In re WPE Property Development, Inc. (MPT-2)
Examinees' law firm represents WPE Property Development, Inc., a developer of low-income housing properties in Franklin. WPE contracts with Trident Management Group to manage many of its properties in compliance with Internal Revenue Code provisions to ensure tax-exempt status. One of these properties has now lost its tax-exempt status as the result of Trident's mismanagement. WPE and Trident have a long-term business relationship that is valuable to both parties. Thus, while WPE appears to have a strong breach of contract claim against Trident (for tax liabilities and penalties resulting from Trident's failure to maintain the tax-exempt status), the client, WPE's CEO, is reluctant to file suit against Trident, hoping that a settlement can resolve the matter short of litigation and thereby avoid negative publicity for the housing project. However, despite many assurances from Trident's counsel that Trident is willing to reach a settlement and make WPE whole for its losses, no final agreement has been reached, and the statute of limitations on a claim against Trident will run in just 15 days. The senior partner must advise WPE's CEO of the legal consequences of not filing the complaint against Trident before the deadline. Examinees are asked to draft a letter to WPE's CEO for the senior partner's signature analyzing the potential legal consequences to WPE if it decides not to file its complaint against Trident and whether there might be any theories under which WPE could recover against Trident after the limitations period has run. The File consists of the task memorandum from the senior partner, a memo to the file summarizing WPE's concerns, and several pages of correspondence between counsel for WPE and Trident discussing the proposed settlement of the breach of contract claim. The Library contains three cases on the statute-of-limitations issue.

THREE FEBRUARY 2012 SELECTED MPT ANSWERS TO FOLLOW

February 28, 2012

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

Dear Mr. Moreno:

I am writing to you to apprise you of our current position with respect to a potential suit over a breach of contract claim against Trident Management Group. As Mr. Perkins informed you in a letter sent to you in July, we have had many meetings with representatives of Trident but have been unable to reach an agreement. In your response to Mr. Perkins letter, you requested that we "keep trying to settle." It is my understanding that the Forest Avenue project was controversial from the outset and that you would like to avoid the negative publicity involved in such a law suit as well as maintain your relationship with Trident. As such, we have made numerous efforts to avoid filing suit, but at this time, we must come to a decision on whether to file the suit because there is a one-year statute of limitations on a breach of contract claim and the period of limitation will run in fifteen days. What that means is that if we do not file suit on your behalf in fifteen days, we may be barred from doing so altogether. These types of statutes are designed to assure fairness to defendants and are based on the policy that even if a party has a valid claim, their opponent is entitled to fair notice. We have already drafted a copy of the complaint on your behalf and sent a copy to Meg Hamilton Trident's legal counsel, along with a letter which expressed our desire to reach a settlement agreement. This letter (and the accompanying complaint) was mailed in mid-April. As you are aware, we have maintained steady correspondence with Trident since then, and have made several attempts to secure a firm agreement to settle. In a settlement meeting in April, Mr. Perkins discussed several alternatives with Ms. Hamilton which included Trident attempting to reinstate pre tax exempt status of the project with the IRS and if we could demonstrate "reasonably ascertainable loss, "Trident would make your company whole by paying restitution. Despite these talks, the settlement has not been finalized due to several delays and additional conditions imposed by Trident. At this point I would like to discuss with you the legal consequences to WPE if you decide not to file your complaint within the next fifteen days.

In Franklin under these circumstances, when a party is faced with a rapidly approaching limitation period, they may obtain an agreement from the other party to toll the statute. This agreement essentially "stops the dock" for procedural purposes. Mr. Perkins spoke to Ms. Hamilton on the phone on January 10th and she orally agreed to toll the statute of limitations for six months. Mr. Perkins promptly sent a letter that day requesting her signature to confirm the agreement. As of this writing, Trident has not returned the letter, but instead imposed additional conditions for settlement. Their response was sent fifteen days later. Given their response, I believe we can safely assure that despite Ms. Hamilton's oral representations, it seems highly unlikely that Trident will return an agreement to toll the statute or a satisfactory settlement agreement in the next 15 days. We must, therefore, come to an agreement on how to proceed.

If we file suit after the period for the statute of limitations (sol) has run, Trident will immediately file a motion for summary judgment. A motion for summary judgment asks the court to dismiss a case against a party because legally, it cannot be brought. Trident will likely win this motion because all they must demonstrate is that the SOL has run. If the motion for

summary judgment (mgs) is granted, our suit will essentially be dismissed. I have researched this matter and believe that we may make two potential arguments to the court to allow the suit after the SOL has run, but neither is likely to be successful. We can argue a theory of promissory estoppel (based on a case called DeSonto V. Pendant Corp.) where we argue that we should be allowed to bring suit after the SOL because of a "promise" made by Trident. We would have to prove that Trident "promised" that we reasonably expected would come to fruition and that we did not bring suit because of it. We can refer to statements from Ms. Hamilton that reflect that Trident wished to settle but never did and because of their assurances to us, we wished to avoid litigation and come to an agreement however, the court has required a "clear and definite promise and has held that relying on future intention of a possible settlement is not reasonable and so it would be difficult for us to win this argument because Ms. Hamilton never committed inequitably to settle. If a motion for sj is granted and we lose our appeal, the suit will be barred from being filed.

We could argue in the alternative that Trident should be equitably estoppel from asserting a SOL defense to our claim. To disallow them from using such a defense we would have to demonstrate that Trident did something which was intended to cause us to believe certain facts (ie. that they would settle), that as a result we did something that we would not otherwise do (have, wait to file suit) and that we exercised due diligence in our effort to settle. There are two cases decided in Franklin "Henley V. Yunker and Merchants' Mutual Insurance Co. V. Budd) which seem to demonstrate that general statements like "there is enough time" are not enough; rather we would have to prove that Trident took active steps to prevent us from filing suit (Merchants')

Certainly, Ms. Hamilton has stalled repeatedly despite our extending our deadline (June to October to January). In another case, where an insurance company made repeated representations that they would settle, the court applied the doctor of equitable estopped (EE) and the suit way not barred, however, the defendant in that case gave a definite time and said they would "honor" the claim. Ms. Hamilton has said she would consult with Trident to finalize the settlement but never committed to a time or a definite statement of responsibility. Therefore, it is unlikely that we would be successful if we made these arguments on appeal.

Mr. Moreno, we understand your position and your desire not to go to trial if possible but at this point, we may be barred from suing altogether. We attempted to resolve this matter beginning in June. Trident has made some statements which made it seem like they may settle or agree to toll the SOL but they have not. We are unlikely to prevail on appeal if they are granted a MSJ and therefore, we urge you to file suit before the SOL runs or the action will be barred. We will await your decision before proceeding any further, but please note the fifteen delay deadline.

As always, if you have any questions please do not hesitate to call.

Sincerely,

Thomas Perkins

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[RAWSON HUGHES & CONRAD, LLC Letterhead]

February 28, 2012

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

Dear Mr. Moreno,

I am writing this letter because the statute of limitations is close to expiring on your claim against Trident. We understand your desire to avoid litigation with Trident, and although filing a complaint prior to the expiration of the statute of limitations would be certain to protect your claim against trident, Franklin courts recognize a doctrine of equitable estoppel and a doctrine of promissory estoppel which could permit WPE to preserve its claim even after the statute of limitations has expired. Nonetheless, given the facts at hand, we must caution you that it would likely be difficult for WPE to convince a court to apply the docrine, and therefore WPE must understand that it is taking a very real risk by not filing a complaint against Trident prior to the close of the statute of limitations.

First, I address the doctrine of equitable estoppel as applied. In attempting to employ equitable estoppel to prevent a defendendant from asserting the statute of limitations as a defense, the burden is on the plaintiff to show by "clear and convincing evidence" (a high evidentiary standard) that all elements required for application of the doctrine have been met. The tripart test setting for the elements for equitable estoppel was detailed by the Franklin Court of Appeal in Henley: "(1) the defendant has done or said something that was intended or calculated to induce plaintiff to believe in the existence of certain facts and to act on 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, in as much as equitable estoppel is not available to a person who conducts himself or herself with a careless indifference or ignores highly suspicious circumstances" (emphasis added).

In Henley the court held that certain purported misrepresentation made by a defendant to an unsophisticated plaintiff claiming personal injury and unrepresented by counsel were not sufficient to warrant the application of equitable estoppel to save plaintiff. When, for example, the unsophisticated plaintiff expressed concern about the statute of limitations expiring, he was told by defendant not to worry because "he had plenty of time". The court stated that such a statement would not be misleading unless plaintiff could show it was made in the day or two prior to the expiration of the statute of limitations. Likewise, although defendant a asked plaintiff to sign a medical authorization three days prior to expiration of the statute of limitations, an action plaintiff claimed was calculated to induce him to believe a settlement was imminent so that he would not file, the court held that such requests are routine and plaintiffs belief that it constituted anything other than a routine request was unreasonable. Therefore the test for element (1) was not met because defendant had said or done nothing to induce plaintiff to believe he did not need to file.

A court would likely view our scenario similarly, particularly given that unlike the plaintiff in Henley you are a large and sophisticated real estate investor represented by counsel. We would attempt to argue that the frequent representations by Meg Hamilton on behalf of Trident that they are amenable to favorable terms to a settlement (though they have yet to sign), that they are willing to agree to toll the statute of limitations (though they have yet to sign), that she has frequently requested that we refrain from filing a lawsuit as we are on the verge of a settlement and her recent notice of January 25 that Trident is clarifying administrative matters so that it can settle were inducements to believe that Trident was prepared to settle and we did not need to file, meeting element (1). A court would likely not agree in light of Henley. It can be shown that we were fully aware of the deadline to file suit and aware of the repercussions (that we would have no standing to file) and therefore were not induced to unknowingly waive any recourse. Further, none of her "misrepresentations" (though more frequent than in Henley) were overly close to the expiration of the statutory period. Finally, although Henley was not required to reach element (2) or (3), those may cause trouble for us as well. As you have noted, you value WPE's services (very possibly more than the present legal claim), therefore it can be argued that you cannot meet your burden under (2) because you cannot show by clear and convincing evidence that you have done something (ie, failed to file the lawsuit) which you would not otherwise have done; ie, you would not have filed your lawsuit against WPE regardless of any misrepresentations because you value a continued relationship on good terms more than your legal claim. Finally, it can be argued that you cannot meet your burden under (3), because you have ignored highly suspicious circumstances. You began initiating settlement discussions with Trident shortly after the potential claim came into being, almost a year ago, and Trident though indicating they are amenable to settle has continued to delay while not agreeing to toll the statute of limitations--it could be argued that this behavior is suspicious and put you on notice that they were delaying settlement talks in hope the statutory period would expire. Failure by WPE to show any three of these grounds by the high standard of clear and convincing evidence is sufficient to prevent the application of equitable estoppel. It therefore appears unlikely that a court would apply it.

The Franklin Court of Appeals holding in Budd while more helpful also does not assure an application of equitable estoppel. In Budd, an insurance company repeatedly assured a plaintiff that it would honor its claim, effectively conceding that it was liable for the full amount of its claim. By assuring plaintiff claim would be paid it was able to delay filing of a claim until the statute had run. The court held that these intentionally dilatory tactics were unfair and plaintiff should be estopped from

The Franklin court of Appeals has also recognized a doctrine of promissory estoppel. Like equitable estoppel, all elements must be proved by the plaintiff by clear and convincing evidence. The elements were laid out in DeSonto: "(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" (emphasis added). The application of the doctrine in Desonto also makes it unlikely that a court would apply the doctrine in your case. The court held that reliance by a plaintiff on an expression of future intention was unreasonable and could not be reasonable because such expressions are not sufficiently definite--intent can always change. Therefore, while we would argue that Meg's frequent notices to us that Trident intended to pay for reinstatement of tax exempt status and to reimburse WPE for expenses incurred as well as her notice that Trident would sign the agreement to toll the statute of limitations were promises on which WPE was induced to rely, Trident would prevail because they were mere expressions of future intent which could change at any time and on which under (3) WPE was unreasonable to rely. Indeed, the court's holding in DeSonto would indicate that such promises which can be changed are not promises at all, especially because the settlement offer was subject to certain conditions. Finally it is doubtful that, as discussed above, WPE can be shown to have been induced to do anything it was not otherwise inclined to do under (2)

because it may well have declined to initiate a claim anyway in deference to Trident. Failure by WPE to show any three of these grounds by the high standard of clear and convincing evidence is sufficient to prevent the application of promissory estoppel. It therefore appears unlikely that a court would apply it.

In light of the foregoing, you should recognize that if WPE fails to file a claim before the statute of limitations expires it will likely be unable to maintain any legal action against Trident.

Very truly yours,

Thomas Perkins
Managing Partner, Tax Group

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

February 28, 2012

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

Re: Trident Matter

Dear Juan:

We are still in negotiations with the attorneys for Trident in an effort to reach a settlement agreement in order to avoid litigation in this matter. On January 10, 2012 I had a phone conversation with counsel for Trident in which she agreed to extend the statute of limitations for six months. That same day I sent her a letter memorializing that agreement but she has not signed and returned the agreement. I last heard from Trident's counsel on January 25, 2012. In that letter she stated that Trident still agrees in principle to settle the case, but that they are awaiting information regarding how the losses from this matter will be split between Trident's partners so that it can be included in the written settlement agreement. The statute of limitations for this matter will expire if we do not file suit by March 14, 2012.

I strongly urge you to consider filing suit against Trident prior to the March 14 deadline. Should you choose to file suit before then Trident will not be able to raise the statute of limitations as a defense to the claim. However, if we wait until after March 14 Trident will be able to argue that we filed suit after the statute of limitations, and our claim should be barred for that reason. If we file suit after March 14 and Trident raises a statute of limitations defense, there are two theories of law that we may be able to raise in order to allow our claim to proceed. I would like to say from the outset that I believe it will be difficult to prevail on either of these theories.

The first theory we can raise to defeat a potential statute of limitations defense is called promissory estoppel. In order to prevail on this theory we must prove four elements by clear and convincing evidence. First, we must show that Trident made a promise to settle which they knew we would rely on in order to delay filing suit prior to the statute of limitations expring. Second, we must show that their promise to settle actually caused us to delay filing suit until after the statute of limitations had run. Third, we must show that our delay in filing suit was reasonable. Finally, we must show that unfairness can be avoided only by the court enforcing Trident's promise to settle.

The Franklin Court of Appeals discussed the theory of promissory estoppel in a case called DeSonto v. Pendant Corp. In DeSonto the plaintiff was a member of the board of directors for the defendant corporation. A class action lawsuit had been brought against the corporation alleging violations of securities laws that related to the company's 401(k) plan. Attorneys for the corporation concluded

that the corporations officers and directors, including Mr. DeSonto, were precluded form participating in the lawsuit. They noted, however that any employees that were excluded from the class action would be able to take part in a separate settlement. They also noted that the settlement wold be pursuant to terms determined by the defendant corporation and that the ability to settle could be rescinded.

Mr. DeSonto later resigned from the board of directors and received a severance package. The vice president of the corporation also told Mr. DeSonto that his leaving the company woul have no effect on his ability to participate in the settlement. Two months after he left the defendant corporation however, he received a memo stating that the settlement program would be available only to those who continued to be emlpoyees of the defendant corporation at the time the settlement funds were distributed. Mr. DeSonto then brought suit against the corporation, but the trial court dismissed the claim because the statute of limitations had run.

On appeal Mr. DeSonto argued that he was excused from the statute of limitations under a theory of promissory estoppel. The Court of Appeals disagreed with Mr. DeSonto because it found that there was not a clear enough nor definite enough promise made to Mr. DeSonto. The Court concluded that Mr. DeSonto had relied instead on a statement of future intent, and that such statements are not constitute a promise for purposes of this theory. This is similar to our case. Counsel for Trident has stated on many occassions that it will reach a settlement agreement with WPE at some point in the future, but it has not agreed yet to a settlement nor conclusively promised that it will settle.

The Franklin Supreme Court also concluded in Gruen Co. v. Miller that where a promise is subject to conditions which are under the control of a third party, the promise is conditional and is therefore cannot be enforced under a theory of promisory estoppel. This is similar to our case in that counsel for Trident states that a settlement will be forthcoming at some point, but that Trident's partners must first agree as to how any losses will be distributed so as to incorporate those terms in the settlement agreement. This is a condition under the control of a third party which makes any promise to settle on the part of Trident conditional. For these reasons it is very unlikely that we will be able to prevail on a theory of promissory estoppel.

Another theory which we could pursue to defeat any potential statute of limitation defense raised by Trident is the theory of equittable estoppel. To prevail on a theory of equitable estoppel we must prove the following elements by clear and convincing evidence. First, we must prove that Trident has done or said something that was intended to make us believe that settlement is pending and to act upon that belief. Second, we must show that we were influenced by Trident's statements that a settlement was near and that we delayed filing suit because of those statements. Finally, we must show that we exercised our due diligence in that we did not ignore any suspicious circumstances that warned us that any settlement discussions with Trident may push us past the statute of limitations period and would preclude us from bringing our claim. This may be more applicable to our case because Trident has represented that settlement is forthcoming and we have waited to file suit based on those representations. However we may not be able to show that we meet the third element because we are aware of the limitations deadline and the fact that Trident has continually delayed in reaching a settlement agreement. While I believe that we would be more likely to defeat a statute of limitations defense under this theory, I still think the chances of prevailing under this theory are low.

In Merchants' Mutual Insurance Co. v. Budd the Frankling Court of Appeal ruled that where an insurance company made several representations over the course of a three year period that it would settle claims against it, the plaintiff was not precluded from bringing those claims after the three year statute of limitations had passed. In reaching that conclusion the Court found that the defendant had unfairly lulled his adversary into a sense that the case would be settled only to have the defendant raise the statute of limitations as a defense when the plaintiff filed suit past the statutory period. This is similar to our case where we have attempted to reach a settlement with Trident and they have

assured us on several occassions that a settlement would be forthcoming.

The Franklin Court of Appeals has also ruled the even unintentionally deceptive actions that induce a party to delay filing suit may allow that party to raise equitable estoppel to defeat a statute of limitations defense. In our case, there is no evidence that Trident is engaging in this behavior in order to intentionally cause us to bring suit past the statute of limitations deadline, but even if it is not intentionally doing so it is possible that a court would find that Trident's actions are sufficient to invoke the doctrine of equitable estoppel.

It should be noted, however, that in Merchants Mutual the defendant had told the plaintiff on several occassions that it would honor its claims and thus conceded liability on those claims. This is different from our situation. Counsel for Trident has indicated that although they would like to reach a settlement in order to avoid litigation, they are not conceding liability. Therefore it is possible that a court could rule that our claim for equitable estoppel is insufficient because Trident has not conceded liability.

We should also consider the fact that these theories are equitable legal theories meaning that a court will employ them only where fairness requires them. In our case we are well aware of the statute of limitations period and have even sent Trident a tolling agreement so that we can have an extension of that period. In weighing whether we should be able to defeat a statute of limitations defense with one of these theories the court will likely take into account our awareness of the limitations period, and, if we do not file suit or file past the limitations period, our failure to file our suit on time.

You can see that it will be difficult to prevail on either of these theories. I strongly urge you to consider the consequences of not filing suit by March 14, 2012. If we do not file suit by then it is possible that we will have no legal options left against Trident and that WPE will be solely responsible for the tax burden that has arisen due to Trident's actions.

With Kindest regards,

Tom