EXAMINERS' ANALYSIS OF QUESTION NO. 14

1) Is there a contract between Smith Tire Company and Super Bikes, Inc. for the 1,000 tires?

The first issue is whether Smith Tire Company and Super Bikes, Inc., have a contract for 1,000 tires. The threshold question is whether the UCC or common law applies. The UCC applies to the sale of goods. Goods are defined as all things which are movable at the time of identification to the contract. MCL 440.2105. Here, the contract pertains to the sale of tires. Tires are movable and therefore considered a good. Therefore, the UCC applies.

The next issue is whether Super Bikes, Inc. made a firm offer under MCL 440.2205. The first element of a firm offer is that there must be an offer. An offer is a manifestation of a willingness to enter into a contract made in such a way that the offeree knows that assent is all that is necessary to cement the deal. It must be definite which means that the terms, especially price and quantity, must be specified. Super Bikes, Inc. wanted to buy 1,000 tires for $300 per tire for a total contract price of $300,000. Because we know how many tires were needed and the amount each one cost, the terms of the contract are definite.

The offeror, Super Bikes, Inc., must also be committed to the contract. This means that it had to show a willingness to enter into the contract with Smith Tire Company. Here, the language of Super Bikes, Inc.'s letter said that it "offers to buy" the tires. This language is not an inquiry. It is indicative of a distinct desire to purchase tires from Smith. Therefore, there is commitment.

Lastly, in order to have a valid offer, the offer must be communicated to the offeree (Smith Tire Company). The offeree has to have known about it and understood it. Here, the facts indicate that as soon as Ms. Smith received the letter, she gave it to her production manager in order to immediately begin the manufacturing process. She understood the magnitude of the order and knew that he had to begin working on it right away.

If she did not comprehend this, she would not have sent it to her production manager. Therefore, the offer was communicated to the offeree. Because the offer was definite, committed and communicated, there was an offer.

Next MCL 440.2205 requires that the offer be made by a merchant. Merchant is defined as a person who deals in goods of the kind involved in the transaction. Super Bikes, Inc. is a well-known manufacturer of motorcycles. It is in the business of manufacturing and selling motorcycles. Therefore, it qualifies as a merchant.

A firm offer also requires that the offer has to be in a signed writing. Signed includes any symbol executed or adopted by a party with the present intention to authenticate a writing. MCL 440.1201(39). Here, the facts indicate that the letter was initialed by Larry Jones, the president of the corporation. The president of the corporation has the ability to enter into contracts on behalf of the entity. It does not matter that only the initials were supplied. Any symbol qualifies as long as there was intent to authenticate the writing. By initialing the letter with the order that was on company letterhead, Mr. Jones had the intent to authenticate the writing. Therefore, the signature requirement is met. In addition, writing includes printing, typewriting, or any other intentional reduction to tangible form. MCL 440.1201 (46). Here we are dealing with a piece of paper with words either typed or written on it. This paper, the letter, is touchable. Therefore, there was a writing.

Next, a firm offer requires that the offeror included assurances that it will be held open. This means that the offer must have language in it indicating that it will not expire for a period of time or that it is firm. The language of the offer stated that the offer was "firm and would not expire until May 30, 2012." Since the letter stated that it would not lapse for a particular period, the assurance requirement is met.

Because the requirements of a firm offer have been satisfied, the offer is not revocable, for lack of consideration, for the time stated. The time period of irrevocability cannot exceed 3 months. MCL 440.2205. Here the offer was received on March 1, 2012 and the expiration date was May 30. This is within the 3 month limitation. Thus, the offer

would not be revocable for the time stated. Super Bike, Inc.'s revocation on the evening of May 29, 2012 via the voicemail message was ineffective to terminate the power to accept.

Further, there was a bargained for exchange between Smith Tire Company and Super Bikes, Inc. Smith would produce and sell the tires, and Super Bikes, Inc. would pay $300,000 for the goods. Although consideration is not necessary, under these facts, there was consideration and examinees should be given credit for noting this. Therefore, there was a contract between Smith Tire Company and Super Bikes, Inc. for 1,000 tires.

2) Who has the risk of loss and why?

A shipment contract occurs when the seller is required to send the goods to the buyer and the contract does not require him to deliver them at a particular destination. The seller fulfills his delivery obligations when he gets the goods to the common carrier, makes reasonable arrangements for the delivery and notifies the buyer of the shipment. See MCL 440.2504. In this case, the contract indicated that Smith Tire Company was to use Allied Freight to transport the tires to Super Bikes, Inc. The terms of the contract stated FOB -West Bloomfield. Since Smith Tire Company is located in West Bloomfield, this is deemed to be a shipment contract. Mr. Smith got the tires to Allied Freight, promptly faxed Super Bikes, Inc. notice of the shipment along with all the documents necessary to enable Super Bikes, Inc. to obtain possession of the tires. Smith Tire Company's delivery obligations were complete.

Super Bikes, Inc. may argue that since the goods were destroyed en route, that Smith Tire Company was in breach for failure of delivery. This argument will fail. Neither Smith Tire Company nor Super Bikes, Inc. were to blame for the accident that destroyed the contents of the Allied truck. The agreement of the parties regarding the risk of loss controls. Here, the contract is silent on who bears the risk of loss. The general rule is that the risk of loss is on the seller until it completes its delivery obligation. Once completed, the risk of loss shifts to the buyer. Here, Smith Tire Company completed its delivery obligations. Therefore, the risk of loss falls upon Super Bikes, Inc.