Question 10 – February 2019 – Selected Answer 1

A) A contract was formed but it had not occurred until Retailer had accepted delivery and assented to the terms of the acknowledgement sent by the Manufacturer

At issue is whether a contract was formed between Retailer and Manufacturers considering the communications made between the parties under the UCC. A contract is made when there is offer, acceptance, and consideration. When the Manufacturer originally sent the Retailer a quote for $15 per unit for 500 thermos bottles, this was an invitation for offers by the Manufacturer. When the retailer responded with it's purchase order, an additional term was added to the order that contained a warranty for fitness for an ordinary purpose. This purchase order constituted as an offer by the Retailer. The express warranty on the back may not have been part of the offer because it was located on the back side of the order which did not make the term conspicuous enough for the Manufacturer to assent to. When the Manufacturer sent a response to the PO which included an Acknowledgement order with additional conditions about the warranties it makes, then this would have operated as an acceptance of the offer but for the additional terms included in the acknowledgement about conditions to accepting the order that the Retailer waives its right to remedies on the warranties listed. This acknowledgement thus was a counteroffer by the manufacturer. Acceptance had no occurred at this point until Retailer had accepted delivery of the 500 thermos bottles, and impliedly assented to the terms sent in the acknowledgement. This is allowed under the UCC because both parties are considered merchants and less stringent requirements are needed for merchants. Given that the invoice is sent and delivery accepted then there was an implied promise by the Retailer to pay the invoice which satisfies the consideration element.

B) Retailer may collect damages for implied warranties of fitness for a particular purpose or warranties of merchantability

Retailer may still collect damages for breach of contract on the thermos bottles if they can prove that trade usage of thermos bottles meant that the bottles were meant to keep cold liquids cold and hot liquids hot. Both parties are considered merchants under the UCC and either party may use extrinsic evidence of trade usage to try to prove that there was still an implied warranty for fitness for a particular purpose or merchantability by trade usage. If common trade usage is that thermos' are meant to keep hot liquids hot and cold liquids cold, then the retailer may collect damages for breaches of those warranties and collect damages. Retailer may collect damages to the extent of their purchase order if it was not a perfect tender under the UCC for which it could collect the entire value of the contract.

Question 10 – February 2019 – Selected Answer 2

(A) There is a valid contract between Retailer and Manufacturer, however, its terms are governed by the conduct of the parties, not their written agreements.

This question involves application of the battle of the forms provisions governing commercial contracts. The transaction between Manufacturer and Retailer is governed by the Texas UCC, because it involves an agreement with respect to goods (the thermos bottles).

For an effective contract to be formed, there needed to be both an offer and acceptance.

The terms of an offer must be sufficiently certain, and must manifest an intent to be bound, such that all that is left if for the other party to accept. Retailer originally inquired about purchasing 500 thermos bottles from Manufacturer, and Manufacturer responded with a quote of a price of $15 per unit for 500 thermos bottles with logo. Neither of these initial communications constituted an offer because it is clear that the parties were negotiating the terms of a purchase and were not yet ready to be bound. When Retailer sent its purchase order for 500 bottles at the quoted price, this communication constituted an offer. A purchase order is sufficient such that the other party would understand all that is left is to accept.

Manufacturer responded to Retailer by sending its standard Order Acknowledgement Form. This would ordinarily constitute an acceptance. Under the common law mirror image rule, the terms of an offer and acceptence must be identical, otherwise the response is not an acceptance, but rather a rejection and counter offer. However, the UCC battle of the forms provisions replace the common law rule with respect to sales of good and provide that when parties exchange preprinted forms that includes different or additional terms is still an acceptance, unless the other party's acceptance of the new terms is an express condition. Manufacturer's response provided the additional term that it made no warranty as to the quality of the goods it provided, and further provided that its acceptance was expressly conditioned on Retailer's agreement to those terms. Retailer did not expressly agree to those terms, and therefore, an agreement was not created.

However, when an agreement fails but the parties perform as if one had been created, a contract is formed by their conduct. Here, the goods were sent and accepted, and therefore, an implied contract was created for 500 thermos bottles (the amount shipped) at a price of $15 per unit (the price paid).

(B) Damages:

The issue of damages depends on the extend of the warranty that was provided by Manufacturer in the contract between the parties.

Retailer rejected the goods on the grounds that none of them kept hot liquids hot or cold liquids cold. Retailer would argue this is a violation of the express term of the agreement contained on the back of its PO form, which provides that Manufactuer expressly warrants that the goods provided are fit for the ordinary purposes for which they are used. Manufactuer would argue that its language controls, which provides that it made no warranty as to the quality of the goods. However, as discussed above, the contract between the parties was created by their conduct, and therefore, the terms of their form agreements do not control.

There is an implied warranty of merchantability in every sales contract by a merchant, which provides that the goods will be fit for their ordinary purpose (essentially the language in Retailer's PO). Therefore, if the fact that the bottles did not keep liquids hot or cold made them unfit for their ordinary purpose, Retailer was entitled to reject them and is entitled to damages.

In this case Retailer could get restitution and require Merchant to require the amount it paid for the bottles that were rejected, along with its costs incurred.