EXAMINERS' ANALYSIS OF QUESTION NO. 9

1. (a) Is there a contract between Ryan Motor Company and Stanley Wiper Supply?

The first issue is whether there is a contract between Ryan Motor Company ("Ryan") and Stanley Wiper Supply ("Stanley"). It must be determined 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 the contract. MCL 440.2105. Here the contract pertains to the sale of windshield wipers. Windshield wipers are moveable and therefore considered goods. Thus, the UCC applies.

The next issue is to determine whether there is a contract between Ryan and Stanley.

The elements of a contract are offer, acceptance and consideration. An offer is a manifestation of intent 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. Here, the offer by Ryan was definite in its terms. Ryan sent a writing to Stanley to purchase 40,000 wipers for $600,000. Ryan was committed to entering into the agreement as it sent a purchase order to Stanley containing the terms. The offer was sent to Stanley via U.S. Mail and received by Stanley; it was communicated. All Stanley had to do was assent to the terms in order to make the deal. Therefore, there is a valid offer.

According to MCL 440.2207(1), "a definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time, operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." Here there was a written confirmation that was sent by Stanley to Ryan soon after it was received. Written includes printing, typewriting, or any other intentional reduction to tangible form. MCL 440.1201(2)(qq). Sending an item by mail means that it can be touched and therefore it is tangible. It was also written because we know that the money and quantity terms were agreed to and the warranty disclaimer clause was added. These terms were

read by Ryan and therefore, the information had to be printed or typewritten. Lastly, there was no delay in sending the confirmation because the facts state that Stanley sent the written confirmation upon receipt. Therefore, the confirmation was sent within a reasonable time.

The additional terms in the confirmation disclaiming the warranty of merchantability and fitness for a particular purpose would present a problem at common law because of the mirror image rule. These additional terms would be considered a counter-offer. However, the UCC is different in this case. MCL 440.2207(1) states that these additional terms will not negate Stanley's attempted acceptance of Ryan's offer as long as the acceptance was not made expressly conditional on Ryan's assent to the additional terms. Stanley did not condition the acceptance on Ryan's assent to the new terms. Therefore, there is an acceptance.

The third element of a contract is consideration. "Consideration is defined as a bargained exchange involving a benefit on one side, or a detriment suffered, or service done on the other." *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58 (2005) (internal quotations and citations omitted). Here Ryan offered $600,000 to Stanley in exchange for 40,000 windshield wipers. The promise by Ryan to pay $600,000, induced Stanley to fulfill the order and transfer ownership of 40,000 windshield wipers. Therefore, there is consideration.

Since there is an offer, acceptance and consideration, there is a contract.

1. (b) What are the terms of the contract?

In this case each of the parties are merchants. A merchant is defined as "a person that deals in goods of the kind. . . ." MCL 440.2104(1). Transactions "between merchants" means "any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants." MCL 440.2104(3). Here, Ryan is a car manufacturer that deals in manufacturing and assembling cars. Ryan has the ability to manufacture the wipers, however it chose to hire a supplier due to the size of the order. Stanley is an auto parts supplier that manufacturers wiper blades for the automobile manufacturing industry. Both

deal in manufacturing of parts for automobiles and are charged with the knowledge or skill of entities dealing with the goods involved in this trade, specifically wiper blades.

MCL 440.2207(2)(a) states that "when both parties are merchants, the additional terms become part of the contract unless the offer expressly limits acceptance to the terms of the offer." Here the offeror, Ryan Motor Company, included a clause indicating that it expressly limited acceptance to the terms of the offer. Because of this express limitation, Stanley's attempt to add the disclaimer would not be successful. Therefore, the addition of the warranty disclaimer clause would not be part of the contract. The terms would be 40,000 wipers for $600,000.

Examinees can also receive credit for utilizing MCL 440.2207(b) which states another ground for concluding that the warranty disclaimer is not part of the contract. Under MCL 440.2207(b), an additional term in an acceptance does not become part of the contract if it materially alters it. Adding a warranty such as that of merchantability or fitness for a particular purpose in this case would materially alter the contract. Examinees should get full credit if they discuss either MCL 440.2207(a) or MCL 440.2207(b).

2. What damages would Ryan have to pay if it breached its obligations under the contract?

Since there is a contract between the parties, Ryan Motor Company would be in breach of contract if it attempted to avoid its obligations. Part 7 of Article 2 contains the general contract damages policy of putting the non-breaching party where it would have been had the contract been performed. MCL 440.2703 *et seq*. In a situation where the buyer breaches and the seller has the goods, the damages are measured by either (1) the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages but less expenses saved in consequence of the buyer's breach (MCL 440.2708); **or** (2) the difference between the resale price and the contract price together with any incidental damages but less expenses saved in consequence of the buyer's breach. (MCL 440.2706).

Here, Ryan, the buyer, is in breach and Stanley, the seller, is in possession of the wipers. The contract price was $600,000. It is appropriate to utilize formula (1) in the above paragraph because the facts do not support that a resale has occurred. Currently the market value of a wiper is $10.00 and 40,000 were ordered. Thus, $400,000 would reflect the current market price for the order ($10.00 x 40,000 = $400,000). The damages are measured by *contract price minus market price at the time and place of delivery.* ($600,000 - $400,000 = $200,000.) Therefore, $200,000 is the amount of damages that Ryan would have to pay Stanley.

According to the statute, the amount of damages can be increased by any incidental damages that Stanley can prove. Incidental damages include "any commercially reasonable charges, expenses or commissions incurred in stopping delivery, in the transportation, care and custody of goods after the buyer's breach, in connection with return or resale of the goods or otherwise resulting from the breach." MCL 440.2710. Further, the damage amount will be reduced by any expenses which were saved in consequence of the buyer's breach. There are no supporting facts regarding incidental damages or expenses that were saved, but points should be awarded to the examinee for noting this.

In conclusion, there is a contract. The terms are $600,000 for 40,000 wipers. Ryan would pay damages to Stanley in the amount of $200,000 plus incidentals minus expenses saved.