February 2012 Bar Examination

Question 1

The Taxicab Association of Georgia (TCAG) is a nonprofit corporation comprised of several companies. Each member of TCAG is the holder of a Certificate of Public Necessity and Convenience (CPNC) issued by City. A CPNC is required for operation of a taxicab or limousine in City. Holders of a CPNC must comply with the city ordinance pursuant to which City regulates the taxicab industry. The ordinance subjects a holder of a CPNC to the imposition of fines and penalties in the form of suspension or revocation of the CPNC, when, in violation of the ordinance, drivers fail to obtain valid insurance and inspection stickers for the vehicles and fail to obtain or renew a driving permit.

The ordinance provides that the CPNC is transferable "pursuant to a purchase . . . ." The interest "in a CPNC may be transferred involuntarily and disposed of by public or private sale in the same manner as personal property." Notwithstanding these provisions, the transferee is required to "submit an application for a CPNC and . . . meet all requirements for the same."

City recently amended the ordinance to require that the holder of a CPNC be a resident of City "for at least one year immediately preceding the date of application . . . ." The legislative history shows that the intent of the residency requirement is to foster better familiarity with City. Prior to the enactment of the amendment, there was no residency requirement, and holders of CPNCs routinely solicited the sale and lease of CPNCs with non-city residents, which often led to contracts with the operators of taxicabs and limousines who were nonresidents.

TCAG filed suit against City, seeking damages and a declaration that various sections of the ordinance are unconstitutional. In Count One of the complaint, TCAG alleges that the provision of the ordinance that subjects holders of CPNCs to possible imposition of fines and penalties in the form of suspension or revocation for violations of the ordinance constitutes a violation of substantive due process. Count Two of the complaint alleges that the ordinance violates the Commerce Clause. Finally, Count Three of the complaint alleges that the ordinance violates equal protection of the laws.

Fully discuss the merits of each count alleged in TCAG's complaint.

Question 2

On July 4, 2008, John Smith suffered a detached retina in his left eye while straining to lift his boat out of the water. He went to the emergency room at Local Hospital, and the attending emergency room physician arranged for immediate surgery by Dr. Peeper, an ophthalmologist who is a board-certified retinal specialist and surgeon. Unfortunately, Dr. Peeper operated on the wrong eye. The botched eye surgery left John totally blind.

While in the hospital, recovering from the surgery, John needed to get out of the bed to go to the bathroom. He rang for the nurse, who escorted him to the bathroom but then forgot that she had left him there. After waiting for almost an hour for her to return, John tried to leave on his own, tripped and fell, and broke his leg.

John hired a lawyer and filed suit on July 1, 2010. He sued Dr. Peeper for the loss of his eyesight and the Local Hospital for the broken leg. He attached an expert affidavit to his Complaint from Dr. Houdoo, a retired optometrist, who opined on the negligence of Dr. Peeper. While Dr. Houdoo was still a licensed optometrist and faculty member at the Southern College of Optometry, he is not a medical doctor. In addition, he had been retired from active practice for five years and had only been a faculty member for two of the past five years.

With regard to the Local Hospital, John alleged the hospital was vicariously liable for the nurse's ordinary negligence as opposed to professional negligence or malpractice. He did not file an expert affidavit concerning the nurse's actions.

The lawyers defending both Dr. Peeper and Local Hospital raised objections in their answers based on Georgia's Professional Negligence Statute, O.C.G.A. § 9-11-9.1 and the Expert Witness Statute, O.C.G.A. § 24-9-67.1. They also filed Motions to Dismiss the Complaint. Before the Court ruled on the Motions, John's lawyer dismissed the Complaint without prejudice on August 1, 2010. He paid the accrued court costs and refiled the Complaint on January 10, 2011.

1. What objection, if any, could Dr. Peeper raise to the affidavit from Dr. Houdoo?

2. What objection, if any, could the Local Hospital raise concerning the claim against its nurse?

3. Could John's Complaint be refiled on January 10, 2011, against both Dr. Peeper and the Local Hospital? Explain your answer.

4. If John is able to refile the Complaint, how are the merits of the case affected by his earlier dismissal? Explain what steps his lawyer should take to avoid a dismissal by the trial judge.

Question 3

Mr. C. Q. Redfern, still a fastidious man at age 85, had executed a Last Will and Testament in 2005 that had been prepared by you, his attorney. Mr. Redfern's Estate then, as now, was estimated to have a value of about $4,000,000.00. His Will included the following provisions:

(1) He gave a $10,000.00 charitable bequest to the Boys and Girls Club of Damascus and $5,000.00 to each of his surviving grandchildren; and

(2) He gave one-half of his residuary estate outright to his wife and the remaining one-half to a trust for the benefit of his wife and children during his wife's lifetime, with remainder per stirpes to his lineal descendants living at the death of his wife and him.

He had named his wife as Executor, his oldest son Bill as successor Executor, and a local bank as Trustee of the residuary trust. No other successor Executor or Trustee had been named. You are aware that Mr. Redfern's son Bill died in a car accident in 2010. Bill was survived by his wife and two minor children, one of whom was adopted in 2007. Mr. Redfern's other son Sam is not married and has no children. His third child and only daughter, Sally, is married and has three children.

Early in 2009 Mr. Redfern decided to make a change to his Will. A committee at his church had been strongly encouraging members to leave gifts to the church endowment in their Wills. Not wanting to bother his attorney or incur additional legal expense, Mr. Redfern simply pulled out his original Will one night and wrote at the end of the paragraph that gave the bequest to the Boys and Girls Club of Damascus the following: "I also give $10,000.00 to my church, First Baptist of Damascus."

He also decided to give more money directly to his grandchildren, so he struck through the $5,000.00 sum referenced in that bequest and wrote in the figure "$10,000.00" above it, thereby intending to double the gift to each of his grandchildren.

Mr. Redfern then initialed both changes. The next morning, he had his gardener take the Will next door so the couple who lived there could initial the two changes as well. Mr. Redfern never mentioned these changes to you as his attorney and made no further amendments to his Will even when his son Bill died in 2010.

Mr. Redfern has now died; and his wife and two surviving children, Sam and Sally, have come to you for assistance in probating the Will. You review the original Will and realize that Mr. Redfern had apparently made the above-described hand-written changes. The family related the above facts to you and then asked you the following questions:

1. Did the handwritten changes made by Mr. Redfern to his 2005 Will affect its validity?

2. What is the legal effect of the two changes that Mr. Redfern made by hand to this Will?

3. Mrs. Redfern indicates she has no desire to serve as Executor. How should it be determined who the personal representative for the estate should be and what proceeding should then take place in the local Georgia Probate Court?

4. The Boys and Girls Club of Damascus is no longer in existence. What should happen to the charitable bequest to that organization?

5. If all of Mr. Redfern's descendants, except for son Bill, are still living at the death of his wife, to whom and in what fractional amounts should the remaining assets of the trust be distributed?

How would you answer their questions? Please explain the reasoning behind your responses.

Question 4

Despite having horrible credit and less than $15,000.00 in cash, Buyer wants to buy a house to take advantage of the depressed prices of homes in Georgia. Buyer meets with a real estate agent (hereinafter Agent) who tells Buyer he would not qualify for a conventional purchase money loan from a traditional lender. Agent tells Buyer not to worry about that because there are unconventional creative financing methods available for buyers with credit problems and sellers seem to be willing to consider almost anything when they need to sell a home in this financial environment.

Agent tells Buyer he knows of the perfect situation for Buyer. Seller owns a home and has lost her job and needs to relocate out of state as soon as she can sell her home.

Seller paid $110,000.00 for the home four years ago. Seller borrowed $80,000.00 from Bank to help purchase the property. Seller executed Bank's purchase money note with fixed monthly payments at a fixed interest rate of 4% amortized over thirty (30) years and executed Bank's deed to secure debt to secure the note.

The deed to secure debt executed by Seller to Bank has a due-on-sale clause that provides in part:

> "If all or any part of the property or an interest therein is sold or transferred by the borrower, without lender's prior written consent, lender may declare all the sums secured by this deed to be immediately due and payable."

The due-on-sale clause specifically excludes subordinate liens or encumbrances from being a violation of the clause.

Buyer wants to buy Seller's home. Seller wants to sell her home, get out of debt, and get some return on her investment.

Agent meets with Buyer and Seller to describe three different creative financing methods that might be available to them. These are as follows:

1. "Subject To"

    Agent says that Buyer could offer to buy the property for $100,000.00 and take title "subject to" Seller's loan from Bank and give Seller a second mortgage for $10,000.00 and pay the difference in cash at closing. Seller will transfer legal title to Buyer by warranty deed "subject to" Seller's deed to secure debt to Bank. Buyer will then make payments to Bank.

2. "Assumption"

Agent says that Buyer could offer to buy the property for $100,000.00 and seek Bank's written consent to "assume" Seller's loan from Bank and give Seller a second mortgage for $10,000.00 and pay the difference in cash at closing. Seller will transfer legal title to Buyer by warranty deed and Buyer will assume loan to bank and make payments to Bank.

3. "Bond for Title, Land Contract, Installment Land Sales Contract, and Contract for Deed"

Agent says that Buyer could offer to buy the property for $100,000.00 and enter into a "Bond for Title" with Seller. "Bonds for Title" are also often referred to as "Land Contracts", "Installment Land Sales Contracts", and "Contracts for Deed".

Seller would retain legal title to the property and Buyer would be given only equitable title to the property. Buyer would pay Seller 100 monthly payments of $1,000.00 a month. Upon the 100th payment Seller would sign a warranty deed to Buyer conveying legal title. Seller will continue to pay Bank.

QUESTIONS:

Address these three independent, separate, and different questions.

1. After the meeting with the Buyer and Agent, Seller independently seeks your advice with regard to Agent's three creative financing suggestions. You have had no contact with Agent or Buyer. How do you advise Seller with regard to the legal implications of each suggestion and why?

2. After meeting with the Seller and Agent, Buyer independently seeks your advice with regard to Agent's three creative financing suggestions. You have had no contact with Seller or Agent. How do you advise Buyer with regard to the legal implications of each suggestion and why?

3. Consider the ethical and legal implications of the following scenario: Agent approaches you and asks you to close a "Wrap Around Mortgage" (hereinafter Wrap) for this transaction. You have had no contact with Buyer or Seller.

   Agent describes the Wrap to you as follows: Buyer will offer to purchase the property for $100,000.00 and give the Seller a Wrap note for $90,000.00 and pay the difference in cash at closing. At closing Seller would deed legal title to Buyer by warranty deed.

Buyer would execute a new note to Seller for $90,000.00 with a fixed interest rate and fixed payments amortized at 6% over the term of the loan. Bank's note and the new note from Buyer to Seller will mature on the same date. Buyer will also execute a new deed to secure debt to Seller to secure the new note.

Seller will continue to make payments to Bank on the $80,000.00 loan to Bank and keep the difference between that payment and Buyer's payments on the new $90,000.00 loan from Seller.

Agent reminds you that Agent refers all his "normal", conventional, more profitable, and easier residential real estate closings to you and your firm. Agent explains that you need to handle this transaction because Agent's business has been slow and Agent needs this commission.

Agent has never been involved in a Wrap before and knows that you have not been involved in closing one. Agent says he learned about Wraps on a one hour on-line continuing education seminar concerning several creative financing techniques. Agent will prepare the contract from a form obtained at that seminar and will provide you with closing forms from that seminar.

Assume that you know Wraps are complex and dangerous transactions for unsophisticated parties and are typically employed only in commercial transactions. Also, assume that you know that the contract and closing documents are usually lengthy, detailed, and are specifically negotiated to provide as many safeguards as possible in the event that buyers or sellers default on their obligations. You are not comfortable with your expertise in preparing the documents.

You also know that Wraps have been employed in residential transactions to keep lenders from being aware that their borrowers have transferred legal title to a new buyer because the lender's original borrowers keep making the payments.

Describe what concerns, if any, you have under the Georgia Rules of Professional Conduct about your handling this transaction?

Applicant Number

MPT-1
212

THE MPT®

MULTISTATE PERFORMANCE TEST

Franklin Resale Royalties Legislation

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Franklin Resale Royalties Legislation

FILE

Memorandum from Charles Lieb..........1

Letter from Melody Muni, Executive Director, Franklin Artists Coalition..........2

Template for "Leave-Behind"..........3

Testimony of Carol Whitford before the Olympia State Senate (2006)..........4

Testimony of Jerome Krieger before the Olympia State Senate (2006)..........6

Testimony of Daniel Boyer, Esq., before the Olympia State Senate (2006)..........8

LIBRARY

Franklin Assembly Bill 38..........11

Selected provisions from the 1976 Copyright Act (17 U.S.C.)..........12

Samuelston v. Rogers, U.S. Court of Appeals (15th Cir. 1977)..........13

Franklin Press Service v. E-Updates, Inc., Franklin Court of Appeal (2011)..........15

FILE

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.

Thanks and kind regards,

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.

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LIBRARY

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.

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In re WPE Property Development, Inc.

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In re WPE Property Development, Inc.

FILE

Memorandum from Thomas Perkins 1

Memorandum to file from Thomas Perkins 2

Correspondence 3

LIBRARY

Henley v. Yunker, Franklin Court of Appeal (2005) 11

Merchants' Mutual Insurance Co. v. Budd, Franklin Court of Appeal (2010) 13

DeSonto v. Pendant Corp., Franklin Court of Appeal (2005) 15

FILE

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.

Very truly yours,

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.

Sincerely,

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

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.

Sincerely,

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.

Sincerely,

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

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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.

[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.

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 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

[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).

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.

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]

---

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

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.

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.

MULTISTATE PERFORMANCE TEST DIRECTIONS

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.