MPT 1 - Sample Answer # 1

Introduction:

The proposed legislation will provide royalties to artists when their visual arts, such as an original painting, sculpture, or drawing, are resold. The artist will receive five percent of the profit from such sale. In the event the artist is deceased, his or her heirs will receive the royalties up until 70 years after the artist's death.

Why Legislation is Necessary and Appropriate:

Providing royalties to artists on the resales of works of visual art are aligned with the already established law of requiring creative work artists to be paid for reproductions of their music, literature, and drama. Works of visual art, such as original paintings, sculptures, and drawings, are rarely reproduced. In a study by the Olympia Art Collective in 2004, only seven percent of a visual artists' income is from the sale of reproduction rights. The remaining 93 percent is from the sale of original works.

Works of visual art vastly appreciate in value as a young, unknown artist hones his talent and becomes an established name in the art industry. However, such artists do not reap the benefit of his or her hard work and labor. Ninety-seven percent of visual artists earn less than $35,000 a year, according to the Olympia Art Collective study. Furthermore, heirs received less than $2,000 a year from the deceased artists' works, which mostly comprised of selling original unsold works. However, auction houses and art galleries made $62 million dollars in profits from resales alone in 2004. These businesses are making millions of dollars off of an artist's work while artist's widows, such as Lawrence Huggins's wife, life in poverty.

There is a higher cost to creating a work of visual art than other creative artists due to the expensive materials and tools. In theory, such costs should be compensated later on at the sale of the works. However, evidenced by the little income a visual artist earns each year, those costs are left a burden.

There is an incorrect perception that this royalty will only benefit already established artists and not the starving unknown artists. In testimony by Jerome Krieger, owner of an Olympia art gallery, he claims that the vast majority of artists never make it to the resale market. However, he fails to reference any studies or evidence that would support such a generalized claim. With auction houses and art galleries making $62 million dollar profits annually, there clearly is a large and profitable market for resales that could not be sustained by only a few, famous artists.

The royalty will assists visual artists in developing their own talent. Currently, art galleries invest in an artist in order to develop his or her career. If artists were able to obtain just 5% from the profit of resold works, the artist would have a stronger economic foundation to invest in himself or herself. Even with art galleries losing 5% of its $62 million dollar profits, the galleries would remain solvent and able to develop new potential.

The royalty will attract new artists to Franklin because they will be able to realize the full benefit of their hard work. When new, inspiring talent moves into the area, the art collectors will follow. This force can only help both the artists and auction houses.

Why Any Legal Obligation Is Not Valid:

Some have argued that the proposed legislation is valid because of the preemption provision in the 1976 Copyright Act. However, this is not true.

Under Section 301a of the 1976 Copyright Act ("Act"), the Act essentially "trumps" any state law that conflicts with the Act. In the case of Franklin Press Service, the court outlined a two-step process to determine if the Act "trumps" other laws. First, the work must "come within the subject matter of the copyright." Pictorial, graphic, and sculptural works (such as paintings, drawings and sculptures) are considered to be within the subject matter of the Act.

Second, the rights involved must be within the "exclusive rights" granted by the copyright owner. This is where the proposed legislation if clearly not "trumped" by the Act. Under Section 106 of the Act, the owner of a copyright can distribute copies of the work to the public. Under Section 109(a) of the Act, the owner of a copy can sell that copy without the copyright owner's permission.

Here, the issue is not about copies of visual art. This proposed legislation only applies to the actual original work, and the royalties only apply to that original work being resold at a profit. This is an element that legitimately differs from the "exclusive rights" granted to a copyright owner in the Act. Since the proposed legislation does not fall under the second part of the test, it is therefore not "trumped" by the Act.

In conclusion, the 1976 Copyright Act does not preempt the proposed legislation, thus it is valid.

MPT 1 - Sample Answer # 2

Introduction:
Franklin Assembly Bill 38 (FA 38) will mandate a modest royalty to visual artists for certain resales of their works. Artists are important contributors to the culture of Franklin, yet many of them barely eke out a living. This proposed bill supports Franklin artist and offers them a fair return on their work.

FA 38 gives a five percent royalty to Franklin artists and their heirs for sales of visual art, including paintings, sculptures, and drawings on sales that occur in Franklin or for sales by residents of Franklin. The royalty is determined based on the profit from the sale. No royalty need by paid on the initial sale of the work by the artists, on any resale that nets a profit of less than $1000, or on any resale by an art dealer to an art dealer within 10 years of the initial sale by the artist. This royalty may, by written contract, be increased. This royalty may not be dismissed by contract. Failure to pay the royalty results in a claim for damages. (FA 38.)

This bill differs, in many important ways, from the proposed legislation that was tabled in Olympia in 2006. FA 38 was drafted to address some of the objections to the Olympia bill and is thus a bill that we can all support.

This legislation is necessary and appropriate.
The vast majority of visual artists earn a very low income from the sale of their work. Generally, heirs of artists receive at most a few thousand dollars annually from the sales of deceased artists work. (Testimony of Carol Whitmore.) In contrast to these modest incomes, the total sale of arts in the state of Franklin is a million-dollar business. (By way of comparison, in Columbia in 2004, art sales totaled $62 million dollars.) (Whitmore.) As a matter of equity and fairness, artists should be compensated for the resale of their work.

Many visual artists receive no renumeration from the resale of their works. In contrast to music or literature, or works which can be mass-produced, most paintings and sculptures are never reproduced. Under current law, artists only receive remuneration on the initial sale of the work by the artist. For subsequent sales, artist receive nothing. Whitmore. This creates a harsh economic reality for artists, and one which FA 38 will mitigate.

Currently, when a collector or dealer sells an art work at a great profit, the artist receives nothing. Just as collectors receive huge profits when art works appreciate in value, so should the artist. (Whitmore.)

The resale royalties provided for in this bill will also permit artists to defray some of the costs of materials, which can be quite expensive. (Whitmore.)

This law does not merely reward the established and affluent artist. First, even established and successful artists should be entitled to a fair profit from the resale of

their work. Second, the current bill supports not only established artist, but any artists the sale of who's work nets a profit of $1000, a fairly modest sum. (Whitmore, Krieger.) Royalties to heirs are limited in time to the 70 years following the artists death and FA 38 does not apply to artists who are already dead. (FA 38.)

This law will not dry up the Franklin market in visual arts. As noted above, Franklin has a thriving arts market. A modest sale of 5% on certain sales will not have any negative effect on the market. Some might argue that the royalty will drive collectors out of state, and point to the decreased sales in Columbia after the royalty was enacted there. However, the art market in Columbia ultimately rebounded. (Krieger, Whitmore.)

This carefully crafted law allows gallery owners to develop a market for new artists by exempting both initial sale and those sales from art dealers to art dealers within ten years of the initial sale of the work. As such, it balances the need for gallerists to develop new artists with the need for artists to be fairly rewarded for the resale of their works. (Krieger.)

This law does not discourage investment in art or restrict free trade or private property rights. An art collector is still permitted to invest in art and will still be rewarded should that art increase in value. Under the new law however, the artist will also share in that bounty.

If the art does not increase in value, there is no royalty paid since the royalty is determined based on the profit from the sale. (Krieger, FA 38.) Since the royalty only comes into play if there is a profit of $1000, and the royalty on such a sale would be a modest $50, the administrative costs of the resale royalty are not so high as to discourage sales. Moreover, in such an example, the reseller would still retain 95% of the profit ($950). Certainly, everyone can agree this is fair.

<u>There is no valid legal objection to Franklin Assembly Bill 38.</u>

Bill 38 is not preempted by the 1976 Copyright Act (Title 17 USC § 301(a)) (the Act). Federal law preempts state law where is completely occupies the field on the subject matter at issue; there is no room for state legislation where there is preemption. The 1976 Copyright Act contains a specific preemption clause: "All legal or equitable rights that are equivalent to the exclusive rights within the general scope of copyright . . . are governed exclusively by this title." No person is entitled to any "equivalent right" under state law. Preemption is always a question of Congress's intent: has Congress exercised its full power and thus barred state's from all power over the subject matter? (Goldstein v. California.) In this case, the answer is no.

The rights at issue under the Act are the rights to distribute copies of the copyrighted work to the public by sale; after the initial sale, subsequent sales are not under the control fo the copyright owner. The fact that the 1976 Act contains a preemption clause is not determinative. In Franklin Press Service v. E-Updates, the Franklin

Court of Appeals considered a claim that Franklin's common law tort of misappropriate was preempted by the Act and found that it was not. (Franklin Press.) There are two criteria, both of which must be met for preemption. First, the work at issue, must "come within the subject matter of copyright." Section 102 of the Act sets forth which works come with in the scope of the Act. Copyright protection is accorded to "original works of authorship fixed in any tangible medium of expression" and includes pictures and sculptures. (§ 102.) Clearly, the visual arts covered by FA 38 come within the scope of the federal law.

Second, the rights involved must be within the exclusive rights granted to a copyright owner. (Franklin Press.) Sections 106 and 109 of the Act note that a copyright owner has the exclusive rights to distribute copies, but does not prohibit a lawful owner of a copy from reselling that copy. State laws that include elements that "legitimately differ" from the rights in a copyright are not within the subject matter of copyright and are not preempted by the Act. (Franklin Press.) Here, the right at issue is not copyright - or the right to distribute copies - but the right to receive payment for the resale of an original work. As such, the Act does not preempt FA 38. Because FA 38 accords a different right to artists and gives rise to a legal claim with different elements (a covered sale with a profit of over $1000 and no royalties paid), there is no preemption.

In Samuelston v. Rogers, the USC Court of Appeals held that the Columbia Act, a predecessor of this act, was not preempted by the 1909 Copyright Act. There, the 1909 Act granted a copyright owner the exclusive right to vend the copyrighted work, but did not otherwise restrict the transfer of copyrighted work, after the first sale. It contained no preemption clause. The Columbia Act required resale royalties. The Samuelston court held that the Columbia Act was not preempted because it not did not impinge on the artist's ability to sell his work and applied only after he had sold a copy of the work - as such, like FA 38 - it provided an additional right not granted by the 1909 Act. Finally, that the resale of art may create an economic liability to the artists, does not create a legal restraint on the transfer of work. Although the 1909 Act contained no explicit preemption clause, the end result of analysis is the sale: FA 38 provides an additional state right that is not preempted by federal law.

Please support FA 38.

MPT 2 - Sample Answer # 1

Rawson Hughes & Conrad [letterhead]

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

February 28, 2012

Dear Juan:

As you know, the statute of limitations for your claim against Trident in relation to the Forest Avenue project runs in 15 days. As I previously mentioned to you, Trident has not returned our agreement to toll the Statute of Limitations. As a result, if you do not file suit against Trident within the next 15 days, the law provides that you may be barred permanently from suing Trident for its negligence. More specifically, if you file a lawsuit after the Statute of Limitations has run, Trident through counsel may file a motion to dismiss, in which it argues that the Statute of Limitations has run as its defense. The general rule for statutes of limitations provides that the motion would be granted.

There are some exceptions, which I explain below. The law provides for two theories on which a court will still allow a plaintiff to sue after the statute of limitations has run.

(1) **Equitable estoppel**. This requires that: (a) the defendant did or said something intended to induce the plaintiff to believe something and to act upon that belief, (b) the plaintiff was induced to act based upon that, and (c) the plaintiff used "due diligence," meaning that the plaintiff didn't ignore highly suspicious circumstances. These three elements must be proved by clear and convincing evidence. As applied specifically to a defendant's actions or words in relation to a statute of limitations, where a defendant takes active steps to prevent a plaintiff from suing in time. Merchants (2010.) The defendant's active steps need not be fraudulent. Merchants.

There is an argument to be made that, within the past year, Trident's counsel made statements to me that were intended to induce WPE not to file suit. On April 13, 2011, in a meeting on April 25, 2011, in a June 16th, 2011 communication, on October 6, 2011, and in communications in January, 2012, Trident made representations to me that it intended to settle the case, and urged us not to file suit. Most pointedly, on June 16th, Trident counsel stated that Trident agreed "in principal' to our settlement agreement and stated: "We are going to get this resolved....In my view, settlement discussions are on track, and there is no need for a lawsuit." Additionally, at a meeting on January 10, 2012, Trident counsel indicated that it would agree to toll the statute of limitations for six months. (Importantly, however, it did not follow up by signing an agreement. If it did sign such an agreement, it would be enforceable and

the Statute of Limitations would be considered tolled by the courts. Henley v. Yunker.)

We may further argue before that court that your case is similar to that of Merchants. In that case, the defendant insurance company assured a plaintiff that it would "honor" its claim several times, but indicated that it was burdened by the paperwork and required additional time to do so. Similarly, in our case, Trident's numerous statements assured us that Trident intended to settle.

However, a court might find that we did not act as we should with respect to "highly suspicious circumstances." In our case, the fact that Trident repeatedly stated that it would settle, but kept putting off settlement, might be a dilatory tactic that we should be wary of. Furthermore, the fact that Trident agreed in a meeting with us to toll the Statute of Limitations, but refused to sign the agreement, is further evidence of "highly suspicious circumstances." As a result of these two issues, I cannot tell you with confidence that there is a high likelihood of us prevailing on an equitable estoppel claim. It is very possible that a court would not find that we have proved equitable estoppel by clear and convincing evidence.

Additionally, Trident may argue that its statements to us were not actually "misleading" because they did not state definitively that we would settle, since no settlement agreement terms were finally agreed to before the statute of limitations. In Henley v. Yunger, for example, the Court of Appeal found that an insurance company's statement to an unrepresented plaintiff that he had "plenty of time" to file a lawsuit was not misleading, because it did not indicate a specific period of time that the plaintiff had to file suit, and the facts as presented to the court were unclear as to when the statement was made. Trident never gave us a specific date by which it promised to make a settlement final.

(2) **Promissory estoppel.** This requires: (a) a promise by the defendant who asserts the Statute of Limitations as a defense, such that the person who makes the promise would reasonably expect to induce action by the plaintiff (b) the promise actually induces action or forbearance by the plaintiff, and (3) injustice can only be avoided by enforcement of the promise. This type of estoppel differs from equitable estoppel, in that the representation by the defendant that is at issue is the promise of the defendant, not the representation of fact. DeSonto (2005.) A conditional promise cannot be reasonably relied upon in promissory estoppel, and it is also unreasonable to rely on an oral promise where there is a written contract. Desonto.

Viewed in the context of promissory estoppel, we may argue that Trident's counsel made two promises: (1) that it would settle before the statute of limitations, which would make it unnecessary for us to file suit before the Statute of Limitations, and (2) that it would agree to toll the statute of limitations. As to the second element (promise induced action or forbearance by the plaintiff), we may argue that we decided not to sue before the statute of limitations in reliance on its promise.

There is a problem as to the second element: inducing reliance. On the one hand, it is reasonable that we have delayed filing suit *before the statute of limitations has run*, since suggested that it would settle. However, it becomes imprudent to rely on a promise to settle if, at the time of the Statute of Limitations running, the settlement has not been reached. Given Trident's delays - that we have been discussing settlement for well over 9 months now-- it is not reasonable to believe that settlement will occur before the tolling. As of January 25, 2012, all the Trident did was suggest additional terms, without signing an agreement to toll the Statute of Limitations.

As to any promises: we should not proceed with an argument that it promised to agree to toll the statute of limitations. A plaintiff cannot reasonably rely on an oral agreement of a defendant where there's a written contract at issue (DeSonto) to do so would be unreasonable.

I believe that the facts strongly support an argument that Trident made a promise to settle before the statute of limitations. This is based on the email stating "We are going to get this resolved....In my view, settlement discussions are on track, and there is no need for a lawsuit," and by a further statement of Trident's counsel, "There is no need to file your complaint."

However, even if Trident did make such a promise, as I explained above, I do not believe that a court would find that we could have reasonably relied on their promise, since they failed to sign our agreement to toll the statute of limitations, and failed to settle before the statute of limitations ran, and their dilatory actions in settlement make it unreasonable to rely on the promise.

Conclusion
In conclusion, if you hope to recover anything from Trident, I strongly suggest that you permit me to file suit on your behalf within the next few days. I understand that you have other considerations, including the fact that you believe that the value of Trident's other business is far more substantial than Forest Avenue project, and your desire to avoid adverse publicity. Thus, I leave the decision in your hands.

Please provide me with your decision within the next ten days.

Very truly yours,

Thomas Perkins, Managing Partner

MPT 2 - Sample Answer # 2

Dear Juan,

If we fail to file a complaint against Trident by the March statute of limitations date, Trident will almost certainly raise a statute of limitations defense if we ever do sue them. If they succeed in raising this defense, we would lose all of our claims against them. However, we do have a strong argument that the doctrine of equitable estoppel will apply to bar them from asserting a statute of limitations defense. We could also potentially argue that Trident cannot assert the statute of limitations defense under the doctrine of promissory estoppel, but it is a weaker argument.

Equitable estoppel is a doctrine recognized by courts to avoid unfairness when the strict application of the rule of law would result in some sort of injustice in the case. Essentially, it means that a party is "estopped" from asserting a claim or defense because of their own bad behavior. To assert it, a plaintiff must show that "(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 the 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." *Henley*. I believe that we have a good argument that Trident will be equitably estopped from asserting the statute of limitations defense because of its many statements that we should not file the complaint, that settlement will be successful, and that Trident will indemnify us for all of our damages.

This is not the first time that a plaintiff has argued that the defendant is equitably estopped from asserting the statute of limitations because of things that it has said as a part of settlement negotiations. In *Merchants Mutual Insurance Co. v. Budd*, the plaintiff corresponded with the defendant for years trying to get the claim settled out of court. The defendant, much like Trident in our situation, continued to insist that it would get to it soon but had other issues that were currently taking priority, but that it would ultimately "honor your subrogation claim." Ultimately, the statute of limitations ran, and, when the plaintiff tried to file suit, the defendant argued a statute of limitations defense. The court, however, held that the defendant was equitably estopped, saying that "[o]ne cannot justly or equitably lull his adversary into 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 this very delay caused by such conduct as a defense to the action when brought." Further, the court stated that the defendant did not need to act fraudulently to be barred by equitable estoppel, noting that "unintentionally deceptive acts that lull or induce the plaintiff to delay filing his or her claim may trigger [equitable estoppel]." The court specifically pointed to instances where the defendant promised that it would honor the plaintiff's claim in order to get extensions from the plaintiff in filing the lawsuit, and said that the defendant could not

now take advantage of its "dilatory tactics" to defeat the plaintiff's claim. Therefore, the court found that the defendant was equitably estopped from arguing a statute of limitations defense, and allowed the lawsuit to proceed.

Our case is very similar to *Merchants Mutual*. Trident, just like the defendant in *Merchants Mutual*, repeatedly told us that it would "make WPE whole" and that "our settlement discussions are indeed on track" to get extensions from filing the lawsuit. In fact, Trident took things a step further than the defendant in *Merchants Mutual*. When we raised the statute of limitations issue, Trident repeatedly responded with assurances that settlement would be reached and that "[t]here is no need to file your complaint." In fact, Trident even orally told us that it would toll the statute of limitations. Based on this conduct, we can certainly argue that the result in *Merchant's Mutual* is justified here as well. After all, the *Merchants Mutual* court specifically stated that "the doctrine of equitable estoppel allows a plaintiff to avoid a bar of the statute of limitations if the defendant takes active steps to prevent a plaintiff from suing on time, for example, by promising not to plead the statute of limitations." All of Trident's other conduct is equally analogous to the defendant's in *Merchant's Mutual*, and we could argue that it served "lull or induce" us to not file the complaint.

However, our argument, while strong, is not ironclad. To argue equitable estoppel, "the plaintiff must exercise due diligence such that his reliance on the defendant's conduct is reasonable." *Henley*. We must be able to show that we exercised due diligence in believing Trident's assurances that it would settle and that we did not need to file a complaint. In another recent case, *Henley v. Yunker*, the court specifically found that the plaintiff could not argue equitable estoppel because he had not reasonably relied on the defendant's assurances that he "had plenty of time to make a claim." However, this case is almost certainly distinguishable from our situation because the plaintiff there only received that one assurance, at an unspecified time, that the statute of limitations had not run, along with a request for documentation right before it ran, which he relied on as an implicit agreement not to assert the statute of limitations. In our case, we received our last assurance that Trident would "reimburse WPE for any losses" less than two months before the statute of limitations was due to expire,and we have received multiple other similar assurances before that. Further, we are not relying on some request for documents as an assurance that Trident will not assert a statute of limitations claim--we are relying on their oral promise not to assert the statute of limitations. Trident could argue that it was not reasonable for us to rely on an oral assurance when Trident did not sign the written agreement not to sue, but we should be able to point to the fact that they repeatedly promised to sign it, and that we believed them because of our long course of dealings with them.

Finally, as noted at the beginning of my letter, we could also argue promissory estoppel to avoid the statute of limitations defense, but it is not a strong argument. Promissory estoppel is very similar to equitable estoppel. The primary difference between the two is that promissory estoppel deals with reliance on a promise, while equitable estoppel deals with reliance on a representation of fact. To prove a claim of

promissory estoppel, a plaintiff must show that (1) the promissor made a promise which it should reasonably expect to induce reliance on the part of the promisee; (2) it actually did induce such reliance; (3) the reliance was reasonable; and (4) injustice can be avoided only by the enforcement of the promise." DeSonto. Notably, a "promise" for the purposes of equitable estoppel cannot be an expression of future intention, cannot be conditional in any way. DeSonto. In our situation, the promise that we would most likely want to assert is Trident's oral promise to toll the statute of limitations. This promise was not conditional, but it is an "expression of future intention," which Franklin courts have found is not a sufficiently definite promise for the purposes of promissory estoppel. After all, Trident made its promise back on January 10, 2012, more than two months before the statute of limitations ran, and they could possibly argue that their subsequent failure to sign the agreement showed that they did not intend to keep their promise, and that we did not reasonably rely on it. Therefore, I believe that this is the weaker claim.

I hope that this letter has answered your questions. Please contact me if you have any further questions or wish to discuss this matter.

Sincerely,

Thomas Perkins

MPT 2 - Sample Answer # 3

Dear Juan:

As you are aware, we have been in discussions with Trident regarding both a settlement agreement and a tolling of the statute of limitations to facilitate such agreement. Trident has been largely uncooperative and to date, we do not have a settlement agreement or a tolling agreement signed. The statute of limitations period for WPE to file a compliant against Trident expires in fifteen days and it is absolutely critical that you understand the risks of allowing such period to expire.

As a general matter of Franklin law, once the statute of limitations period has expired, a plaintiff *will not* be able to file a complaint against a defendant for a particular transaction or occurrence, regardless of how much damage is suffered as a result of such occurrence. Courts have repeatedly denied plaintiffs' day in court on statute of limitations grounds, citing the defendant's interests in fairness and timely notice. What this means for WPE is that, if the statute of limitations is allowed to run out, there is a substantial likelihood that WPE will be completely unable to recover damages from Trident. Considering the potential scope of liability here (current and back taxes, negative publicity, potential lawsuits, etc.), we believe it is in WPE's best interests to file a complaint before the expiration of the statute of limitations unless we execute a settlement agreement or tolling agreement with Trident prior to such expiration.

Despite the foregoing, we realize that WPE is loathe to file a complaint in this situation for a variety of reasons. Ultimately you and your colleagues at WPE will have to make a business decision on this matter, and we will of course follow your instructions. Should you determine that it is not in the best interests of WPE to file a complaint before the statute of limitations runs out, there are a few other possibilities of which you should be aware.

Courts have broad discretion to grant what is known as "equitable relief" when the conduct of parties involved in a dispute suggests that strict application of the law would result in injustice. There are three types of equitable relief which may be available to us should Trident attempt to raise a statute of limitations defense to our claim in the future. First, we could attempt to establish an implied or "quasi" contract. Second, we could argue that Trident should be prevented from using the statute of limitations as a defense on a theory of "equitable estoppel." Third, we could argue that Trident should be prevented from using the statute of limitations as a defense on a theory of "promissory estoppel."

Implied or Quasi Contract. The Franklin Court of Appeal stated in the 2005 case, *Henley*, that it is possible for two parties to agree to a tolling of the statute of limitations in Franklin. For any agreement to be enforceable, it must be supported by mutual consideration (meaning both parties to the agreement must give something up), and the court in Henley suggested that the requirement of consideration is often inherently present in an agreement to toll the statute of limitations. This inherent

consideration takes the form of defendant giving up the right to bar suit after the expiration of the statute and plaintiff temporarily giving up its right to cut off settlement negotiations and sue the defendant, allowing the parties additional time to reach a settlement (which presumably is preferable to litigation for the defendant).

Since Trident has not returned our tolling agreement letter, the essential element of a contract - an agreement or "meeting of the minds" between the parties, would have to be implied from the course of dealing. In this matter, we believe that proving an agreement between the parties may be possible. On April 26, 2011 Meg Hamilton of Trident sent an email which said in relevant part "should WPE incur any reasonably ascertainable loss, Trident *will* make WPE whole." Again on January 25, 2012, Meg sent an email saying that Trident will "reimburse WPE for any losses." These statements are both qualified by Meg's statement that they are not admitting or conceding fault. But for the purposes of implied contract, this should not matter. The implied agreement is that Trident will indemnify WPE and in exchange, WPE will not resort to litigation. WPE has not resorted to litigation, so it has upheld its end of the bargain. Accordingly, a court could compel Trident to uphold its end of the bargain and indemnify WPE for any ascertainable losses.

Equitable Estoppel. This doctrine is well established in Franklin and was invoked just recently in the Franklin Court of Appeals in the *Merchant's Mutual* case, and was also invoked in *Henley*. The application of equitable estoppel requires that (1) the defendant said or did something intended to induce plaintiff to do or believe something, (2) plaintiff has actually done that something, and (3) plaintiff has been diligent in its own conduct.

Here, we believe that element 1 is easily established if Trident does in fact try to raise a statute of limitations defense in the future. Their repeated statements regarding their intent and desire to settle would have been clearly designed to cause WPE to not file a complaint. Likewise, element 2 is easily established if, in reliance on these statements WPE does not, in fact, file a complaint.

The potential downfall here lies with the 3rd element. In applying equitable estoppel, Franklin courts are primarily concerned with protecting the 'innocent' and perhaps unsophisticated person. Given the course of our dealings with Trident, a court may well hold that WPE cannot use equitable estoppel because WPE "ignored highly suspicious circumstances which should warn of danger or loss." If the court makes such a finding, we will not be able to recover under an equitable estoppel theory. I do note however, that the January 25, 2012 email from Meg referring to the need to calculate percentages for partnership allocation purposes could be, and might actually be, legitimate. Using this email we could make a strong argument that we were reasonably relying on Trident's statements.
It may be possible however, under *Merchant's Mutual* to nevertheless recover under equitable estoppel if we can prove that Trident "effectively conceded" liability for WPE's claim. For instance, on June 16, 2011 Meg sent me an email saying that her client had agreed in principle to the draft settlement. Based on the contents of the

draft settlement, this may mean that they agreed to liability. The April 26, 2011 and January 25, 2012 emails from Meg are however, less likely to satisfy this condition since they explicitly state that Trident was not "admitting or conceding fault."

Promissory Estoppel. The Franklin Court of Appeal requires four elements to prevail on a theory of promissory estoppel, as set forth in *DeSonto*. First, there must be a promise by defendant designed to induce or forebear action. Second, such inducement or forbearance must occur. Third, the inducement or forbearance must be reasonable. And fourth, injustice can be avoided only by enforcement of the promise.

Promissory estoppel requires a clear and definite promise, which we may or may not be able to establish here, based on our correspondence with Trident. The closest thing to a clear and definite promise may be in the April 26, 2011 email discussed above, but it is conditional. Meg was clearly contemplating additional conditions and or modifications to the agreement. We can however, show with relative ease that this was designed to encourage WPE to not file a complaint and that WPE did not file a complaint.

The glaring problem with this theory is however, the following: in *DeSonto*, the Franklin Court of Appeal held that "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." It is abundantly clear from our correspondence with Trident that a formal written contract is contemplated. We drafted an agreement, they acknowledged receipt of that agreement, and even said that their comments would be forthcoming. I do not imagine that any amount of creative interpretation could overcome this issue.

For the sake of completeness, we probably could show the fourth element - that injustice could only be avoided by enforcement of the promise. Although, like with equitable estoppel, a court could hold that we knew or should have known that Trident's promises were empty.

In sum, I will reiterate our belief that the best course of action for WPE is to file a complaint against Trident before the statute of limitations runs out, unless it receives a valid settlement agreement or tolling of the statute prior to such date. However, in the event WPE determines that it is in the best interests of the company to not file a complaint, we will have reasonable arguments that based on the repeated statements and delay caused by Trident, Trident is estopped from asserting the statute of limitations as a defense, because they will be using it as a sword and such use will justify equitable relief.