THE MPT®

MULTISTATE PERFORMANCE TEST

February 2012 MPTs and Point Sheets

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Contents

Preface

The Multistate Performance Test (MPT) is developed by the National Conference of Bar Examiners (NCBE). This publication includes the items and Point Sheets from the February 2012 MPT. Each test includes two 90-minute items; user jurisdictions may select one or both items to include as part of their bar examinations. (The MPT is a component of the Uniform Bar Examination [UBE]. Jurisdictions administering the UBE use two MPTs as part of their bar examinations.) The instructions for the test appear on page iii. For more information, see the *MPT Information Booklet,* available on the NCBE website at www.ncbex.org.

The MPT Point Sheets describe the factual and legal points encompassed within the lawyering tasks to be completed. They outline the possible issues and points that might be addressed by an examinee. They are provided to the user jurisdictions to assist graders in grading the examination by identifying the issues and suggesting the resolution of the problems contemplated by the drafters.

Description of the MPT

The MPT consists of two 90-minute items, one or both of which a jurisdiction may select to include as part of its bar examination. (UBE jurisdictions use two MPTs as part of their bar examinations.) It is administered by participating jurisdictions on the Tuesday before the last Wednesday in February and July of each year.

The materials for each MPT include a File and a Library. The File consists of source documents containing all the facts of the case. The specific assignment the examinee is to complete is described in a memorandum from a supervising attorney. The File might also include transcripts of interviews, depositions, hearings or trials, pleadings, correspondence, client documents, contracts, newspaper articles, medical records, police reports, or lawyer's notes. Relevant as well as irrelevant facts are included. Facts are sometimes ambiguous, incomplete, or even conflicting. As in practice, a client's or a supervising attorney's version of events may be incomplete or unreliable. Examinees are expected to recognize when facts are inconsistent or missing and are expected to identify potential sources of additional facts.

The Library may contain cases, statutes, regulations, or rules, some of which may not be relevant to the assigned lawyering task. The examinee is expected to extract from the Library the legal principles necessary to analyze the problem and perform the task. The MPT is not a test of substantive law; the Library materials provide sufficient substantive information to complete the task.

The MPT is designed to test an examinee's ability to use fundamental lawyering skills in a realistic situation. Each test evaluates an examinee's ability to complete a task that a beginning lawyer should be able to accomplish. The MPT requires examinees to (1) sort detailed factual materials and separate relevant from irrelevant facts; (2) analyze statutory, case, and administrative materials for applicable principles of law; (3) apply the relevant law to the relevant facts in a manner likely to resolve a client's problem; (4) identify and resolve ethical dilemmas, when present; (5) communicate effectively in writing; and (6) complete a lawyering task within time constraints.

These skills are tested by requiring examinees to perform one or more of a variety of lawyering tasks. For example, examinees might be instructed to complete any of the following: a memorandum to a supervising attorney, a letter to a client, a persuasive memorandum or brief, a statement of facts, a contract provision, a will, a counseling plan, a proposal for settlement or agreement, a discovery plan, a witness examination plan, or a closing argument.

Instructions

The back cover of each test booklet contains the following instructions:

You will be instructed when to begin and when to stop this test. Do not break the seal on this booklet until you are told to begin. This test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. Columbia and Olympia are also fictitious states in the Fifteenth Circuit. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

You will have two kinds of materials with which to work: a File and a Library. The first document in the File is a memorandum containing the instructions for the task you are to complete. The other documents in the File contain factual information about your case and may include some facts that are not relevant.

The Library contains the legal authorities needed to complete the task and may also include some authorities that are not relevant. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if they all were new to you. You should assume that the cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

Your response must be written in the answer book provided. If you are using a laptop computer to answer the questions, your jurisdiction will provide you with specific instructions. In answering this performance test, you should concentrate on the materials in the File and Library. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

Although there are no restrictions on how you apportion your time, you should allocate approximately half of your time to reading and digesting the materials and to organizing your answer before you begin writing it. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet. You may not tear pages from the question booklet.

This performance test will be graded on your responsiveness to the instructions regarding the task you are to complete, which are given to you in the first memorandum in the File, and on the content, thoroughness, and organization of your response.

February 2012 MPT

▶ *FILE*

MPT-1: *Franklin Resale Royalties Legislation*

LIEB & LIEB
Attorneys at Law
988 Mirrow Street
Franklin City, Franklin 33602

MEMORANDUM

To: Examinee
From: Charles Lieb
Date: February 28, 2012
Re: Proposed Resale Royalties Legislation

The Franklin State Assembly is considering legislation that would require royalties—payments for continuing use of artworks—to be paid to artists and their heirs for resales of artworks in the state (bill no. F.A. 38). Such royalties would benefit artists and their heirs, who, under current law, receive nothing from such resales.

Our client, the Franklin Artists Coalition, is strongly in favor of the legislation and has asked for our assistance in its efforts to persuade the legislature to enact the legislation.

I am attaching a letter from our client and materials which will provide background on the legislation and its subject matter, and from which you may discern the arguments being advanced for and against enactment. Please assist me in preparing a document (a so-called "leave-behind") which may be given to legislators and their staff members after in-person visits by our client. The purpose of the "leave-behind" is to persuade legislators to vote in favor of the legislation. (Note that the recipients of the "leave-behind" will include nonlawyers.)

Your draft of the "leave-behind" should accomplish two goals: 1) it should make the case for the legislation and respond to the arguments against, and 2) it should persuasively deal with the single legal issue involved. I am attaching a template for the "leave-behind" for you to use. Draft only the material indicated in brackets, and do not repeat the opening and closing text.

FRANKLIN ARTISTS COALITION
285 DOLLEY AVENUE
FRANKLIN CITY, FRANKLIN 33600

February 23, 2012

Charles Lieb, Esq.
Lieb & Lieb
988 Mirrow Street
Franklin City, Franklin 33602

Dear Charlie:

As we discussed on the phone earlier today, we would like you to assist us in seeking enactment of legislation pending in the Franklin State Assembly that would mandate royalties on resales of works of visual art. I am enclosing the text of the proposed legislation, Franklin Assembly Bill 38 (F.A. 38).

Our neighboring state of Columbia enacted such a statute in 1973. Similar legislation was introduced in our other neighboring state of Olympia in 2006 but, unfortunately, never got out of the Olympia Senate's Committee on the Arts, which voted to table the proposed legislation "for further study." I am enclosing hearing testimony given by the witnesses who appeared for and against the Olympia legislation. F.A. 38 was drafted to address some of the objections to the Olympia bill.

I know that the effort in Olympia raised a purely legal aspect of this issue which we must address as well, and which I will leave in your capable hands.

As I mentioned, we need a "leave-behind" that we can use to persuade legislators to vote our way, and given your firm's experience with the Franklin legislature, we could really use your help.

Melody Muni

Melody Muni, Executive Director

TEMPLATE FOR "LEAVE-BEHIND"

THE FRANKLIN ARTISTS COALITION URGES SUPPORT FOR F.A. 38.

The Franklin Artists Coalition, representing over 5,000 visual artists who live and work in our state, urges your support for Franklin Assembly Bill 38.

[**Introduction**: Describe the proposed legislation in a few sentences.]

[**Why Legislation Is Necessary and Appropriate**: Explain the arguments for and answer the arguments against the proposed legislation in short paragraphs or bullet points of a few sentences each.]

[**Why Any Legal Objection Is Not Valid**: Respond to any legal objection to the proposed legislation. Your response should be detailed and thoroughly discuss the issue, but keep in mind that many of the legislators and their staffers are not attorneys.]

Franklin's visual artists, who contribute so much to our state's economy and culture, look to the legislature to enable them to earn a fair living as artists by enacting F.A. 38.

F.A. 38 DESERVES YOUR SUPPORT.

TESTIMONY OF
CAROL WHITFORD, Sculptor and Member, Olympia Art Collective
BEFORE THE COMMITTEE ON THE ARTS, OLYMPIA STATE SENATE

October 19, 2006

Mr. Chairman, I appreciate the invitation to appear before the Committee to testify in favor of the "Olympia Resale Royalties Act." As a working artist with close ties to the entire Olympia art community, I can tell you that Olympia's artists strongly support this legislation.

The life of an artist is a difficult one. The great satisfaction we get from creating works of art is tempered by the harsh economic realities we face. Works of visual art are different from other types of creative works (such as music, literature, and drama). The value in those other types of works is found either in the use of their intangible copyright rights (such as the right to publicly perform musical works) or in the sale of mass-produced physical copies (such as the sale of books). But most visual artists receive very little, if anything, from the exploitation of their intangible copyright rights, for most paintings and sculptures are never reproduced in copies (such as in posters or art books).

Rather, the overwhelming value of an artist's visual art is found in the sale of the original physical work (such as an oil painting). After the initial sale of that original physical work, unlike the sale of other types of artistic works, the artist and his or her heirs receive no "back end" remuneration—the money we receive when we first sell our paintings or sculptures is all we ever see.

Yet when our paintings or sculptures are resold by collectors, such collectors frequently reap huge profits because our works have appreciated in value. For example, a sculpture by the late Olympia artist Lawrence Huggins, which a collector originally purchased from him in 1983 for $45, was recently sold at auction for $780,000. There is no market for reproductions of such sculptural works, and Mr. Huggins's widow lives in poverty. It is only fair that artists and their heirs share, even if only to a small degree, in those profits. This legislation, with its modest five percent resale royalty, would make that possible.

Mr. Chairman, visual artists bear certain costs other creators do not. As a sculptor, I must buy the materials—granite, marble, steel—and the tools—chisels, power saws, and drills—I use to create my art. Painters must buy canvas, paints, and brushes. These things are expensive, and resale royalty payments would help defray these costs, unique to visual artists.

The Olympia Art Collective has commissioned an economic study of the visual artist's plight. Here are the report's key findings:

- 97% of Olympia's visual artists earn less than $35,000 annually from sale or other exploitation of their artwork. The remaining 3% earn, on average, $173,000 annually.
- 93% of visual artists' income from artwork comes from sale of the original physical work; the remaining 7% comes from sale of reproduction rights.
- The immediate heirs of visual artists receive, on average, less than $2,000 annually from the deceased artists' artworks, mostly from sales of previously unsold works in "inventory."
- In 1972, the year before the enactment of resale royalty legislation in our neighboring state of Columbia, public sales of works of visual art by auction houses and art galleries totaled $79 million; in 1974, the year after enactment of the Columbia statute, sales totaled $13 million; in 2004, the last year for which we have data, sales totaled $62 million (all figures are adjusted for inflation).

I know many say that resale royalties will only make the rich richer, only aid already- established artists whose works are valuable. But there are many resales for relatively modest sums of works by artists who are not the "stars" of our culture. And we are not asking for welfare. Resale royalties are a matter of equity, and even those who are successful are entitled to a fair return for the exploitation of their creations. In our society, no one would argue that a famous and successful singer-songwriter or author is not entitled to royalties for his creations because he "has enough." That is not the American way.

Mr. Chairman, on behalf of Olympia's artists, who contribute so much to our state's culture, I urge enactment of this legislation.

TESTIMONY OF
JEROME KRIEGER, Owner, K & S Galleries, and President, Olympia Art Gallery Ass'n
BEFORE THE COMMITTEE ON THE ARTS, OLYMPIA STATE SENATE

October 19, 2006

Mr. Chairman, thank you for the opportunity to testify against passage of the proposed "Olympia Resale Royalties Act," which is ill-considered for many reasons:

- Olympia has a thriving art market. Our many wonderful artists can earn a living here, thanks to the many art galleries and auction houses which cater to our state's art lovers and patrons. However, especially in difficult economic times, those galleries and auction houses operate, like all small businesses, on very thin margins. If this tax on resales of artworks is enacted, art collectors will choose to buy and sell their art elsewhere—and ultimately drive those galleries and auction houses out of our state. That will dry up the art market in Olympia, as it did in Columbia after it adopted this type of legislation.

- The legislation also reflects a misunderstanding of the economics of the art market. The vast majority of artists never make it to the resale market. Their art is sold once, but no secondary market ever develops. It is the job of a gallery to develop each new artist's career so that the artist's work will be in demand—both his new works and his older works. A dealer's profit largely comes from selling the works of established artists, often in secondary market sales. If those profits are reduced by this new tax—either because of the expense of the tax itself, or because the secondary market is chased from the state—our galleries will have fewer resources available to give new artists the support they need to develop a market for their work. The legislation will therefore hurt the very people that its proponents say it is necessary to help.

- This legislation makes no distinction between well-off living artists and those few deceased artists whose families might be in need. In the arts, as in most professions, you receive modest payment for your work when you first start out, and as your experience, reputation, and abilities grow, you receive more for your work. We believe that the overwhelming majority of beneficiaries of this resale tax would be living artists who are already successful and do not need any more money.

- This legislation reeks of paternalism—it deprives artists on the one hand, and galleries, auction houses, and collectors on the other, of their basic rights of freedom of contract and private property. All property can increase or decrease in value with changes in the market over time. Why should an art patron who takes a chance and buys a painting from an unknown artist not reap the reward if the painting's value appreciates? After all, there is no guarantee that the work will become more valuable, and if it does not, or declines in value, the art patron will have to bear the entire loss.

- It often takes years for a dealer to develop a market for an artist's work, and there are frequently sales among dealers before the work is sold to the public. Why should those sales among art dealers be taxed?

- This legislation sets no lower limit on the amount of the resale royalty. If I bought a painting for $100 and sold it for $200, the proposed five percent royalty on the gross sales price would net the artist $10—but it would cost me far more than that to find the artist and pay my checking account fees. And note that the legislation you are considering here in Olympia would impose a royalty on the total amount of the sale, not the profit. If I bought a painting for $1,500 and sold it at a loss for $1,000, I would still owe the artist $50, compounding my loss.

- Finally, as our counsel will testify, this legislation would run afoul of the preemption provision of the 1976 Copyright Act.

This bill should not be enacted.

TESTIMONY OF

DANIEL BOYER, ESQ., Counsel, Olympia Art Gallery Association

BEFORE THE COMMITTEE ON THE ARTS, OLYMPIA STATE SENATE

October 19, 2006

MR. BOYER: Good morning. I am the attorney for OAGA. Let me address the preemption issue Mr. Krieger referenced: The federal Copyright Act provides that "all the legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . and come within the subject matter of copyright . . . are governed exclusively by this title. [N]o person is entitled to any such right or equivalent right in any such work under the common law or the statutes of any State." 17 U.S.C. § 301(a). This provision operates here and preempts the proposed resale royalties legislation.

One of the exclusive rights under the Copyright Act is the right to distribute copies of the copyrighted work to the public by sale. 17 U.S.C. § 106(3). Further, once the "first sale" of a copy is made, under authority of the copyright owner, that exhausts the distribution right, and subsequent sales are not under the control of the copyright owner. 17 U.S.C. § 109(a). As the proposed resale royalties statute would impose a tax on such further distribution, it conflicts with the federal Copyright Act and must fail.

SEN. LEDERMAN: But Mr. Boyer, isn't it true that the U.S. Court of Appeals for the Fifteenth Circuit—which includes our state, Columbia, and Franklin—examined that very question as it pertained to Columbia's statute in *Samuelston v. Rogers* and concluded that the preemption provision did *not* apply?

MR. BOYER: Senator, with respect, that's not accurate. *Samuelston* dealt with whether Columbia's resale royalties act was preempted under the prior 1909 Copyright Act, not the current 1976 Act. There is a great difference. You see, there was no specific preemption provision in the 1909 Act. Therefore, *Samuelston* used general federal supremacy jurisprudence and held that preemption occurred only if state law acted in an area which Congress "fully occupied." Because the 1909 Act simply said that a copyright owner had the exclusive right to "vend" copies of the work, but nothing in that Act "restrict[ed] the transfer" of a copy of the copyrighted work once it had been legitimately obtained, *Samuelston* held that Congress had not "fully occupied" this area—the court said that the Columbia statute conferred on the artist a right not provided by the 1909 Act. *Samuelston* also said that Columbia's resale royalties act did not "restrict the transfer" of a copy of an artwork, because transfer was still possible. Thus, the court concluded, state regulation of the market for physical copies of artworks was not in conflict with the intangible copyright rights in the works, and thus the Columbia act was not preempted under the 1909 Copyright Act.

SEN. LEDERMAN: But isn't that decision still applicable in the Fifteenth Circuit, which includes Olympia?

MR. BOYER: No, ma'am, because the 1976 Copyright Act differs from the 1909 Act. First, the 1976 Act contains an explicit preemption provision, in § 301(a), evincing a clear congressional intent to preempt laws like this one. The 1909 Act did not have an explicit provision; *Samuelston* had to rely on implied general supremacy doctrine jurisprudence.

Second, the 1976 Act changed the standard for preemption: instead of some vague notion of Congress "occupying" the area in question, it set forth two explicit criteria in § 301(a). State law is preempted if it applies to works "within the subject matter of copyright," as is the case here, and if it deals with rights that are the equivalent of "exclusive rights within the general scope of copyright," as is also the case here.

SEN. LEDERMAN: Well, I cannot agree with that reading of the law—precedent is precedent. Mr. Chairman, I have no further questions.

February 2012 MPT

▶ *LIBRARY*

MPT-1: *Franklin Resale Royalties Legislation*

FRANKLIN ASSEMBLY BILL 38

To provide royalties to artists and their heirs on resales of visual art.

SECTION 1. Title 9 of the Franklin Civil Code is amended by adding the following § 986:

986. Resale Royalties

(a) For purposes of this section, the following terms have the following meanings:

(1) "Artist" means the person who creates a work of visual art and who, at the time of resale, is a citizen of the United States or a resident of Franklin.

(2) "Visual art" is an original painting, sculpture, or drawing existing in a single copy.

(3) "Art dealer" means a person who is principally engaged in the business of selling works of visual art for which business such person validly holds a sales tax permit.

(b) Whenever a work of visual art is sold and the seller resides in Franklin or the sale takes place in Franklin, the seller shall pay to the artist of such work of visual art or to such artist's agent five percent of the profit from such sale. The right of the artist to receive an amount equal to five percent of the profit from such sale may be waived only by a written contract providing for an amount in excess of five percent from the profit of such sale. An artist may assign the right to collect the royalty payment provided by this section.

[Provisions dealing with artists who cannot be located are omitted.]

(4) If a seller fails to pay an artist the resale royalties set forth in this subsection, the artist may bring an action for damages.

(5) Upon the death of an artist, the rights and duties created under this section shall inure to his or her heirs until 70 years after the artist's death. The provisions of this paragraph shall be applicable only with respect to an artist who dies after the date of enactment of this Act.

(c) Subsection 986(b) shall not apply to any of the following:

(1) To the initial sale of a work of visual art where legal title to such work at the time of such initial sale is vested in the artist who created it.

(2) To the resale of a work of visual art for which the profit is less than $1,000.

(3) To the resale of a work of visual art by an art dealer within 10 years of the initial sale of the work by the artist to an art dealer, provided all intervening resales are between art dealers.

[Other provisions omitted.]

SELECTED PROVISIONS, 1976 COPYRIGHT ACT (TITLE 17 U.S.C.)

§ 102 (Subject matter of copyright in general)

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression. . . . works of authorship include the following categories: . . .

(5) pictorial, graphic, or sculptural works . . .

* * * *

§ 106(3) (Exclusive rights in copyrighted works)

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: . . .

(3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership . . . .

* * * *

§ 109(a) (Limitations on exclusive rights: Effect of transfer of particular copy)

Notwithstanding the provisions of section 106(3), the owner of a particular copy . . . lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . . .

* * * *

§ 301(a) (Preemption with respect to other laws)

[A]ll the legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by section[] 102 . . . are governed exclusively by this title. [N]o person is entitled to any such right or equivalent right in any such work under the common law or the statutes of any State.

Samuelston v. Rogers
United States Court of Appeals (15th Cir. 1977)

Arthur Samuelston is an art dealer. On March 24, 1975, he sold two paintings under circumstances that required him to pay royalties to the artist, Clay Rogers, under the Columbia Resale Royalties Act (the "Columbia Act"). When Rogers demanded those royalties, Samuelston challenged the Columbia Act's constitutionality, claiming that it is preempted by the 1909 Copyright Act. The district court rejected Samuelston's argument, and we affirm.

The 1909 Act and Samuelston's Argument: Section 1 of the federal 1909 Act grants to a copyright owner "the exclusive right: (1) To . . . vend the copyrighted work." Section 27 reads: "but nothing in this title shall be deemed to . . . restrict the transfer of any copy of a [lawfully possessed] copyrighted work" after the first transfer of that copy is made (this provision is termed the "first sale doctrine"—the copyright owner's right to control the sale of copies is limited to the first sale of any copy). Samuelston contends that the Columbia Act both impairs the artist's ability to "vend" the work and "restricts the transfer" of a copy of the work. Thus, he argues, the federal 1909 Act preempts the Columbia Act as a matter of federal supremacy.

The Preemption Doctrine: Federal law preempts state law to the extent that federal law has "occupied the field" and state law "conflicts" with federal law. The Supreme Court has spoken on this issue, as regards the 1909 Copyright Act, in *Goldstein v. California*, 412 U.S. 546 (1973). There, the Court upheld a California statute making record piracy a criminal offense; record piracy was not an activity covered at the time by the 1909 Copyright Act. The Court refused to read the Constitution's Copyright Clause, which grants Congress the power to enact copyright legislation, to deprive the states of all power over the subject matter of copyright. Rather, the Court held that Congress had neither exercised its full power as to record piracy (and was not required to do so) nor evinced an intent to bar state legislation in this area. Thus, it had not "fully occupied" the field, nor was there any conflict between the 1909 Act and the state statute. Thus, the California statute "[did] not intrude into an area which Congress has, up to now, preempted" and the state was free to enact legislation which touched on copyright in this instance.

The Columbia Act Is Not Preempted: The same holds true here. The Columbia Act in no way impinges upon the artist's right to "vend" a copy of the work he or she has created under section 1, for the Columbia Act applies only *after* the artist has sold the copy of the work. The Columbia Act provides an *additional* right not granted by the 1909 Act.

Nor does the Columbia Act "restrict the transfer" of a copy of the work under section 27. The copy of the work may be transferred without restriction. The fact that, under the Columbia Act, a resale may create a liability to the artist (in that royalties may be owed) and, at the same time, constitute an exercise of a right under the 1909 Act does not make the former a *legal* restraint on the latter, whatever the *economic* implications of the Columbia Act may be.

We conclude by noting that we do not consider the extent to which the recently enacted (but not yet effective) 1976 Copyright Act may preempt the Columbia Act. (The 1976 Act was signed into law on October 19, 1976, but will not become generally effective until January 1, 1978.) Our holding and reasons address the 1909 Copyright Act only.

Affirmed.

Franklin Press Service v. E-Updates, Inc.
Franklin Court of Appeal (2011)

Plaintiff Franklin Press Service (FPS) is a news cooperative that furnishes news stories to subscribing newspapers and other news outlets throughout the state of Franklin. It delivers its news reports through various means, including securely encrypted Internet transmissions. It also has a publicly available website through which members of the public may access its news stories at no cost. The defendant, E-Updates, Inc., is an Internet news site which furnishes news stories, including its own commentary, to members of the public who pay a fee for the service.

FPS's complaint alleged that E-Updates appropriated "hot news"—i.e., news that FPS itself had gathered and had just reported—from FPS's public website and, without taking FPS's exact language, placed that news on its own website with neither permission from nor attribution to FPS. FPS sued for that form of unfair competition known as misappropriation under Franklin state common law.

E-Updates moved to dismiss on the ground that Franklin's common law of misappropriation is preempted by the 1976 Copyright Act, 17 U.S.C. § 301(a), which provides: "all the legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . and come within the subject matter of copyright . . . are governed exclusively by this title. [N]o person is entitled to any such right or equivalent right in any such work under the common law or the statutes of any State." The trial court denied the motion to dismiss and granted leave for interlocutory appeal. We affirm.

E-Updates's claim is easily dealt with. By its own statutory language, the Copyright Act's preemption provision in § 301(a) sets forth two criteria which must *both* be met for preemption: First, the work must "come within the subject matter of copyright." Works that come within the subject matter of copyright are set forth in § 102 of the 1976 Copyright Act. Second, the rights involved must be within the "exclusive rights" granted to a copyright owner. The exclusive rights are set forth in § 106, and the limitations are set forth in succeeding sections. It is well settled that state common law or statutes that establish causes of action that are based on works not within the subject matter of copyright, or that include an element that legitimately differs from, or is in addition to, the rights in a copyright, are not "within the subject matter of copyright" or the "exclusive rights within the general scope of copyright," and so are not preempted.

The tort of misappropriation of "hot news" has been accepted as Franklin state common law. It differs from a claim of copyright infringement in several ways.

First, unlike a novel or a musical composition, reproduction of the news itself does not come within the subject matter of copyright. Copyright protects the expression of ideas but not the ideas themselves, 17 U.S.C. § 102(b). It is well settled that the facts of current events which make up the news are "ideas," as opposed to the particular phrasing of a news story, which is "expression."

Second, even if that were not the case, the other requirement for preemption under § 301(a) is not present. That is because proof of common law misappropriation involves rights different from the exclusive rights granted to the copyright owner by the Copyright Act, in that there must be proof of elements that are in addition to or differ from those necessary to prove infringement of copyright—specifically, that the misappropriation is of information which has been gathered at cost, is time-sensitive, constitutes free riding by a competitor, and so reduces the incentive to produce the service. Such is the case here.

We conclude that Franklin's common law cause of action for misappropriation is not preempted, and we affirm the order denying the motion to dismiss.

February 2012 MPT

▶ *FILE*

MPT-2: *In re WPE Property Development, Inc.*

memo **Rawson Hughes & Conrad · 22 Main Street · Springfield, Franklin 33755**

to: Examinee

from: Thomas Perkins, Managing Partner, Tax Group

date: February 28, 2012

re: WPE Property Development, Inc.: Dispute with Trident Management Group

We represent WPE Property Development, Inc., a property developer in Springfield. WPE contracts with Trident Management Group to manage many of WPE's tax-exempt, low-income housing projects. Last year, Trident's mismanagement caused one of the properties to lose its tax-exempt status, resulting in substantial federal tax liability and penalties for WPE.

Since learning about the loss of the exemption, I have had many meetings and exchanges of correspondence with counsel for Trident, continuing until a few weeks ago, in an effort to resolve this matter short of litigation. These efforts have been unsuccessful, however. WPE has a long-standing and profitable relationship with Trident, wants it to continue, and doesn't want to sue Trident. The housing project at issue has been controversial from the start, and WPE would like to avoid any adverse publicity that a lawsuit would surely generate. Trident has assured us that it, too, wants to settle and has repeatedly asked us not to sue.

The one-year statute of limitations on WPE's breach of contract claim against Trident will run in 15 days. I sent Trident an agreement to toll the statute of limitations in January. Trident has not returned it but instead has imposed additional conditions for settlement. We have kept WPE fully informed of our negotiations and Trident's latest settlement conditions. However, WPE still maintains that it wants to avoid filing its complaint if at all possible to avoid the adverse publicity (and the consequences thereof). I attach the relevant correspondence, including my notes summarizing my initial meeting with WPE's CEO, Juan Moreno, last March.

Please draft a letter to Moreno for my signature analyzing the legal consequences to WPE if it decides not to file its complaint against Trident before the statute of limitations runs. You should discuss whether there are any theories under Franklin law that would allow WPE to pursue an action against Trident even after the statute of limitations has run and advise Moreno as to the likelihood of prevailing on those theories. Do not write a statement of facts, but be sure to incorporate all relevant facts into your analysis, state your conclusions, and explain your reasoning.

memo **Rawson Hughes & Conrad · 22 Main Street · Springfield, Franklin 33755**

to: FILE

from: Thomas Perkins

date: March 29, 2011

re: WPE Property Development, Inc.: Dispute with Trident Management Group

I met today with Juan Moreno, the CEO of WPE Property Development. He informed me that WPE had received a notice from the IRS that it had lost its tax exemption for a 200-unit low-income housing project it constructed four years ago at 316 Forest Avenue in Springfield. WPE had contracted with Trident Management Group to manage this as well as several other WPE housing projects. Moreno is convinced that Trident's mismanagement caused loss of the exemption because Trident failed to maintain the required percentage of low-income residents in the property and rejected many low-income applicants. Loss of the tax exemption is significant because WPE will incur substantial retroactive tax liability. It may also be exposed to lawsuits by the rejected housing applicants.

Moreno reminded me that the Forest Avenue project was controversial from the outset. Many qualified applicants were rejected as potential residents, and the Forest Lakes Neighborhood Association did not want the property built, claiming that it would add too much population density and accompanying demands on infrastructure.

The local media has not picked up on the loss of the tax exemption, but if a lawsuit is filed, they will almost certainly cover the story. Once word gets out, the resulting adverse publicity will likely lead to lawsuits from aggrieved housing applicants and hurt WPE's ability to obtain financing for similar projects in the future.

Moreno also told me that WPE does substantial business with Trident. While the loss of the exemption poses a risk of significant costs, including back taxes and penalties, the value of WPE's other business with Trident is far more substantial. Trident is also the only business in the region able to provide the services WPE needs on properties of this scale. This relationship has reinforced Moreno's desire to resolve this problem without a lawsuit, if at all possible.

RAWSON HUGHES & CONRAD, LLC
ATTORNEYS AT LAW
22 MAIN STREET
SPRINGFIELD, FRANKLIN 33755

April 12, 2011

Ms. Meg Hamilton
Evans & Glover
227 Washington Avenue
Springfield, Franklin 33703

Re: WPE Property Development, Inc.
316 Forest Avenue property

Dear Ms. Hamilton:

As you know, our client, WPE Property Development, contracts with your client, Trident Management Group, to manage many of WPE's tax-exempt properties in the Springfield area. On March 14, 2011, WPE received a notice from the Internal Revenue Service revoking its tax exemption for the property that Trident manages at 316 Forest Avenue in Springfield, on the ground that the property was being operated in violation of provisions of the Internal Revenue Code.

Because WPE stands to incur substantial federal taxes and penalties, we have drafted a complaint against Trident for breach of contract, which we intend to file unless the parties can reach a settlement. I have enclosed a copy of the draft complaint for your information. If your client is interested in discussing settlement, please contact me immediately.

Thomas Perkins

Thomas Perkins
Enc.

cc: Juan Moreno, WPE CEO

E-mail from counsel for Trident Management Group

Date: April 15, 2011

To: Thomas Perkins, Counsel for WPE

From: Meg Hamilton, Counsel for Trident

Re: WPE/Trident—Forest Avenue property

Tom:

I read your letter and the attached complaint with interest and concern. We are in the midst of a tax audit on one of our other clients, and the place is a madhouse.

I would ask that you not file your complaint at this time, as we believe the matter should be settled without resort to costly litigation. I'll be in touch soon.

Best regards,

Meg

E-mail from counsel for Trident Management Group

Date: April 26, 2011

To: Thomas Perkins

From: Meg Hamilton

Re: WPE/Trident—Forest Avenue property

Tom:

I enjoyed meeting with you yesterday. Here are the points we discussed:

- Without admitting or conceding fault or any causal relationship between Trident's management of the Forest Avenue project and the exemption revocation, we will contact the IRS to determine what is needed to reinstate the tax exemption, and should reinstatement be reasonably attainable, Trident will do so at no cost to WPE.
- With the same preface, should WPE incur any reasonably ascertainable loss, Trident will make WPE whole.

I will consult with Trident to determine what other issues need to be resolved to obtain a final settlement. Again, we hope to reach an amicable resolution of any and all outstanding issues.

Best regards,

Meg

RAWSON HUGHES & CONRAD, LLC
ATTORNEYS AT LAW
22 MAIN STREET
SPRINGFIELD, FRANKLIN 33755

June 13, 2011

Ms. Meg Hamilton
Evans & Glover
227 Washington Avenue
Springfield, Franklin 33703

Re: WPE/Trident—Forest Avenue property

Dear Meg:

Within one week of your e-mail of April 26th, I sent you a draft settlement agreement. We then met several times—most recently three weeks ago. At that meeting, you told me that you would give me comments on my draft, but you have not done so.

Based on your April 26th e-mail, we understand that Trident has agreed that it will, without cost to WPE, obtain reinstatement of the tax exemption for the Forest Avenue property and will make WPE whole for any losses. Therefore, I expect that we will conclude our settlement agreement no later than the end of this month.

Unless we resolve this by the end of the month, we intend to file our complaint.

Thomas Perkins

Thomas Perkins

cc: Juan Moreno, WPE CEO

E-mail from counsel for Trident Management Group

Date: June 16, 2011

To: Thomas Perkins

From: Meg Hamilton

Re: WPE/Trident—Forest Avenue property

Tom:

I received your letter of June 13, 2011. We are going to get this resolved. As a general matter, our client has agreed in principle to the draft settlement. I will inform you soon of any additional items that require resolution. In my view, our settlement discussions are indeed on track, and there is no need for a lawsuit.

Best regards,

Meg

RAWSON HUGHES & CONRAD, LLC
ATTORNEYS AT LAW
22 MAIN STREET
SPRINGFIELD, FRANKLIN 33755

July 18, 2011

Mr. Juan Moreno
WPE Property Development, Inc.
6002 Circle Drive
Springfield, Franklin 33755

Re: Trident matter

Dear Juan:

Here's where we stand with Trident: We've had many meetings. They keep assuring us that they want to settle the matter and that the general settlement terms are acceptable. However, they still have not signed the agreement we forwarded.

I understand your desire to avoid litigation. However, I have a duty to advise you that if this delay continues, we may run up against the choice of suing Trident or having the statute of limitations run out. We will therefore need specific instructions from you as to how you would like us to handle this matter.

With kindest regards,

Tom

Tom

E-mail from Juan Moreno, WPE Property Development, Inc., to Tom Perkins

Date: July 20, 2011
To: Tom Perkins
From: Juan Moreno
Re: Trident matter

Tom,

Got your letter. I understand. Keep trying to settle. Keep me apprised. Let me know when I need to make a decision. Juan

RAWSON HUGHES & CONRAD, LLC
ATTORNEYS AT LAW
22 MAIN STREET
SPRINGFIELD, FRANKLIN 33755

October 4, 2011

Ms. Meg Hamilton
Evans & Glover
227 Washington Avenue
Springfield, Franklin 33703

Re: WPE/Trident Management Group—Forest Avenue property

Dear Meg:

We have communicated several times regarding this matter. Each time you have said that your client generally agrees with the settlement terms, but we still do not have a signed agreement.

We have accommodated your wishes and have held off on filing a complaint. If this matter is not resolved by October 25, 2011, we intend to file the action.

Thomas Perkins

Thomas Perkins

cc: Juan Moreno, WPE CEO

E-mail from counsel for Trident Management Group

Date: October 6, 2011
To: Thomas Perkins
From: Meg Hamilton
Re: WPE/Trident—Forest Avenue property

Tom:

I'll get back to you on the agreement soon. The settlement is still on track. There is no need to file your complaint.

Meg

RAWSON HUGHES & CONRAD, LLC
ATTORNEYS AT LAW
22 MAIN STREET
SPRINGFIELD, FRANKLIN 33755

January 10, 2012

Ms. Meg Hamilton
Evans & Glover
227 Washington Avenue
Springfield, Franklin 33703

Re: WPE/Trident—Forest Avenue property

Dear Meg:

In accordance with our telephone conversation earlier today, I understand that Trident agrees to toll for six months the statute of limitations with respect to WPE's claims for breach of contract against Trident for the loss of WPE's federal tax exemption and the resulting tax liabilities and penalties. To confirm our agreement, please sign and return this letter immediately.

As we discussed, I expect to receive a draft of a complete agreement settling all outstanding claims between WPE and Trident within two weeks.

Thomas Perkins

Thomas Perkins

cc: Juan Moreno, WPE CEO

Agreed: _____ Dated: _____

Meg Hamilton
Counsel for Trident Management Group

E-mail from counsel for Trident Management Group

Date: January 25, 2012

To: Thomas Perkins

From: Meg Hamilton

Re: WPE/Trident—Forest Avenue property

Tom:

Trident agrees that it will attempt to regain tax-exempt status for the Forest Avenue property and will, regardless of the outcome of those efforts, reimburse WPE for any losses it has incurred as a result of the exemption loss—again, without acknowledging any fault on Trident's part.

However, because Trident is composed of two general partners, we will need the settlement agreement to include an allocation of WPE's losses between them based on a percentage currently being negotiated by the partners. I will provide that percentage to you as soon as it is available.

Best regards,

Meg

February 2012 MPT

▶ *LIBRARY*

MPT-2: *In re WPE Property Development, Inc.*

Henley v. Yunker

Franklin Court of Appeal (2005)

Ronald Henley appeals from the trial court's award of summary judgment dismissing his action against Arlene Yunker, who is insured by Evergreen Insurance Company. The issue is whether Yunker should be equitably estopped from asserting a statute-of-limitations defense to Henley's personal injury action because of representations made during the course of settlement negotiations. We affirm.

There is no dispute over the following facts. On January 25, 2003, Yunker lost control of her vehicle on Highway 12 near Springfield and collided with a highway abutment, causing serious injuries to Henley, a passenger in her car. The damages are well within the policy limits.

Under Franklin law, the statute of limitations for a personal injury action is one year. Such statutes are designed to assure fairness to defendants and are based on the policy that even if one has a valid claim, it is unjust not to put the adversary on notice to defend within the period of limitation.[1] Henley decided to pursue settlement with Evergreen without retaining an attorney. He had several discussions with Evergreen claims representatives. In one particular discussion, Henley recalled expressing some concern about the time for making a claim running out. The Evergreen agent told him not to be concerned because he had "plenty of time to make a claim." Henley, however, cannot identify the date of this conversation, other than that it occurred within one year of the accident. On January 22, 2004, just prior to the running of the one-year statute of limitations, Evergreen sent Henley a medical authorization to sign so that it could obtain his medical records.

After Henley filed his action on January 31, 2004, counsel retained by Evergreen to represent Yunker moved for summary judgment based on the running of the statute of limitations. On appeal, Henley argues that Yunker should be equitably estopped from raising the statute as a bar to the action.

We have noted that the purpose of the doctrine of equitable estoppel is not to support some strict rule of law but to show what equity and good conscience require under the particular circumstances of the case, irrespective of what might otherwise be the legal rights of the parties.

It is well established in Franklin that to support an equitable estoppel claim, the plaintiff must prove three elements:

> (1) the defendant has done or said something that was intended or calculated to induce the plaintiff to believe in the existence of certain facts and to act upon that belief; (2) the plaintiff, influenced thereby, has actually done some act to his or her injury which he or she otherwise would not have done; and (3) the plaintiff has exercised due diligence, inasmuch as equitable estoppel is not available to a person who conducts himself or herself with a careless indifference or ignores highly suspicious circumstances which should warn of danger or loss.

The plaintiff must prove all three elements by clear and convincing evidence. *Ford v. Wausau Insurance Co.* (Fr. Sup. Ct. 1979).

With respect to Evergreen's representation that Henley had "plenty of time" to make the claim, without more context we are unable to conclude that such a statement rises to the level of misleading conduct. The words themselves are subjective and do not indicate a specific period of time. Here, Henley could not recall

[1] A party faced with an imminent statute-of-limitations problem can often obtain an agreement to toll the statute. The benefit to the plaintiff is obvious—the right to sue is preserved when it would otherwise be lost. The benefit to the defendant is less obvious but can be significant if the offer to toll occurs in the context of settlement negotiations. Franklin courts have uniformly upheld the validity of such agreements.

when the statement was made, other than that it was some time before the statute had run. It may be that, had the statement been made only a day or two prior to the running of the statute, it would arguably be misleading, but, on this record, those facts are not before us.

Nor does the fact that Evergreen requested a medical authorization only days before the statute ran suggest misleading or inequitable conduct. Such requests are routinely made in cases such as this—both before and after the claimant files an action. And, as noted, in order to invoke equitable estoppel, the plaintiff must exercise due diligence such that his reliance on the defendant's conduct is reasonable. Henley's reliance on Evergreen's request for a medical authorization as anything other than a routine request for information would be unreasonable.

Affirmed.

Merchants' Mutual Insurance Co. v. Budd

Franklin Court of Appeal (2010)

We consider on this appeal whether the defendant, Arthur Budd, *d/b/a* Budd's Roofing, and his insurer, Omega Insurance, should be equitably estopped from raising the statute of limitations as a defense to a subrogation action by Merchants' Mutual Insurance Company (MMI).[1] The trial court granted the defendant's motion for summary judgment. We reverse.

In 2003, Budd's Roofing constructed a roof for Do-It Hardware in Jefferson City. On December 26, 2005, during a heavy snowstorm, the roof collapsed, damaging the property and injuring several customers. MMI was Do-It's property insurer and paid its policy limits to Do-It. On March 3, 2006, MMI notified Omega that it was making a claim for subrogation.

Omega responded that it would consider the claim after processing several personal injury claims associated with the roof collapse. Similar responses were made by Omega to MMI's inquiries on April 16, October 15, and November 7, 2006, and again on January 10 and February 25, 2007.

On May 18, 2007, Omega wrote to MMI stating: "We are still not in a position to honor your subrogation claim, as the personal injury portion of the file is still open. When we are able to close the PI portion, we will then be in a position to honor your subrogation claim."

Omega repeated this statement in subsequent correspondence on July 7 and September 29, 2007. Then, on January 13, 2008, Omega informed MMI: "We might have all the PI claims closed in six months and will then be in a position to honor your subrogation claim." MMI contacted Omega in July 2008, and Omega responded, "We should be able to honor your claim in this matter in November."

On February 8, 2009, Omega notified MMI that the three-year statute of limitations had run in December and rejected MMI's claim. MMI sued to recover the amount paid to its insured, and counsel retained by Omega to defend Budd raised the statute of limitations as a defense. As indicated, the trial court granted summary judgment to Budd.

Courts have long recognized that the doctrine of equitable estoppel may bar a defendant from resorting to the statute of limitations. One cannot justly or equitably lull his adversary into a false sense of security, and thereby cause him or her to subject a claim to the bar of the statute, and then be permitted to plead the very delay caused by such conduct as a defense to the action when brought.

We have held that the doctrine of equitable estoppel allows a plaintiff to avoid the bar of the statute of limitations if the defendant takes active steps to prevent a plaintiff from suing in time, for example, by promising not to plead the statute of limitations. *See Teamsters v. Gunther* (Fr. Sup. Ct. 1980). Furthermore, a defendant's conduct need not be fraudulent to invoke the doctrine; unintentionally deceptive actions that lull or induce the plaintiff to delay filing his or her claim may trigger its application. *Dees v. Miller & Sons Implement, Inc*. (Fr. Ct. App. 1999). This application of estoppel is grounded in the belief that the statutory provisions for preventing stale claims should not be used as offensive or tactical weapons.

[1] Subrogation in the insurance context is defined as "[t]he principle under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy." BLACK'S LAW DICTIONARY at 674 (2001).

In this case, Omega, on several occasions, assured MMI that it would "honor" its claim, thus effectively conceding that it (Omega) was liable for the full amount of the claim. Having convinced MMI that its claim would be honored or paid, Omega had no difficulty in securing multiple extensions of time until the statute of limitations had run. In reliance on Omega's assurances, MMI did not sue. Now Omega seeks to take advantage of its dilatory tactics to defeat MMI's just claim. To permit Omega to do so would be contrary to equity, morality, justice, and good conscience.

The trial court's judgment is reversed and the cause remanded with directions to enter judgment for MMI for the conceded amount of the subrogation claim.

Reversed and remanded.

DeSonto v. Pendant Corp.

Franklin Court of Appeal (2005)

In this appeal, we consider whether promissory estoppel may excuse a plaintiff's failure to file a complaint before the running of the statute of limitations. Ralph DeSonto was an officer of Pendant Corporation for several years. In 1998, a class action was filed against Pendant alleging securities laws violations related to the company's 401(k) retirement plan. DeSonto claims to have lost $1 million as a result of these securities laws violations and thus wanted to participate in the class action to recover his losses.

In April 2000, Pendant's general counsel issued an interoffice memo stating that Pendant's officers and directors, such as DeSonto, were excluded from participating in the class. The memo indicated, however, that Pendant's board of directors would settle the claims of excluded employees but that this was a separate settlement and was "totally voluntary on the part of Pendant and that [it] reserved the right, in its sole discretion, to alter the terms of such separate settlement or rescind its determination to provide the settlement."

In May 2000, DeSonto resigned from Pendant for unrelated reasons. In negotiating DeSonto's separation package, a Pendant vice president told DeSonto that his leaving the company would "have no bearing on his eligibility for the settlement program." Two months after finalizing his separation package, DeSonto received a memo informing excluded directors and officers that the voluntary settlement program would be available only to those "who continue to be employees of Pendant at the time the settlement funds are distributed." DeSonto applied for his share of the settlement but was denied. He then filed this action seeking damages from Pendant. By that time, however, the statute of limitations had run. Pendant moved for summary judgment on that basis, which the trial court granted.

DeSonto argues that the promissory estoppel doctrine excuses his untimely suit. He claims that the April 2000 memo and the vice president's "unqualified promise" that DeSonto would still be eligible for the voluntary settlement program after leaving Pendant provide the basis for his argument. DeSonto also asserts that the "boilerplate" language in the settlement program (that its availability was subject to Pendant's sole discretion) did not make the "promise" of settlement indefinite.

Promissory estoppel centers on a "promise" made by a defendant under circumstances where considerations of fairness and equity will relieve the promisee from any adverse effects of his or her reliance on the promise.[1]

For the rule to apply, a plaintiff must prove by clear and convincing evidence that (1) there is a promise which the promissor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, (2) the promise must actually induce such action or forbearance, (3) the action or forbearance must be reasonable, and (4) injustice can be avoided only by enforcement of the promise. Promissory estoppel differs from equitable estoppel in that the representation at issue is promissory rather than a representation of fact. *Chester's Drive-In v. Schwaller Meat Co.* (Fr. Ct. App. 1991).

Pendant's "promise" (the April 2000 memo and the vice president's May 2000 statement) was conditional and subject to modification or withdrawal. It was, therefore, not the type of clear and definite promise required. We are also satisfied that DeSonto's reliance on the "promise" was unreasonable. Reliance on an expression of future intention cannot be reasonable within the rule because such expressions do not constitute a sufficiently definite promise. A true statement about a party's present intention regarding future acts is not a foundation upon which estoppel may be built. The intention may change. Here, the settlement program was qualified in the April 2000 memo by its warning that the program could be modified or withdrawn in Pendant's discretion.

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[1] As plaintiff DeSonto has not raised the doctrine of equitable estoppel here, we need not address it.

Similarly, when an alleged "promise" is subject to conditions, some of which may be under the control of third parties, it is conditional and "does not constitute a reasonable basis for reliance, and promissory estoppel will not lie." *Gruen Co. v. Miller* (Fr. Sup. Ct. 1992). Finally, where it is clear that the parties contemplate a formal written contract, it is unreasonable for a party to act in reliance on an oral "promise" until the writing has been executed. *Id.*

DeSonto relied on statements that were no more than expressions of future intention regarding *possible* settlement with the excluded employees, and his reliance on such statements was unreasonable. Therefore, the trial court properly granted summary judgment in favor of Pendant.

Affirmed

February 2012 MPT

▶ *POINT SHEET*

MPT-1: *Franklin Resale Royalties Legislation*

Franklin Resale Royalties Legislation
DRAFTERS' POINT SHEET

In this performance test item, examinees' law firm represents the Franklin Artists Coalition, which is supporting enactment of legislation introduced in the Franklin Assembly which would require royalties to be paid to artists or their heirs for resales of their works of visual art. Similar legislation was enacted over 30 years ago in the neighboring state of Columbia, but other similar legislation was defeated in the neighboring state of Olympia when proposed a few years ago.

The Franklin Artists Coalition's executive director has asked examinees' law firm to assist in the legislative effort by drafting a "leave-behind"—a document to be given to legislators and their staffers after in-person visits by the client's representatives asking them to vote for the legislation. The "leave-behind" should persuasively make the arguments in favor of enactment, answer the arguments against enactment, and also respond to the single purely legal issue raised by opponents of the legislation: that the state legislation would be preempted by federal law. The overriding purpose of the document is to persuade legislators to vote for the bill.

The File contains the instructional memorandum, a letter from the client to the law firm, a template for the "leave-behind," and testimony by three witnesses before the Olympia State Senate arguing for or against similar legislation, as the case may be. The Library contains the text of the proposed legislation, excerpts from the federal Copyright Act, and two cases bearing on the legal issue of preemption.

The following discussion covers all the points the drafters intended to raise in the problem. Examinees need not cover them all to receive passing or even excellent grades.

I. FORMAT AND OVERVIEW

The assignment is to prepare a document—a "leave-behind"—persuasively arguing in favor of enactment of the proposed legislation, Franklin Assembly Bill 38 (F.A. 38). The "leave-behind" must not only present arguments in favor of passage but also deal with arguments against, as well as the purely legal issue of federal preemption which is presented. As to the former points, examinees' draft of the "leave-behind" should ideally present the arguments in bulleted points of a few sentences each. As to the latter issue, examinees' draft of the "leave-behind" should be similarly and persuasively to the point, rather than a long legal exegesis. Examinees are instructed that their analysis of the legal issue should be thorough and detailed, but with the knowledge that many of the intended recipients are not attorneys.

As examinees are presented with a template for the "leave-behind," they are presented with two discrete tasks: (1) they must discern the arguments for and against enactment (which appear in various documents in the File and Library), synthesize their analysis of those arguments, place them within the template, and do so in a persuasive fashion to convince legislators to vote in favor; and (2) they must deal with the legal issue presented, also within the template. Note that

there is no need for examinees to copy the introductory or concluding text of the template. They are instructed to draft only the material indicated in brackets on the template.

The first aspect of the first task—presenting the arguments for the legislation—is relatively simple, as virtually all those arguments are found in the testimony of the witness in favor of Olympia's legislation. Examinees' task thus is to synthesize those arguments into a persuasive point-by-point presentation.

The second part of the first task—responding to the arguments against the legislation—is more difficult. Although a few points are directly rebutted in the proponent's testimony, many can only be discerned by an examination of the proposed statute's provisions. Further, the task will require examinees to deal with some difficult facts that do not fully support enactment of the legislation. Again, the responses must be synthesized into a persuasive point-by-point presentation.

The second task requires a legal analysis, which takes the reasoning of prior precedents and applies it to the new statutory language at issue to reach the same result.

It is expected that examinees will cogently argue that the equities for enactment of the legislation are strong and that none of the arguments against the legislation are persuasive. Further, it is expected that, on the legal issue, examinees will conclude and persuasively argue that the logic of the prior precedents, combined with the language of the current Copyright Act, compels the same result—that is, that state resale royalty legislation is not preempted by the federal Copyright Act.

II. DISCUSSION

As examinees are given a template in which to present their work product, they should be able to organize their arguments easily at the gross level; organizing their arguments within each section of the template will be more challenging. They should make the following points within each of the template's headings, and it is an important part of their task that examinees make the points persuasively. It is not expected that examinees will use the specific language given under each heading below; however, all the points that they might cover are listed.

A. **Introduction**

Examinees should briefly describe the proposed legislation. For example: When there are resales of works of visual art in Franklin, our state's artists and their heirs do not receive any share of the seller's profits, even when those profits are enormous. To remedy this unfair situation, F.A. 38 would enable our visual artists and their families to receive royalties of five percent of the seller's profit when their artworks are resold.

B. **Why Legislation Is Necessary and Appropriate**

The testimony of Carol Whitford identifies several justifications for enacting resale royalties. Examinees should emphasize that artists currently receive nothing when their artwork is resold and generates huge profits for art galleries and collectors.

1. Arguments in Favor of Enactment

- Visual artists are almost invariably compensated only when they first sell their artworks. Unlike other creators, such as writers and composers—who receive continuing royalties for continued commercial use of their works, as by distribution of copies of books or public performance of music—visual artists usually receive no "back end" remuneration. Visual artists rarely receive anything from their copyrights, such as by sale of reproductions in posters, art books, or T-shirts. Resale royalties would remedy this inequity.
- Visual artists bear costs—for materials and tools—which other creators do not have. Resale royalties would help defray those expenses.
- Visual artists' lives are economically difficult. A recent study in our neighboring state of Olympia found that the overwhelming majority of visual artists—97 percent—earn less than $35,000 annually from their artworks. And the overwhelming majority of that income—93 percent—comes from the initial sales of their artworks.
- Similarly, visual artists' heirs earn on average less than $2,000 a year from the artists' works, and that usually is derived from sales of inventoried artworks.
- It is unfair for dealers and collectors to reap huge profits from the sale of artists' works without allowing the artists—who created the property—to benefit, however modestly. The case of the late Lawrence Huggins proves the point. Huggins originally sold one of his sculptures for $45, but it was resold after his death for $780,000, thus enriching the collector and the auction house while Huggins's widow must live near the poverty level.
- (*Perceptive examinees may also make this argument*:) Franklin's art community deserves to be supported, so that our state's culture may be enriched. The economic struggles of our state's artists work to the detriment of our state's culture. Resale royalties will help support our artists.

2. Response to Arguments Against Enactment

The testimony of Jerome Krieger, an art gallery owner in Olympia, sets forth several arguments against enacting resale royalties. Examinees should recognize that some objections to the Olympia statute, such as imposing royalties on resales even when the sale is made at a loss, and on sales between dealers made as part of developing a new artist, have been addressed in the

proposed Franklin legislation. Examinees will also have to finesse the fact that resale royalties may, as they did in Columbia, have an initial negative effect on the art market.

- Resale royalties' opponents claim that resale royalties hurt the art market, and they point to Columbia's experience after enacting such legislation. But Columbia's experience shows that resale royalties do not *in the long run* adversely affect the art market. After an initial drop in art sales, the Columbia art market is about back to where it was before resale royalties were enacted.
- Resale royalties' opponents claim that resale royalties will only benefit artists who are already doing well. That claim is specious. In our American economic system, every artist—rich or poor—and his or her heirs are entitled to benefit from the true market value of his or her work. The struggling artist as well as the well-off artist will benefit, and that, as a matter of equity, is as it should be.
- Resale royalties' opponents argued before the Olympia legislature that the Olympia bill would impose a royalty on sales at a loss. The proposed Franklin legislation provides, in § 986(b), that resale royalties are to be paid only for those sales that result in a profit, and then only on the amount of the profit itself. If the sale is at a loss, the artist gets nothing. Thus, the artwork's seller bears no risk of compounding any loss in such sales.
- Similarly, the Olympia bill's opponents said that, without a lower limit, administrative costs would exceed the trifling royalties to be paid for sales at small amounts. But the proposed Franklin legislation provides, in § 986(c)(2), that only significant sales—where the profits are $1,000 or more—will generate resale royalties. Thus, the administrative costs of paying minimal royalties will not hinder a seller.
- The Olympia bill's opponents were concerned that resales by dealers who acquired the artworks from the artists, and inter-dealer sales, would engender royalties. But the Franklin legislation safeguards the economic viability of dealers in that when the artist sells the work to a dealer, the dealer's subsequent sale to a purchaser will not engender a royalty if it occurs within 10 years. And that exemption will not be lost even if, before that sale to a purchaser, there are intervening sales among art dealers, § 986(c)(3).
- Resale royalties' opponents claim that the legislation is unfair because the art buyer bears the risk that the artwork will depreciate, rather than appreciate, in value. But when artists sell their works, they have no way of determining what the works' true commercial value will be in the future. And, given their economic circumstances, they are in a situation of unequal bargaining power with purchasers. Resale royalties level the playing field.
- Resale royalties' opponents claim, on the one hand, that such legislation "reeks of paternalism" by interfering in freedom of contract—yet they also make the

paternalistic claim that, because art galleries need profits from resales to support artists just starting out, such legislation would hurt the very artists it is designed to help. But requiring payment of a royalty on certain sales does not interfere with or compromise the artwork owner's freedom to contract; he or she remains free to sell the artwork. Moreover, any claim that such a royalty would threaten the ability of galleries to support young and emerging artists is undercut by the modest amount of the royalty. If the profits generated by the resale of the Huggins sculpture—over three-quarters of a million dollars—are any example, the proposed five percent royalty is modest by any measure.

(*Perceptive examinees may also make these arguments*:)

- Although opponents of resale royalties claim that they hurt the art market and that the market will move to another state to avoid payment, it is likely that as more states adopt resale royalties (especially neighboring states like Columbia), there will be fewer alternative venues to which the market can move. It is therefore likely that Franklin's adoption of resale royalty legislation will affect the Franklin art market less than it did in Columbia.
- Calling resale royalties a "tax" is a misnomer and misleading. Taxes are paid to the government. Resale royalties are payments for the property value of the works being sold, made to the creators of those works.

C. **Why Any Legal Objection Is Not Valid: The Resale Royalties Act Is Not Preempted by Federal Law.**

Finally, examinees must turn to the legal issue of whether resale royalties are preempted by the federal Copyright Act of 1976. The testimony of Daniel Boyer outlines the legal objection to resale royalties—that imposing such royalties on works of visual art via state legislation runs afoul of the federal Copyright Act. In drafting this portion of the leave-behind, examinees should write persuasively, yet in terms that nonlawyers will understand, as many legislators are not attorneys. One possible approach to this task is as follows:

Opponents of the legislation argue that it is unconstitutional as a matter of federal supremacy—that state resale royalty statutes are preempted by the federal Copyright Act. They argue that precedent upholding state resale royalty legislation under the prior Copyright Act is no longer valid. They are wrong. The reasons why no preemption was found under the prior 1909 Copyright Act, applied to the text of the current 1976 Copyright Act, compel the same result: state resale royalty statutes are not preempted.

The current Copyright Act preempts state statutes only if they <u>both</u> 1) come within the subject matter of copyright <u>and</u> 2) grant rights equivalent to those under copyright. 17 U.S.C. § 301(a); *Franklin Press Service v. E-Updates, Inc*. (Fr. Ct. App. 2011). That standard is not met here.

Certainly, works of pictorial, graphic, and sculptural art do fall within the subject matter of copyright. 17 U.S.C. § 102(a)(5). Thus, the first requirement for preemption is met.

But the second requirement is not. The law provides that the rights involved are not equivalent to those protected by the Copyright Act when some element of proof is necessary beyond or different from those elements necessary to prove copyright infringement. *Franklin Press Service*. Here, the Copyright Act protects the copyright owner's right to distribute copies of artworks, 17 U.S.C. § 106(3). That right is limited to the first sale of any particular copy, 17 U.S.C. § 109(a). The proposed statute explicitly exempts such first sales from its provisions, § 986(c)(1). Hence, the proposed statute does not affect the right to make the first distribution or sale, which is the copyright owner's. Rather, the proposed statute only affects resales, which are not among the exclusive rights granted to the copyright owner by the Copyright Act, given the first sale doctrine, 17 U.S.C. § 109(a).

Further, the entitlement of the possessor of the copy to make a resale without the authorization of the copyright owner, assured by the first sale doctrine, is not affected either—the owner of the copy is perfectly free to dispose of it without that authorization. Under the proposed statute, he or she must simply pay a portion of the profits to the artist. That economic right is in no way equivalent to the legal right the owner of the copy has to dispose of the copy under the first sale doctrine of 17 U.S.C. § 109(a). *Samuelston v. Rogers* (15th Cir. 1977). In sum, the elements of proof that would be needed for an action under the resale royalties legislation—that a resale occurred without paying the necessary royalty to the artist—are different from the elements of proof that would be needed for an action for copyright infringement—that an unauthorized initial sale was made by someone other than the copyright owner. Thus, the proposed statute would not be preempted.

February 2012 MPT

▶*POINT SHEET*

MPT-2: *In re WPE Property Development, Inc.*

In re WPE Property Development, Inc.
DRAFTERS' POINT SHEET

Examinees' law firm represents WPE Property Development, Inc. One of its properties is alleged to have been mismanaged by Trident Management Group, resulting in tax liabilities and penalties against WPE for which WPE could bring a breach of contract claim against Trident. WPE's CEO wants Trident to compensate WPE for its losses but does not want to sue Trident. With the statute of limitations looming, examinees are instructed to draft a letter for the senior partner's signature to send to the CEO explaining (1) the legal consequences of failing to sue before the statute of limitations runs; (2) under what theories, if any, WPE could recover even after the statute has run; and (3) the likelihood of prevailing on those theories.

I. BACKGROUND

WPE specializes in developing low-income housing projects in Franklin that are exempt from federal income tax. WPE contracts with Trident Management Group to manage many of its tax-exempt properties in compliance with Internal Revenue Code provisions to ensure tax-exempt status. WPE and Trident have a long-term business relationship that is valuable to both.

In 2011, WPE learned that one of its properties (316 Forest Avenue) had lost its tax-exempt status because Trident failed to maintain the required percentage of low-income residents. As a result, WPE now has liability for substantial taxes and penalties. WPE thus has a potential breach of contract claim against Trident for mismanagement of that property. WPE's CEO, Juan Moreno, appears loath to sue Trident because of their long-term profitable relationship and also because he is worried about the negative publicity such a lawsuit would generate. The Forest Avenue project was controversial from the start; many low-income housing applicants were turned away. Moreno is worried that if WPE files suit, the press will pick up on the story and WPE will face suits from aggrieved housing applicants. Moreno has thus instructed the senior partner to avoid filing suit at almost all cost.

For almost one year, the senior partner and counsel for Trident have been trying to settle the dispute. Trident's counsel has repeatedly reassured WPE that Trident wants to settle and that it agrees, "in principle," to make WPE whole for its losses and to regain the exemption, but to date, there has been no written settlement agreement. Faced with a statute of limitations that will run in only 15 days, the senior partner must plainly advise Moreno of the consequences for continuing to hold off filing a complaint—possibly losing the right to sue. Examinees are asked to draft a letter to Moreno for the partner's signature analyzing the potential legal consequences to WPE if it decides not to file its complaint against Trident, whether there might be any theories under which WPE could recover against Trident after the limitations period has run, and the likelihood of succeeding under those theories.

The File consists of the task memo from the senior partner (Perkins), a memo to the file from Perkins summarizing his interview with Moreno, and correspondence between the parties discussing settlement of the breach of contract claim. The Library contains three cases.

The following discussion covers all the points the drafters intended to raise in the problem. Examinees need not cover them all to receive good grades.

II. OVERVIEW

This item raises issues of equitable and promissory estoppel—rules which, in simplest terms, hold parties to representations made or positions assumed where inequitable consequences would otherwise result to the party who has relied on those representations in good faith. The question here is whether the representations made by Trident's attorney during the parties' negotiations can estop Trident from raising a statute-of-limitations defense to WPE's action.

Examinees should ultimately conclude that while it is *possible* that a court would estop Trident from asserting the statute-of-limitations defense under the equitable estoppel theory, it would indeed be risky to rely on that theory. Examinees should also conclude that it is probably even less likely that a court would find that Trident would be barred under a theory of promissory estoppel. Examinees should recognize the fairly subtle differences between the two equitable doctrines and analyze the application of each doctrine to the facts of this case.

Trident and WPE have engaged in extensive negotiations in an effort to settle this matter.

- Beginning at least in April 2011, shortly after WPE was notified that its tax exemption was revoked, the parties have exchanged emails and letters, met in person, and spoken on the phone in efforts to resolve the matter.
- During their many discussions, Trident's counsel (Hamilton) has represented to Perkins that the matter will be settled and has requested that WPE not file the action. Negotiations—peppered with representations such as those just mentioned—have continued over 10 months.
- In their correspondence, Trident's counsel, in addition to requesting that the action not be filed, has stated that Trident has "agreed in principle" to obtain reinstatement of the exemption, "should reinstatement be reasonably attainable," and to make WPE whole for "any reasonably ascertainable loss."
- The final communication from Hamilton on January 25, 2012, states that Trident will try to regain the property's tax-exempt status and make WPE whole for any losses, but because Trident is composed of two general partners, the settlement agreement must include an allocation of losses between them, currently in negotiation.

- Throughout the negotiations, Trident has maintained that any settlement will not include an admission of fault on its part. (*See* 4/26/2011 email.)

III. ANALYSIS

A. The Law of Equitable and Promissory Estoppel

Three Franklin Court of Appeal cases are included. In *Henley v. Yunker* (Fr. Ct. App. 2005), Henley was a passenger in Yunker's car when it hit a highway abutment, injuring Henley. Henley tried to settle his injury claim with Yunker's insurer, Evergreen. Henley claimed to have had several discussions with an Evergreen agent, in one of which the agent told him not to be concerned about the time for making a claim running out because he had "plenty of time to make a claim." In addition, just three days before the statute of limitations was to run, Evergreen sent Henley a medical authorization to review his medical records. Henley filed his personal injury action six days *after* the statute had run, and Yunker's counsel moved for summary judgment. The court granted the motion and dismissed Henley's complaint. On appeal, Henley argued that Yunker should be equitably estopped from raising the statute as a bar.

The trial court held that Henley failed to establish the following elements of equitable estoppel by *clear and convincing evidence*:

> (1) the defendant has done or said something that was intended to induce the plaintiff to believe in the existence of certain facts and to act upon that belief,
>
> (2) the plaintiff has actually done some act to his or her injury which he or she otherwise would not have done, and
>
> (3) the plaintiff has exercised due diligence (i.e., he or she has not acted with careless indifference or ignored highly suspicious circumstances warning of danger or loss).

The court held that the agent's representation that Henley had "plenty of time" to make a claim did not rise to the level of misleading conduct. The words were subjective and did not give a specific time period. The court also held that Evergreen's request for a medical authorization only days before the statute was to run did not suggest any misleading intent or inequitable conduct, as it was merely a routine request for information and was commonplace in personal injury cases.

In contrast, *Merchants' Mutual Insurance Co. v. Budd* (Fr. Ct. App. 2010) held that the defendant and his insurer *were* estopped from raising the statute-of-limitations bar. In *MMI*, the roofer, Budd, constructed a store's roof, which collapsed, injuring customers and damaging the store. MMI, the store's insurer, notified Omega, Budd's insurer, that it was filing a subrogation claim against Omega. Omega told MMI repeatedly, for two and a half years, that after the personal injury claims stemming from the roof collapse were resolved, it would "honor" MMI's subrogation claim. Six months later, Omega notified MMI that the three-year statute of limitations had run and rejected MMI's claim.

The court held that Omega could not assert the statute of limitations as a bar to MMI's subrogation claim because it had repeatedly assured MMI that it would "honor" its claim, thus effectively conceding that it was liable for the full amount of the claim. Having convinced MMI that it would pay, Omega secured many time extensions until the statute had run. Reasonably relying on Omega's assurances and apparent concession of liability, MMI did not sue. The court concluded that to allow Omega to take advantage of its dilatory tactics to defeat an apparently undisputed claim "would be contrary to equity, morality, justice, and good conscience."

The separate but related doctrine of promissory estoppel—a rule focusing on enforcement of a party's promises—is addressed in *DeSonto v. Pendant Corp*. (Fr. Ct. App. 2005). To apply this doctrine, a plaintiff must prove that (1) there is a promise which the promissor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, (2) the promise must actually induce such action or forbearance, (3) the action or forbearance must be reasonable, and (4) injustice can be avoided only by enforcement of the promise.

DeSonto, a Pendant executive, wanted to participate in a Pendant employees' class action lawsuit for 401(k) violations. DeSonto learned, in a memo from Pendant general counsel, that Pendant officers and directors (of which he was one) were excluded from the class action; rather, their claims would be settled by the board of directors, who reserved the right to alter the terms of any such settlement. DeSonto later resigned from Pendant for unrelated reasons. A Pendant vice president told him that his resignation would have no bearing on his eligibility for the settlement program. Later, DeSonto received another memo stating that settlement would be available only to current employees. He sued Pendant seeking damages for the 401(k) losses, but the statute of limitations had run by that time.

DeSonto argued that the first memo had promised that he could participate in the settlement, and also that a Pendant V.P. had told him that he could participate even after he resigned. The court held that Pendant's "promise" was conditional and subject to modification or withdrawal and thus was not the type of "clear and definite promise" required to invoke the doctrine. Further, it held that DeSonto's reliance on the "promise" was unreasonable—it was apparent that a formal *written* contract was contemplated by the parties, and it was unreasonable for DeSonto to rely on oral representations prior to the execution of the contemplated document.

B. Application of the Doctrine of Equitable Estoppel

In *Henley*, the court held that the plaintiff had failed to show that his reliance on the defendant's representations was reasonable. The *Henley* court also examined whether the defendant had engaged in "misleading conduct." Examinees should thus consider whether *Henley* may be distinguished on the basis that the defendant's insurer's statements—that the plaintiff had "plenty of time to make a claim"—and its actions—requesting a medical authorization just

before the statute was to run—were less likely to induce some action or inaction by the plaintiff than Trident's repeated and specific requests that WPE refrain from filing suit because settlement was imminent, requests which come much closer to the idea of "lulling" WPE into allowing the statute to run.

The *MMI* court, on the other hand, found that the defendant Omega Insurance's repeated and unequivocal statements over the course of over two years that it would soon be "in a position to honor [MMI's] subrogation claim" were enough to bar the statute-of-limitations defense, finding that MMI reasonably relied on Omega's assurances. Omega had effectively conceded that it was liable for the full amount of MMI's subrogation claim by its assertions. In contrast, Henley's would-be claim against Evergreen did not appear reasonably certain, nor had Evergreen ever conceded liability for Henley's claim.

Note the seeming "conflict" between *Henley* and *Merchants' Mutual*—the former phrasing the rule in terms of "misleading conduct" and the latter in terms of "contrary to equity, morality, justice, and good conscience" in light of the policy underpinnings of the rule and of the statute of limitations. Examinees should consider the likelihood that estoppel would be applied here even though Trident's conduct may not have been "misleading."

The WPE/Trident communications probably lie somewhere in between the relatively weak estoppel facts of *Henley* and the stronger facts of *MMI*.

- From the outset, Trident repeatedly expressed its willingness to make WPE whole for its losses and to reinstate its tax exemption on the property; it repeatedly asked WPE to hold off on filing suit, stating that it agreed "in principle" to settlement, that the settlement discussions were "on track," and that there was thus no need for a lawsuit.
- This conduct appears similar to Omega's conduct wherein it repeatedly told MMI that it would be in a position to honor its subrogation claim once the personal injury claims against it were resolved.
- Regarding the second element, WPE has held off filing its complaint in reliance on Trident's assertions that it wants to settle and that no suit is necessary.

However, the following facts tend to undercut WPE's equitable estoppel argument on the other factor—whether WPE acted with due diligence.

- While Trident may have agreed "in principle" to compensate WPE and attempt to regain its tax exemption, it also repeatedly refused to admit fault or a causal relationship between its actions and the loss of the exemption. This is not like the concession of liability made by Omega in *MMI*.
- A tolling agreement, which would have extended the statute of limitations for six months, went unsigned by Trident. A court might well conclude that this alone is a "highly suspicious circumstance[] which should warn of danger or loss."

- Further, the last piece of correspondence in the File is the January 25, 2012, Hamilton e-mail stating that while Trident agreed to regain the exemption and reimburse WPE for losses, still undecided was how to allocate losses between Trident's general partners. Certainly, as of January 25, WPE was on notice that a settlement would not be finalized until the cost allocation issue was resolved.

And, although it is discussed in *DeSonto*, the promissory estoppel case, it is nonetheless relevant to WPE's equitable estoppel argument that the parties clearly anticipated that their settlement agreement would be in writing. How could it be reasonable for WPE to rely on assertions made orally and via e-mail in the absence of a concrete settlement agreement? Better examinees may note this.

- On the other hand, examinees could make a plausible argument that WPE did act with due diligence and that Trident did not necessarily exhibit behavior that should have put WPE on notice that settlement was unlikely.
    - Throughout its correspondence with WPE's attorney, Trident has not wavered on its purported desire to settle the matter. Trident even stated in its final email (dated 1/25/12) that it was prepared to seek reinstatement of the tax exemption and reimburse WPE for its losses. Given these facts, an examinee could plausibly argue that even the last-minute cost-apportionment issue was simply a formality to be added to the settlement documents and not a warning to WPE that Trident had no real intention of reaching a final settlement.

It is *possible* that a court could view WPE's reliance on Trident's representations (that it would cover WPE's losses and reinstate the exemption so that there was no need to file a claim) as being reasonable and thus supporting a claim of equitable estoppel should Moreno insist on not suing. These statements seem much more likely intended to induce forbearance by WPE than the benign assertion in *Henley* that the plaintiff had "plenty of time" to file a claim.

But on balance it is more likely that a court would not find that equitable estoppel would apply here. The indefiniteness and conditional nature of Trident's representations make it unclear whether, under the case law, the "due diligence" requirement is met—especially in light of Trident's failure to sign the tolling agreement and WPE's repeated references to the lack of a written agreement. And better examinees will point out that WPE would have to satisfy by a high burden of proof (clear and convincing evidence) all three prongs of the equitable estoppel doctrine to prevail. The only real counter to the argument that a prudent attorney would timely file the action to avoid these problems is the client's desire to avoid a lawsuit at all possible cost.

C. Application of the Doctrine of Promissory Estoppel

Examinees should analyze promissory estoppel as an alternative ground for relief should WPE not file its complaint by the statute's running, based on Trident's purported "promise" to

settle. In *DeSonto v. Pendant Corp*., the court found no clear and definite promise on which the plaintiff could reasonably rely, and therefore the doctrine of promissory estoppel did not save the plaintiff's claim from the statute-of-limitations bar. Here, too, examinees should consider whether, and to what degree, any likelihood of success is eroded by the conditional nature of the alleged "promise" of settlement (e.g., the apparent contemplation of a written agreement and the need for a cost-allocation agreement between Trident's general partners).

Assuming that the various emails and accounts of the conversations with Trident's counsel constitute a "promise" that Trident would attempt to regain the tax exemption and make WPE whole and thus would settle the matter without litigation, WPE's biggest hurdle, should it not file, will be proving by clear and convincing evidence that its failure to sue was reasonable.

- By stating that settlement hinges on a yet-to-be-determined loss allocation between Trident's general partners, Trident is putting another condition on its "promise" to resolve the matter timely and without litigation. The more conditions it imposes on settlement, the more the facts align with those of *DeSonto*, where the "promise"—the settlement agreement for employees excluded from the class action—was subject to alteration or rescission at Pendant's sole discretion.
- While Pendant may have honestly stated its intent to settle the claims at some future time, that intent was too indefinite to constitute a promise and bind it on a theory of promissory estoppel. Here, Trident says it wants to settle but has yet to remove the conditions beyond simply agreeing "in principle."
- In addition, the *DeSonto* court held that a written explanation of the proposed settlement agreement, which stated that the settlement program could be modified or withdrawn at Pendant's discretion, trumped the vice president's later assurances that DeSonto could still participate in the settlement after his resignation.
- And, as stated above, the fact that both parties contemplated that the settlement be in writing underscores that reliance on oral and email "promises" to settle could not be reasonable.

It is thus likely that a court would find Trident's "promise" to make WPE whole and reinstate the tax exemption too indefinite to be reasonably relied upon, especially toward the end of the negotiations, when Trident suddenly added partner cost allocation as another condition. Also, a court could conclude it unreasonable for WPE to rely on Trident's promises to settle after they had failed to materialize and nothing was reduced to the expressly contemplated writing.

Finally, because the other prongs are almost certainly not met, the last prong—avoidance of injustice—need not be addressed. If WPE failed to act with reasonable due diligence and Trident's promises were too indefinite, then how would it be necessary to enforce such a "promise" to avoid injustice? Even if WPE lacks other remedies if its suit is time-barred, the failure to satisfy the reasonable reliance and other prongs renders promissory estoppel unavailable here.

V. Conclusion

WPE must prove all elements of either equitable or promissory estoppel by clear and convincing evidence to prevent Trident from asserting the statute of limitations as a bar to a late suit by WPE. Examinees should advise Moreno that not suing Trident until after the statute has run is risky under either theory, although WPE would have a better chance of prevailing under equitable estoppel than under promissory estoppel.

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