes of conducting their business so that they can protect their personal assets from potential business liabilities. Bob and Carl agree. They decide that Bob will be the President and Carl will be the Secretary and Treasurer of the new corporation. They agree that they will each own 50% of the shares of the new corporation.

Bob and Carl inform Attorney that they need their new corporation to be effective as soon as possible so that the corporation can make an offer to buy a house on Tuesday, the next day. Attorney advises Bob and Carl that this is not a problem because, under Alaska law, Attorney can electronically file articles of incorporation with the State of Alaska, with Attorney acting as the incorporator, and the State will issue a certificate of incorporation immediately upon submission of the online filing. Attorney tells Bob and Carl that he will file the articles of incorporation electronically that afternoon, immediately after their meeting, and will put the certificate of incorporation in the mail before the end of the day. Thus, by Tuesday morning, says Attorney, Bob and Carl will be ready to do business as Alaska Properties, Inc. ("API"), their chosen name for the corporation.

Bob, acting as President of API, signs a contract to purchase a house from Jack on Tuesday morning. At the time Bob signs the contract, Bob tells Jack that Bob and Carl had met with Attorney on Monday and that, while Bob had not yet received the certificate of incorporation, it was in the mail. Bob made clear to Jack that Bob was acting solely as the President of API in signing the purchase contract. Jack stated that he understood. The contract bound API to purchase Jack's house but allowed API sixty (60) days to obtain financing to complete the purchase.

Unfortunately, Attorney forgot to file the articles of incorporation for API on Monday. Attorney finally remembered that he needed to file the articles of incorporation on Wednesday. Attorney filed articles of incorporation for API on Wednesday afternoon that contained only the minimum provisions required under Alaska law; thus, the articles did not name the initial directors of the corporation. Attorney printed the certificate of incorporation issued by the State of Alaska and placed the certificate in the mail to Bob and Carl.

Bob and Carl received API's certificate of incorporation on Friday. They then set to work to obtain a loan for API to pay the purchase price for Jack's house. Unfortunately, no bank would make a loan to API. Thus, Bob, acting as the President of API, wrote a letter to Jack to advise him that API would not be completing the purchase of Jack's house.

1. Discuss whether Attorney properly could act as the incorporator of API.
2. Discuss whether all requirements for the proper incorporation and organization of an Alaska corporation were completed by Attorney, Bob and Carl, including discussion of any additional things Bob and Carl need to do to complete the proper organization of API.
3. Jack sues API, Bob and Carl. He proves that the contract for the purchase of his house was breached and that he suffered damages. Discuss whether Bob and Carl may be held individually liable for the damages.

GRADER'S GUIDE

*** QUESTION NO. 6 ***

SUBJECT: BUSINESS LAW

1. Discuss whether Attorney properly could act as the incorporator of API. (10 points).

Any natural person who is at least 18 years of age may act as the incorporator of a corporation by signing and delivering an original and an exact copy of the articles of incorporation to the commissioner of the Alaska Department of Commerce, Community & Economic Development or the commissioner's designee. AS 10.06.205. While the State's online filing does not technically require the signing and delivery of an original and an exact copy of the articles of incorporation, and while examinees may not be familiar with the online filing alternative, the facts establish that the legitimacy of online filing is not in issue. The facts state that the State permits online filing and, in fact, issued a certificate of incorporation for API.

The sole question here is whether Attorney properly could act as the incorporator. Alaska law does not require an incorporator to be a prospective shareholder of the corporation. Consequently, Attorney properly could act as the incorporator of API.

2. Discuss whether all requirements for the proper incorporation and organization of an Alaska corporation were completed by Attorney, Bob and Carl. (60 points).

Attorney filed articles of incorporation that contained all of the provisions required under Alaska law. The facts state further that the State of Alaska issued a certificate of incorporation. Corporate existence begins upon issuance of the certificate of incorporation and the issuance of the certificate of incorporation is conclusive evidence that all precedent conditions required to be performed by the incorporator have been satisfied and that the corporation has been incorporated. AS 10.06.218. Thus, API was properly incorporated.

However, after the commencement of corporate existence by the issuance of a certificate of incorporation, the Alaska Corporations Code requires that an organizational meeting be held for the purpose of adopting bylaws, electing directors (if directors have not been named in the articles of incorporation), electing officers, and transacting such other business as may come before the meeting. AS 10.06.223. Either the incorporators or the board of directors named in the articles of incorporation are responsible for conducting the organizational meeting. AS 10.06.223.

The facts state that the articles of incorporation filed by Attorney contained the minimum provisions required by Alaska law. Alaska 10.06.208 requires that articles of incorporation set out: (1) the name of the corporation; (2) the purposes for which the corporation is organized; (3) the address of the corporation's initial registered office and name of its initial registered agent; (4) information regarding alien affiliates; and (5) information concerning shares authorized to be issued by the corporation. AS 10.06.208. Thus, since the facts indicate that the articles did not name the initial directors of API, examinees may identify that Attorney would be responsible for calling the organizational meeting and furnishing the notice required by statute, AS 10.06.223.

Because the articles of incorporation did not name initial directors, Attorney, as the incorporator, would have authority, pursuant to AS 10.06.225, to do whatever is necessary and proper to perfect the organization of the corporation until directors are elected, including the adoption of bylaws of the corporation and the election of directors.

While API was properly incorporated, the corporation was not properly organized. No organizational meeting was held. The initial meeting with Attorney would not be deemed the required organizational meeting because the organizational meeting can be held only after the corporation is brought into existence (by issuance of a certificate of incorporation).

An Alaska corporation also must adopt bylaws. The facts do not state that any bylaws were adopted.

In addition, directors must be elected. AS 10.06.223; AS 10.06.450 (providing that the affairs of a corporation are managed, generally, under the direction of a board of directors). Some examinees may explain that the number of directors must be fixed by, or in the manner provided in, the bylaws, since the articles of incorporation did not contain provisions regarding directors. A board of directors must consist of one or more members. AS 10.06.453. The facts do not indicate that any directors were elected.

A corporation also must have, at minimum, a president, secretary and a treasurer. The offices of president and secretary may not be held by the same person unless all of the issued and outstanding stock is held by one person. AS 10.06.483. Bob and Carl agreed that Bob would serve as the President of API and Carl would serve as the Secretary and Treasurer. While Bob and Carl made this agreement in advance of the incorporation of API, the adoption of bylaws, election of directors and appointment of officers is proper only after the commencement of corporate existence. AS 10.06.223. Consequently, no officers were properly appointed.

Finally, API should issue shares to Bob and Carl. Alaska law requires the articles of incorporation to identify the number of shares that a corporation is authorized to issue and, if applicable to identify the classes or series of shares. AS 10.06.208. Generally, shares of a corporation “shall be represented by certificates signed by the president or vice-president and the secretary or an assistant secretary of the corporation.” AS 10.06.348. However, a board of directors may authorize the issuance of shares without certificates; provided that, the corporation sends the shareholder a written statement furnishing all information required to be on certificates and certain other information. AS 10.06.349.

Bob and Carl agreed that they would each own 50% of the shares of API stock. No facts indicate that API actually issued any shares after the commencement of its corporate existence. Examinees should identify that the corporation should issue shares to Bob and Carl. The question does not provide specific information regarding the shares of the corporation and, therefore, examinees are not expected to discuss whether the shares would be certificated or uncertificated or the number of shares that should be issued to Bob and Carl.

3. Discuss whether Bob and Carl are liable for the damages suffered by Jack. (30 points).

Generally, persons who assume to act as a corporation for which there has been no issuance of a certificate of incorporation under AS 10.06.218 are jointly and severally liable for debts and liabilities incurred or arising as a result of that action. AS 10.06.220(a). The statute provides, as follows:

Liability for acting as nonexistent corporation

(a) Except as provided in (b) of this section persons who assume to act as a corporation for which there has been no issuance of a certificate of incorporation under AS 10.06.218 are jointly and severally liable for debts and liabilities incurred or arising as a result of that action.

(b) The terms of a written contract between a third party and persons acting on behalf of a corporation for which there has been no issuance of a certificate of incorporation may modify or preclude the liability created by this section.

(c) An oral promise, agreement or understanding is not effective to modify or preclude the liability created in (a) of this section.

Bob purported to act as President of API at a time when API indisputably did not exist as a corporation. No certificate of incorporation had been issued as of that time. Corporate existence begins upon issuance of the certificate of incorporation. AS 10.06.218. Examinees may note that the doctrines of de jure compliance, de facto corporations and corporations by estoppel have been

abolished in Alaska. AS 10.06.218. Thus, it is only the issuance of a certificate of incorporation that commences corporate existence.

Bob signed the contract with Jack for the purchase of Jack's House. Sub-section (b) of AS 10.06.220 provides an exception to the rule establishing Bob's individual liability if the terms of a written contract between a third party and persons acting on behalf of a corporation for which there has been no issuance of a certificate of incorporation modify or preclude liability created by the statute. AS 10.06.220(b).

Bob orally told Jack that Attorney has filed articles of incorporation and that the certificate of incorporation was in the mail. Jack responded that he understood. If the written contract contained a disclosure regarding the status of the incorporation and an agreement by Jack that only API would be liable for performance under the contract, upon incorporation, Bob would have an argument that he could not be held personally liable for the breach of contract. However, the disclosure and purported agreement or understanding by Jack were not in writing. The discussions were oral. "An oral promise, agreement or understandings is not effective to modify or preclude the liability created" under AS 10.06.220(a). AS 10.06.220(c). Consequently, Bob is personally liable for the breach of contract.

Carl is not personally liable for the breach of contract because, with respect to Jack, Carl did not assume to act as API. The facts do not indicate that Jack had any knowledge of Carl's participation or affiliation with API.