

### **QUESTION ONE**

Krack is a manufacturer of cooling units that contain steel tubing which it purchases from Metalmatic, who had supplied tubing to Krack for over ten years. At the beginning of each year, Krack sent a blanket purchase order to Metalmatic stating how much tubing Krack would need for the year. Then, throughout the year as Krack needed tubing, it sent release purchase orders to Metalmatic requesting that specific amounts of tubing be shipped. Metalmatic responded to Krack's release purchase order by immediately shipping Krack the ordered tubing, followed by an acknowledgment form/invoice with the charges for each shipment.

Each of Metalmatic's acknowledgment forms contained language disclaiming all liability for consequential damages and limited Metalmatic's liability for defects in the tubing to refund of the purchase price. These terms were not contained in Krack's purchase order. Moreover, the following statement was contained on Metalmatic's form:

“Metalmatic's acceptance of purchaser's offer is hereby expressly made conditional to purchaser's acceptance of the terms and provisions of the acknowledgment form. However, once shipment is made, all terms of this acknowledgment form shall be deemed as assent by purchaser.”

On one occasion during the ten-year relationship, Krack's purchasing manager, Zver, discussed the limitation of warranty and disclaimer of liability terms contained in Metalmatic's acknowledgment form with Metalmatic's vice-president. Zver voiced objections to the terms and tried to convince Metalmatic to change them, to no avail. After the discussion, Krack continued to accept and pay for tubing and during the course of the ten years the parties never had an actual dispute.

In February 2001 Krack sold one of its units to Diamond for a controlled-atmosphere fruit warehouse. The unit subsequently began leaking ammonia from a cooling coil made of defective steel tubing. Investigation revealed that the defective tubing was purchased from Metalmatic. As a result of the leak, all of the fruit was destroyed and Diamond suffered over \$100,000 in damages for lost fruit, which it seeks to recover from Krack.

When Krack confronted Metalmatic, they received a letter from Metalmatic's attorney, denying any liability for consequential damages and stated that, in any event, “the contract limits the remedy to a return of the purchase price of the defective tubing, which was contained in the acknowledgment form and assented to by Zver, your purchasing manager.”

Krack's president comes to you for advice and wants to know what rights Krack has against Metalmatic. Discuss the rights and liabilities of Krack v. Metalmatic.

**QUESTION TWO**

Ted plays lead guitar in a rock and roll band. Robert plays rhythm guitar and harmonica. On December 1 Ted receives the following message from Santa Stores Co:

“We would like to hire your band for our Christmas party on December 20. We’ll pay \$1,000. Call me within the next three days to let me know if you’re available and we can discuss specifics.”

On December 1 Robert receives the following fax from Jingle Inc.:

“We are willing to pay \$800 for your band to play at our Christmas party on the night of 12/20. If interested, you can just sign and fax back this form.”

Robert immediately mails the following letter to Jingle, Inc. The letter is received on December 3:

“Got your fax. We would be honored to play at your party. We assume a 9 p.m. start time is OK with you. Look forward to seeing you on the 20th.”

On December 3 Robert stops in at Santa Stores to purchase a Christmas present. He and the owner start talking about music, and Robert tells him the band is playing for Jingle, Inc. on December 20. The owner asks Robert if he is aware of the offer by Santa Stores for the same day, and Robert says no. Robert tells the owner that either he or Ted will get back to him.

On December 4 Ted and Robert meet at band practice and each learns of the communications received by the other. The next morning Robert faxes the following letter to Jingle Inc.:

“Sorry about the mix up, but we can’t play on the 20th for less than \$1,000.”

Later in the day on the 5th, Robert receives the following letter from Jingle Inc., which was mailed on December 3:

“Received your letter. Thank you for accepting our proposal, and we’ll see you there!”

Unaware of the communications by Robert, Ted faxes the following letter to Santa Stores on December 5:

“We accept your offer to play on December 20 for \$1,000.”

On December 6 Ted receives a letter from Santa Stores (dated December 4) withdrawing its offer on December 1. Ted calls Santa Stores and asks the owner to reconsider. He is noncommittal.

On December 15, knowing it would be too late to find another band, Robert faxes the following letter to Jingle Inc.:

“We have another company who has hired us, and therefore will not play at your party unless we receive \$1200 in advance.”

Jingle Inc. doesn't know what to do. It prepares an acceptance of the December 15 fax, but doesn't send it out.

Discuss the rights and remedies of the parties.