ANSWER TO QUESTION 14

1. UCC v Common Law. The primary purpose of the contract between Brawny and Speedy Service was the provision of repair services, not the sale of goods. Therefore, the dispute must be resolved under Michigan's common law of contracts rather than Article 2 of the Uniform Commercial Code.

2. Is there a contract and what are its terms? Speedy Service's quotation is an offer to Brawny to have Speedy Service perform the repair work on the terms stated in Speedy's quotation form. The quotation offers Brawny a choice of two price/urgency options; in either case the offer also includes the terms on the back of the quotation form. To create a contract, an offeree's acceptance must be unambiguous and in strict conformance with the offer. *Kloian v Domino's Pizza, LLC,* 273 Mich App 449, 452 (2006). A contract requires mutual assent (sometimes called a "meeting of the minds") on all essential terms. *Id.* at 453.

Brawny's January 4 communication to Speedy Service was not sufficient to create a contract. It did not specify which of the two price/urgency alternatives Brawny was choosing, and those alternatives differed on terms so important that there can be no contract without them: the contract price and timetable for completing the work. In addition, Speedy Service's quotation form made clear that Speedy insisted on acceptance of all terms on the back of the form in order for there to be an effective acceptance. Brawny rejected this when it stated that the parties' agreement would be subject to all terms of its own form. We know from the facts that the indemnity terms (and other provisions) of the Speedy Service and Brawny forms were quite different. This is an additional reason why Brawny's request that Speedy begin work was not effective in creating a contract. In fact, because Brawny proposed different terms, it was a counteroffer. A counteroffer operates as a rejection of the original offer unless the counterofferor indicates a different intention (for example, is simply asking whether the offeror will modify the original offer.)

Although Brawny's January 4 communication did not plainly tell Speedy Service which of the two price/urgency alternatives that Speedy had originally proposed Brawny desired, it certainly does not suggest that Brawny regarded the expedited timetable as unacceptable. The best reading is that Brawny's counteroffer allowed Speedy to choose the timetable for completion. An offeree is entitled to accept an offer either by promising to perform or by

rendering performance. *DaimlerChrysler Corp v Wesco Distribution, Inc,* 281 Mich App 240, 247 (2008). In other words, mutual assent to contract terms can be found not only through exchanges of words, but from one party's performing the contract and the other party's acquiescence in that performance. From the beginning of Speedy Service's performance, it made clear that it had selected the "expedited" approach to completing the contract and that it would be working overtime, which was consistent only with the expedited, higher-priced alternative. Brawny thus had ample reason to know that Speedy had chosen the $25,000 guaranteed completion approach to performing the contract. There was thus an eventual meeting of the parties' minds on the $25,000 alternative, and on the inclusion of Brawny's standard terms in the contract since Speedy did not propose any modifications to that portion of the contract.

Some examinees may reach the same conclusion based on a different analysis involving *quantum meruit.* These examinees will argue that performing the work on an expedited basis was not a sufficiently clear manifestation that Speedy agreed to all of the terms contained in Brawny's purchase order and hence there is no contract. If that is true, the services that Speedy provided were nevertheless valuable to Brawny, and both parties expected that Speedy would be compensated for them. Speedy is therefore entitled to recover their reasonable value. Both parties agreed that $25,000 was a reasonable value for repairs completed within 3 days --Speedy by quoting that price and Brawny by not suggesting a different price. It is also likely that some examinees will argue that Brawny always retained the right to choose whether it wanted expedited repairs or not and never specified that it did, so that the reasonable value of the repairs was only $15,000. All replies using a *quantum meruit* analysis should be evaluated individually based on their internal logic and persuasiveness.

3. <u>Contract Interpretation.</u> With respect to Speedy Service's injured employee, certainly the indemnity clause on Speedy's quotation form is not part of the contract. If a contract was formed as a result of Brawny's counter-offer, the contract was "subject to all terms of Brawny's purchase order," one term of which was that Speedy Service would be solely responsible for certain injuries or claims asserted against Brawny.

The next question, however, is whether this injury falls within the scope of Brawny's indemnity clause. It does not. It is limited to injuries or claims "arising out of [Speedy's] furnishing the services covered by this Purchase Order." The injury to Speedy's employee had nothing to do with the work being performed. It was part of the process of preparing Speedy's quotation, not of its furnishing repair services. [Some may argue that the clause is

ambiguous and that the ambiguity must be construed against Brawny as the drafter of the clause. This is a worthy suggestion, though the drafter believes the provision is unambiguous on the stated facts.] Furthermore, unless the parties agree otherwise, a contract will not be construed to operate retrospectively, and this injury occurred before the contract was made.

[An examinee who finds that no contract was made and that recovery must be under *quantum meruit* should also logically conclude that Speedy has no obligation to Brawny with respect to Speedy's injured employee since none of the printed form provisions became part of the parties' arrangement.]