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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-181432 DATE: October 20, 1978

MATTER OF: Small Business Administration Purchase of Loans When Guaranty Fee is Not Paid Prior to Default

DIGEST:

1. Provisions in Small Business Administration (SBA) Guaranty Agreement which state that (1) until required fee is paid, loan is not covered by SBA guarantee and (2) fee must be paid by the lending institution within five days of the first disbursement of the loan, create condition precedent binding on the lending institutions and SBA. While the requirement that the fee be paid within five days is not necessarily a material one, the requirement for payment of the fee prior to the borrower's default is crucial to Government's interests and SBA may not purchase the guaranteed loan if the fee has not been paid prior to default. B-181432, March 13, 1975, is affirmed.

2. Our decision B-181432, March 13, 1975, which held that under Guaranty Agreement Small Business Administration (SBA) could not purchase guaranteed loan if required guaranty fee had not been paid by lender before loan went into default is affirmed. No officer or agent of Government has authority to waive this type of contractual right which has accrued to the United States without compensating benefit. Moreover, SBA is not estopped from enforcing guaranty fee provision since 4-step test for estopping Government has not been satisfied.

This decision is in response to a request from the Administrator of the Small Business Administration (SBA) for our Office to reconsider our ruling in B-181432, March 13, 1975. In that decision, we concluded that under the language of the Blanket Guaranty Agreement in effect between SBA and lending institutions participating in SBA's guaranteed loan program, SBA could not purchase a guaranteed loan if the required guaranty fee had

not been paid by the bank before the loan went into default or before the bank had reason to believe that a default was imminent.

The Administrator's request for reconsideration was made in the context of litigation that has arisen as a result of SBA's refusal, pursuant to our decision, to honor its guaranty on several loans made by two California banks--the Bank of America National Trust and Savings Association and the Crocker National Bank (plaintiffs). Enclosed with the Administrator's letter was a memorandum prepared by legal counsel for the plaintiffs which takes the position that our original decision was legally erroneous and should be modified to allow SBA to purchase loans even though the guaranty fee was not paid prior to default. This memorandum was submitted to our Office pursuant to the specific request of the United States Attorney for the Northern District of California and the Assistant United States Attorney handling the litigation in an attempt to achieve "administrative resolution of this dispute." SBA's letter also contained a copy of a Department of Justice memorandum recommending settlement in a similar case, Santa Monica Bank v. A. Vernon Weaver, U.S.D.C., C.D. Ca., Case No. 77-2133-FW, on the basis of which an out of court settlement was reached in that case.

Generally, our Office will not render a decision on a matter that is before a court of competent jurisdiction. See 53 Comp. Gen. 730 (1974); and 52 Comp. Gen. 706 (1973). However, we will consider a question submitted to us where the court requests or expects our decision. See 55 Comp. Gen. 413 (1975); and 56 Comp. Gen. 487 (1977).

Since the Justice Department has stated that the courts in which the two suits are pending have been advised of the Department's attempt to resolve this litigation administratively, during which time the courts have agreed to delay trial of both suits for a short period of time, we will consider SBA's request for reconsideration.

The Administrator sets forth the basis for SBA's request as follows:

> "* * * recent dispositions of cases on this same issue have presented a problem to the Agency and the Department of Justice attorneys representing the Agency from the standpoint of defensibility of the propriety of the Agency actions in denying liability under the SBA guaranty merely on the strength of the Comptroller General's Opinion without resort to the facts surrounding specific cases.

"In addition to the suits filed by the Bank of America and Crocker National Bank, four other suits have been brought against the Agency. Two of these, Santa Monica Bank v. A. Vernon Weaver, U.S.D.C., C.D. Ca., Case No. 77-2123-FW, and First Enterprise Bank v. Mitchell Kobelinski, U.S. D.C., N.D. Ca., Case No. C-76-566-WHO, have been settled by the Department of Justice. In each of these cases, the bank agreed to forego interest to which it normally would have been entitled upon payment by SBA of its participation share of principal. For your information and review, we enclose a copy of the memorandum from the Department of Justice which sets forth a legal analysis of the Santa Monica litigation. In concluding its memorandum, the Department states that 'the facts strongly favor the plaintiffs' argument that the plaintiffs were justified in believing that the timing of the payment of the guaranty fee was not material to a valid Guaranty Agreement.' (Emphasis added.)

"To date the Agency has denied liability on approximately thirty-seven loans on the basis of the Comptroller General's Opinion B-181432. These loans involve a total principal indebtedness of approximately $1,000,000. Since the facts in Santa Monica are fairly representative of all denials, we are of course concerned that more suits will be filed against the Agency with the same end results. We therefore urge that your ruling be reconsidered in light of the analysis prepared by the California banks and the position taken by the Department of Justice.

"To facilitate the disposition of these cases without resort to unnecessary litigation, it is suggested that the Agency be authorized to negotiate settlements in loans where it is apparent that the facts of such cases are parallel to the facts presented in Santa Monica and First Enterprise. In each such case settlement would be attempted on the same basis on which Santa Monica and First Enterprise were settled. Settlement offers would be extended only to those banks where it is clearly demonstrated that the bank inadvertently neglected to pay the guaranty fee. Settlement would not be attempted if the facts indicate that the banks were grossly negligent in payment of the fee or attempted to avoid payment thereof."

Our conclusion in the subject decision was based largely on the language of paragraph 2 of the Blanket Guaranty Agreement which provides that "An approved loan will not be covered by this agreement until lender shall have paid the guaranty fee for said loan as provided in paragraph 5 of this agreement." We also relied on the longstanding principle that no officer or agent of the Government has the authority to waive contractual rights which have accrued to the United States or to modify existing contracts to the detriment of the Government, without adequate legal consideration or a compensating benefit to the Government.

In their memorandum, the plaintiffs maintain that our decision is erroneous from a legal standpoint since the guaranty fee provision contained in the Guaranty Agreement should not have been treated as a condition precedent. To support their position the plaintiffs make the following four basic arguments:

"(1) The contract language is ambiguous as to the status of the guaranty if the fee is paid after the expiration of the 5 day period.

"(2) The requirement that the fee be paid within 5 days is not material to the contract, and enforcement of the requirement, as a condition precedent, would result in a total forfeiture.

"(3) The requirement that the fee be paid within 5 days was waived by SBA personnel.

"(4) SBA may be estopped by its actions from enforcing the requirement that the fee be paid within 5 days."

The Justice Department memorandum prepared in connection with the Department's settlement in the Santa Monica litigation also takes the position that the facts of that particular case support the Santa Monica Bank's assertion that it was "justified in believing that the timing of the payment of the guarantee fee was not material to a valid Guaranty Agreement."

The provisions of the Guaranty Agreement which are in dispute are paragraphs 2 and 5. Paragraph 2 provides that a loan is not guaranteed until the lender has paid the guaranty fee required by paragraph 5. Paragraph 5 provides in pertinent part as follows:

> "Within 5 days of the first disbursement on account of each loan, Lender shall pay SBA a one time guarantee fee amounting to 1 percent of the total amount guaranteed by SBA. However, in those cases where the SBA share is $100,000 or more, a fee may be paid in two installments: one-half within 5 days of the first disbursement, and one-half on the first anniversary thereof or upon Lender's demand for SBA purchase in the intervening period. If the two installment option is elected, an approved loan will be covered by this agreement upon payment of the first installment. * * *"

(The plaintiffs' legal memorandum also refers to paragraphs 2 and 5 of a different type of guaranty agreement covering contract or line of credit loans, although those provisions are essentially the same.)

1. The Five Day Rule.

Both the plaintiffs and the Department of Justice contend that the requirement that the guaranty fee be paid within 5 days is neither a condition precedent nor material to the basic agreement between the SBA and the lending institution. We believe, however, that our prior decisions have been misconstrued.

In light of the first sentence of paragraph 5, the plaintiffs state that the "SBA contract is ambiguous as to the status of the guaranty if the fee is not paid within five days but is paid thereafter." We agree. In fact, our decision of March 13, 1975, specifically recognized that the Agreement is ambiguous in this respect when we said the following:

> "It is clear under paragraph 2 of the Guaranty Agreement that an approved loan is not guaranteed thereunder 'until' the lender has paid 'the guaranty fee for said loan as provided in paragraph 5' thereof. Paragraph 5 provides, in pertinent part, that 'within 5 days of the first disbursement on account of each loan, lender shall pay SBA a one time guaranty fee amounting to 1 percent of the total amount guaranteed by SBA.' Although it might appear from reading paragraphs 2 and 5 together that unless the guaranty fee is paid within 5 days of first disbursement of the loan, SBA's obligation to 'guarantee' an approved loan is extinguished, the use of the word 'until' in paragraph 2 implies that lending institutions can pay the required fee after

> the initial 5-day period has elapsed. (Of course in such case the loan would not be covered by the guarantee until the fee is paid, since paragraph 5 modifies paragraph 2 only to the extent that it permits guaranty coverage of the loan from the date of first disbursement provided the guaranty fee is paid within 5 days of such date. Thus while paragraphs 2 and 5 of the Guaranty Agreement when read together may be somewhat ambiguous, we do not believe that such provisions need be construed as precluding SBA from guaranteeing the appropriate percentage of the balance of an approved loan outstanding on the date the guaranty fee is paid, provided, of course, that the loan is not in default and that neither SBA nor the lending institution are aware of, or have any information indicating, the likelihood of an imminent default by the borrower."

In other words, we have stated that we will not object to SBA's guaranteeing a loan where the required fee has been paid after the 5 days have elapsed. It is not the requirement that the fee be paid within 5 days of disbursement which we have considered to be the important and relevant condition precedent; rather, we believe that under the Guaranty Agreement, it is the payment of the guaranty fee any time prior to default (or knowledge of impending default) which is material to the agreement. However, if payment of the guaranty fee was also permitted after a default had occurred, or an impending default became known, all participating lending institutions would be able, in effect, to receive the full benefit of SBA's guarantee without having to pay anything for it until after the need for the guarantee become known. See B-181432, November 12, 1975. In many ways the guaranty fee requirement is analogous to the requirement in an insurance contract that the insured pay a premium prior to obtaining any insurance coverage. In the event the insured contingency occurred before the required premium was paid, no insurance coverage would exist. We believe the same rationale is applicable here.

2. Lack of Materiality.

As suggested in the plaintiffs' legal analysis, the implicit basis for our March 13, 1975, decision was our view that the guaranty fee requirement set forth in the Guarantee Agreement was a "condition precedent" to SBA's obligation to purchase the guaranteed portion of the loan upon default. A "condition precedent" is generally defined as follows:

> "* * * A condition precedent * * * is one which is to be performed before some right dependent thereon accrues or some act dependent thereon is performed. Federal Land Bank of Louisville v. Luckenbill, 213 Ind. 616, 13 N.E. 2d 531, 533. A 'condition precedent' is one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been agreed on, before the contract shall be binding on the parties. Rogers v. Maloney, 85 Or. 61, 165 P. 357, 358; Mercer-Lincon Pine Knob Oil Co. v. Pruitt, 191 Ky. 207, 229 S.W. 374."

See Black's Law Dictionary, 366 (Rev. 4th ed. 1968). Also see B-181432, February 19, 1976.

The plaintiffs also argue that the 5-day requirement is not material to the contract and that enforcement of the requirement as a condition precedent would result in an unfair forfeiture which would not be favored by the courts. As noted above, we do not consider the 5-day requirement to be a bar to SBA's guarantee of a loan.

To support its contention that the guaranty fee requirement was not a material part of the contract between SBA and the banks, the plaintiffs argue that the consideration for SBA's guaranty is not payment of the fee, but is the making of the loan to an otherwise unqualified borrower. Since the Federal Government is not in the business of guarantying loans for profit and since the fee is not required by the Small Business Act, the plaintiffs maintain that it would be difficult to convince the courts that payment of the fee is a material part of the guaranty contract. It is also argued that SBA personnel failed to adequately alert the banks as to the possible effect of the failure to pay the fee on time and generally did not treat the guaranty fee provision as a condition precedent.

We disagree with the plaintiffs' arguments in this regard. Although it is true that the Small Business Act does not itself require SBA to collect guaranty fees and that SBA is not in the business of guaranteeing loans for profits, it does not follow in our view that the fee payment requirement is not material. First, statutes authorizing an agency to establish a particular program commonly do so in general terms without specifying the precise manner in which the program is to operate. Generally, the agency administering the program is authorized

to promulgate such rules and regulations as are deemed necessary in order to realize the statutory purpose. Such a provision is contained in section 5(b)(6) of the Small Business Act, as amended, 15 U.S.C. § 636(b)(6) (1976), authorizing the Administrator of SBA to make such rules and regulations as he deems necessary to carry out the authority vested in him pursuant to the Small Business Act. Pursuant to this provision, SBA promulgated regulations which are contained in Chapter 1 of title XIII of the Code of Federal Regulations. The requirement that lending institutions participating in SBA's guaranteed loan program pay a guaranty fee is set forth at 13 C.F.R. § 120.3(b) (1977) which provides in pertinent part as follows:

> "In guaranteed loans * * *, a guaranty charge shall be payable by the financial institution to SBA for such agreements.
>
> * * * * *
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> "Effective January 1, 1973, the guaranty is set on a 1-time basis at 1 percent of the amount of the authorized guaranteed portion of the loan, and is payable at first disbursement by the participating lender. * * *"

We do not believe that a requirement such as this, set forth in clear and unambiguous terms in both the contract between the parties as well as a statutory regulation, can be said to be immaterial.

Furthermore although SBA did not require lenders to pay the guaranty fee as a condition precedent to SBA's guaranty until January, 1973, SBA has always charged this type of fee or its equivalent to lenders participating in SBA's guaranteed loan program as well as its predecessor--the deferred participation loan program. In fact, as explained by SBA in its original submission which resulted in our decision of March 13, 1975, the one-time guaranty fee provision that was adopted in 1973 was developed in order to resolve the administrative problems SBA had been having in collecting the fee. We were informally advised by SBA at that time that in some instances, lenders were not paying the guaranty fees unless the borrower defaulted, at which time SBA was requested to and in fact did purchase the guaranteed portion of the loan. It was also pointed out by SBA in its submission that substantial guaranty fee payments were involved. For instance, in fiscal year 1974 SBA received fee payments totaling $14,278,266.08.

Moreover, even if SBA may not have done everything possible to advise lending institutions that under the revised Guaranty

Agreement, payment of the guaranty fee "was a condition precedent" to SBA's guaranty, we do not believe that it was under any legal obligation to do so since the language in the agreement itself is, as stated above, clear and unambiguous in that respect. It is of course a fundamental precept of contract law that in the absence of fraud, misrepresentation, or similar valid legal defense, a party to a contract is bound by the provisions contained therein, notwithstanding any allegation that he was unaware of the existence of some or all of such provisions. See B-181432, July 7, 1978.

Also a reexamination of SBA's original submission reveals that SBA did view the guaranty fee provision as a condition precedent. As explained by SBA, in the summer of 1974, the agency began to become aware of the number of lenders that were not complying with the guaranty fee requirement. Accordingly a uniform follow-up procedure memorandum was issued to all of SBA's field offices containing a sample form letter to be sent to all delinquent lenders advising them that if the fee were not received within 15 days, SBA's guaranty would be terminated. The instruction memorandum and the form letter also stated "that the delinquent fee would not be accepted by SBA where the borrower was in default on the loan prior to the payment of the guaranty fee." (Emphasis added.) Considering all of these circumstances, we cannot agree that payment of the guaranty fee was an immaterial part of the contract between SBA and participating lenders.

3. Waiver and Estoppel.

The plaintiffs maintain that, as a matter of law, SBA either waived the requirement that the fee be paid within five days of disbursement or, in the alternative, that SBA is estopped from enforcing that requirement. As stated above, it is the payment of the guarantee fee prior to default, rather than within five days of default, which is material and we will focus our discussion on that factor.

SBA has not specifically requested that we determine whether waiver or estoppel might form the basis for upholding its guarantee of any or all of the specific loans involved here. Although for purposes of discussion, we have assumed, to a limited extent, that the plaintiff's specific allegations are representative of other loans in which the guarantee fee was not paid prior to default, we have not focused our attention on the loans to these plaintiffs.

For the reasons discussed below, and in some of our prior decisions, we continue to hold that SBA has not waived or been estopped from enforcing the requirements of its guarantee agree-

ment that the fee be paid before the loan is covered. While the doctrines of waiver and estoppel might, in a particularly compelling case, form the basis for a conclusion that SBA's guarantee was still in effect for a specific loan, a specific showing in that case of unusual and compelling circumstances would be required.

A. Waiver

The plaintiff's waiver argument appears to be based on several factors. First, it is alleged that with respect to several of the loans involved, correspondence between the banks and SBA continued to treat these loans as if SBA's guaranty was still in effect, even though the guaranty fee had not been "timely" paid. SBA's action in this connection included meeting and working with the lender and the borrower in an attempt to solve the borrower's problem, approval of revisions in the loan agreement in one instance, and other similar actions tending to show a real and continued interest in the loan. Second, it is maintained that in several instances SBA specifically advised the bank, after default had occurred and the bank had demanded payment on the guaranty, that the bank's demand had been approved even though the fee had not been paid. In this connection it is also alleged that SBA requested and accepted payment of the guaranty fees on several loans after SBA was aware that the loan had already defaulted. With respect to two of the four loans involved, it is further alleged that SBA has never returned and is still holding the respective guaranty fees. Finally it is argued that SBA took specific actions on several loans after the defaults had occurred, including requesting assignment of the loan documentation and collateral and partially liquidating the collateral in one case, even though the guaranty fees had not been paid prior to default.

In discussing the waiver theory, the 5-day requirement is intertwined. It should again be noted that the plaintiffs contention that the 5-day requirement was waived by SBA is not in issue, since, as stated above, our decision was not based on the failure of lenders to pay the fee within 5-days of disbursement.

Our decision was based on the failure of lenders to pay the fee at any time prior to default by the borrower. We addressed the waiver argument in our original decision when we said the following:

> "With regard to SBA's accepting the guaranty fee after a loan is in default, it is clear that such action would modify to the Government's detriment the terms of sections of the Guaranty Agreement requiring payment of the guaranty fee before the loan is covered by the guarantee. The stated rule

> in this regard is that no officer or agent of the Government has the authority to waive contractual rights which have accrued to the United States or to modify existing contracts to the detriment of the Government without adequate legal consideration or a compensating benefit flowing to the Government. See 46 Comp. Gen. 874 (1967); 45 id. 224 (1965); 44 id. 746 (1965); 41 id. 169 (1961); and decisions cited therein."

Also see Bausch & Lomb Optical Company v. United States, 79 Ct. Cl. 584, 607 (1934) cert. denied 292 U.S. 645 (1934); and Pacific Hardware & Steel Company v. United States, 49 Ct. Cl. 327, 335 (1914).

In B-181432, November 12, 1975, we said the following:

> "If officers or agents of the Government do not have the authority to waive the contractual rights of the Government directly, they can not do so indirectly by means of following a particular course of conduct."

Also see B-181432, February 19, 1976.

We recognize that some exceptions to the general rule against waiver of contractual rights that have accrued to the Government have been made by the courts. In this regard the plaintiff relies primarily on three cases to support its position--First National Bank of McMinnville, Tennessee v. Kleppe, 409 F. Supp. 110 (E.D. Tenn. 1975), Gresham and Company, Inc. v. United States, 470 F.2d 542 (Ct. Cl. 1972), and Industrial Uranium Company v. United States, 376 F.2d 861 (Ct. Cl. 1967). However, it is our view that all of these cases are distinguishable from the matter under consideration.

The case involving the McMinnville Bank is of special interest since it also involves SBA's guaranteed loan program. In that case, the court concluded that the lender's failure to obtain certain agreed upon security documents constituted substantial and fundamental nonperformance by the lender, giving SBA the right to rescind its guarantee of the particular loan involved. Upon learning of the Bank's material "breach," SBA was confronted with an election of remedies--either to rescind its agreement or stand upon it. The court went on to hold that SBA's acceptance of the guaranty fee, payment of which was not a condition precedent, after learning of the breach by the Bank constituted a waiver of its right to rescind.

Unlike the case at hand, SBA's continued acceptance of the "consideration" it was entitled to under the contract did not subject the Government to immediate liability and require it to purchase the guaranteed portion of the loan. The borrower might never default on the loan and, hence, SBA might not be called on to honor its guarantee. That is, the Government merely chose to continue its existing contractual relationship. However, SBA's acceptance of the post-default payment of the fee in the instant situation--in contravention of the clear terms of the contract--would immediately subject SBA to payment of the guarantee.

Furthermore, we do not believe that the courts rulings in either Gresham or Industrial Uranium are applicable to the case at hand because both of those cases involve significantly different factual situations. In Gresham, the issue was whether a provision contained in the specifications of a Government procurement contract requiring that the dishwashers, that were the subject of the contract, be equipped with automatic detergent dispensers had been waived by the contracting officer overseeing the contract. We do not believe that a decision in the relatively specialized area of Government procurement law involving this type of provision is applicable to a situation involving a completely different type of provision in a Government loan program, compliance with which is required as a condition precedent of the Government's guaranty.

The Industrial Uranium case involved a provision in a circular published by the Atomic Energy Commission (AEC) concerning the maximum lime content of uranium bearing ores, which had never been enforced by the AEC since the circular had been published. Among other reasons, this case is not applicable to the instant situation because the Guaranty Agreement containing the condition precedent under which SBA was operating was relatively new and no pattern of either enforcement or nonenforcement had yet been established. As mentioned above, in the summer of 1974, prior to requesting our Office to concur in its proposal to waive this requirement, SBA initiated a procedure of alerting lenders that SBA would be enforcing the new provision, adopted in the prior year.

B. Estoppel

Having concluded that, as a general proposition, waiver is not applicable, we turn our attention to the closely related theory of estoppel, which was the primary basis for the Justice Department's recommendation to settle the Santa Monica litigation. The primary difference between the two theories is that the party

claiming estoppel must demonstrate some degree of prejudicial reliance on its part upon the misrepresentation of the party to be estopped.

In its settlement recommendation in the Santa Monica case, the Justice Department said the following regarding estoppel:

> "There is a significant possibility that the agency might, on the facts given supra, be estopped from raising the untimely payment of the guaranty fee as a defense to the action brought here. The agency practice at all times material to this action was to liberally allow late payment of the fee. It was this widespread practice which led the Administrator to plead with the Comptroller General for discretionary authority to pay guarantees which were entered into at a time when the SBA was not enforcing the prompt payment provision.
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> 'Actual enforcement of the new tightened procedure did not begin until after the first opinion of the Comptroller General of September 20, 1974, after the facts in this case had transpired.
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> "The specific transactions which occurred here were consistent with the agency's then existing practice of allowing late payment of the guaranty fee. All of the transactions which took place up to the denial of liability by the SBA, could reasonably have led the Bank to believe that the Guaranty Agreement was still binding on the agency. Even upon the discovery by the agency, when the demand for payment had been made by the Bank after default by the borrower, that the fee had not yet been paid, the agency merely informed the plaintiff Bank that the purchase check was being prepared and that payment of the fee was required before the guarantee monies could be forwarded to the Bank. The Bank has further support in their argument that there was at least a reasonable confusion on all sides, since the SBA and the plaintiff had in effect then six separate Guaranty Agreements on loans made by the Bank. Four of these agreements required only that the

guaranty fee be tendered upon billing by the SBA. * In response to the above notice that the fee needed to be paid before the agency would "forward" the guarantee check, the Bank responded by paying the guaranty fee the following day.

"Finally, the cases which have refused to apply estoppel against the government seemed to be based on upholding a statutory policy, United States v. Lazy FC Ranch, supra. However, there is no such statutory requirement or policy here. What is at issue here is the interpretation of SBA regulations and policies which affect the agency's programs and monies rather than issues which might be characterized as government-wide."

Several cases are cited by the Justice Department in support of its position, some of which are also cited by the plaintiffs, including United States v. Georgia-Pacific Company, supra; United States v. Lazy FC Ranch, 481 F.2d 285 (9th Cir. 1973); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); and California-Pacific Bank v. SBA, 557 F.2d 218 (9th Cir. 1977).

The plaintiffs memorandum is more specific in attempting to demonstrate the establishment of an estoppel against the Government, both as a general proposition applying to all loans in which SBA denied liability on the basis of non-payment of the required guaranty fee prior to default, and with respect to the four specific loans involved here. In general it is argued that the estoppel arises because of the "justified reliance by the banks and their belief that the payment requirement was not a condition precedent which invalidated the SBA guaranties." The actions that were allegedly relied upon included SBA's silence concerning the guaranty fee requirement and the result of a failure by the lenders to comply with that requirement as well as affirmative representations and actions by SBA indicating that the guarantees were in effect.

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*Our discussion here deals, of course, with only those Guarantee Agreements, in use since 1973, containing the two paragraphs discussed above, excluding these four loans in the Santa Monica case. Acceptance of late payment under the subject agreement is, as explained above, crucial only when faced with default by the borrower.

As noted in the Justice Department's settlement recommendation, as well as the plaintiff's memorandum, the courts have traditionally been reluctant to apply the doctrine of estoppel against the Federal Government or one of its agencies and have generally held that the Government is not subject to the same rules of estoppel as are private parties. This judicial reluctance is based on the theory that, because of sovereign immunity, the Federal Government is not responsible for the unauthorized acts of its agents. Thus, in the case of Utah Power and Light Company v. United States, 243 U.S. 389, 409 (1977), the Supreme Court said that "* * * the United States is neither bound nor stopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit * * *." Also see Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 (1947).

However, an estoppel argument has been successfully employed against the United States in certain circumstances. For example, in the leading case of United States v. George Pacific Company, 421 F.2d 92 (9th Cir. 1970), the following essential elements of estoppel were applied in a case involving the United States: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. See also Emeco Industries, Inc. v. United States, 485 F.2d 652, 202 Ct. Cl. 1006 (1973). Our Office, of course, recognizes and applies the rules set forth by the courts.

Although the applicabililty of the estoppel doctrine was not specifically addressed in our decision of March 13, 1975, we considered the estoppel argument in our subsequent opinion of November 12, 1975, supra, in which we said the following:

> "ENBT [the Bank] cannot claim that it was unaware of the requirement that the guarantee fee be paid at the loan was disbursed since this requirement was not only set forth in 13 C.F.R. 120.3(b) (1974) but was specifically included in paragraphs 2 and 5 of the Guarantee Agreement which also specified that a loan is not guaranteed until the lender has paid the fee as provided. In light of the foregoing, it is clear that ENBT must be charged with knowledge of the requirement that the guaranty fee was due at the time of disbursement of the loan, and that until the fee was paid, the loan would not be under the protection of SBA's guarantee. In this regard, the

court said in United States v. Shaw, supra, [137 F. Supp. 24, 28 (D.N.D. 1956)] p. 28-29, that:

> 'Estoppel cannot be invoked by one who knew the facts or was negligent in not knowing them. Where facts were equally known to both parties, or are facts which the one invoking estoppel ought, in the exercise of reasonable prudence, to know, there can be no estoppel. * * *
>
> 'Where the facts are equally known to both parties, there can be no estoppel' where both parties have equal means of ascertaining the facts, then, too, there can be no estoppel. * * *.
>
> 'To constitute an equitable estoppel there must exist a false representation or concealment of facts made with knowledge, actual or constructive, and the party to whom it was made must have been without knowledge or means of knowledge of the real facts * * *."

"Accordingly, we cannot agree that, by its actions, SBA in effect waived the rights it would otherwise have."

Having carefully considered the question once again, we do not believe that the legal analyses set forth by the Justice Department and the plaintiffs demonstrate that, as a general matter, SBA and the Government are estopped from enforcing the Guarantee Agreement as written. As stated in B-181432, November 12, 1975, supra, lenders cannot claim that they were unaware of the guarantee fee requirement since it is unambiguously set forth in the Agreement, nor, in our view, can lenders successfully argue that although aware of the guarantee fee requirement, they were not bound by it because of SBA's so-called laxity in enforcing the requirement. A similar argument, involving another provision in the Guarantee Agreement requiring lenders to notify SBA of defaults by the lender within 30 days thereof as a condition precedent to liability, was considered and rejected by our Office in B-181432, February 19, 1976, in which we said the following:

> "* * * the estoppel argument seems to be, in effect, that continued and presumably knowing failure by lenders to comply with this requirement

> must be excused because of SBA's failure to insist on strict compliance. In our view such an approach is completely untenable as a matter of law and is equally unjustifiable in terms of avoiding undue 'hardship' to the lending institutions."

Certainly, if a lender had some doubt as to the proper interpretation of paragraphs 2 and 5 of the Guaranty Agreement, or questioned whether SBA had actually agreed to waive these provisions, the most reasonable course of action would have been to request clarification from SBA in this regard. To the best of our knowledge, this was never done.

Instead, the theory adopted by the plaintiffs, and to a lesser degree by the Department of Justice, is that SBA's silence regarding the guaranty fee requirement and the failure of some lenders to comply therewith coupled, in some instances, with other exchanges between SBA and the lenders concerning the loans, implied that the guaranties were still in effect. The procedure followed by SBA may well have been improved from an administrative standpoint. However, it has been held that in order to estop the Government, "one must demonstrate that the agent's action constituted affirmative misconduct." See California-Pacific Bank v. SBA, supra, and cases cited therein. We do not believe that SBA's actions and inactions in dealing with lenders constituted "affirmative misconduct," especially where the guaranty fee requirement and the failure of lenders to comply with it, were never specifically addressed until after the defaults occurred.

Further, an essential element of estoppel is detrimental reliance by the party claiming the benefit of the estoppel. The Justice Department memorandum does not adequately deal with this issue. Although the plaintiffs' memorandum does attempt to demonstrate "detrimental reliance," we did not find the discussion persuasive in this regard. For instance, with respect to one of the four loans involved, it was alleged that the bank "relied upon the silence of SBA and the affirmative representations of SBA employees in lending money to someone who would otherwise have been denied a loan." However, it is obvious that this cannot constitute detrimental reliance since the loan was made and the rights fixed, prior to the action or nonaction by SBA personnel that was allegedly relied upon in making the loan.

In accordance with all the foregoing, we once again affirm our decision of March 13, 1975.

R.F. Keller

Deputy Comptroller General
of the United States