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B-198310, Apr 23, 1981

Number: B-198310

Date: 1981-04-23

B-198310, APR 23, 1981

DIGEST: SMALL BUSINESS ADMINISTRATION (SBA) IS NOT LIABLE ON BASIS OF ESTOPPEL THEORY TO REIMBURSE BANK FOR FUNDS BANK ADVANCED AS INTERIM FINANCING TO BORROWER ALLEGEDLY IN RELIANCE ON REPRESENTATIONS IN LETTER FROM SBA TO BORROWER THAT BORROWER'S APPLICATION FOR DIRECT HANDICAPPED ASSISTANCE LOAN HAD BEEN APPROVED. GENERALLY, ONLY PARTIES TO TRANSACTION OR THEIR "PRIVIES" CAN CLAIM BENEFITS OF ESTOPPEL. FURTHERMORE, BANK'S ALLEGED RELIANCE WAS NOT REASONABLE UNDER CIRCUMSTANCES, SINCE NO SBA OFFICIALS MADE ANY REPRESENTATIONS TO BANK AND BANK HAD NO ASSURANCES OF HAVING DIRECT ACCESS TO PROCEEDS OF SBA LOAN THUS ENSURING REPAYMENT OF INTERIM LOAN HAD SBA LOAN ULTIMATELY BEEN APPROVED.

SMALL BUSINESS ADMINISTRATION - BANK CLAIM TO RECOVER INTERIM LOAN TO SBA BORROWER:

THE SMALL BUSINESS ADMINISTRATION (SBA) SEEKS OUR CONCURRENCE IN ITS VIEW THAT IT HAS AUTHORITY TO REIMBURSE THE BANK OF AMERICA, SAN FRANCISCO, CALIFORNIA (B OF A) FOR FUNDS ADVANCED AS INTERIM FINANCING TO NEEDHAM ENERGY SYSTEMS CORPORATION (NESCO), SANTA ANA, CALIFORNIA. SBA'S POSITION IS THAT IT "HAS A LEGAL RESPONSIBILITY AND LIABILITY, UNDER THE THEORY OF PROMISSORY ESTOPPEL, TO REIMBURSE BANK OF AMERICA" FOR THE ADVANCES B OF A MADE TO NESCO IN RELIANCE ON STATEMENTS CONTAINED IN A LETTER FROM SBA TO NESCO.

IN NOVEMBER 1977, NESCO APPLIED TO SBA FOR A DIRECT HANDICAPPED ASSISTANCE LOAN UNDER SECTION 7(H) OF THE SMALL BUSINESS ACT, 15 U.S.C. SEC. 636(H). AN OFFICIAL FROM NESCO VISITED THE LOCAL SBA OFFICE TO REQUEST A LETTER FROM SBA CONCERNING THE STATUS OF ITS APPLICATION AND ADVISED SBA PERSONNEL THAT THE LETTER WOULD BE USED BY NESCO TO OBTAIN INTERIM BANK FINANCING. SBA'S FINANCE DIVISION, "UNDER THE APPARENT AUTHORITY OF THE LOS ANGELES DISTRICT DIRECTOR," EXECUTED A LETTER ADDRESSED TO NESCO, DATED DECEMBER 21, 1977, WHICH READ AS FOLLOWS:

"THIS WILL CONFIRM SBA APPROVAL OF YOUR LOAN IN THE AMOUNT OF $90,000. WE HAVE BEEN ADVISED THAT FUNDING WILL BE AVAILABLE SUBSEQUENT TO JANUARY 1, 1978."

THIS LETTER DID NOT CONTAIN EITHER ANY REFERENCE TO THE B OF A (OR ANY OTHER BANK) OR THE STANDARD PRECAUTIONARY LANGUAGE GIVING NOTICE TO THIRD PARTIES THAT ANY EXTENSIONS OF CREDIT WERE EXPRESSLY AT THE CREDITOR'S RISK, NOTWITHSTANDING THE INTENTION OF SBA TO MAKE FINANCING AVAILABLE TO THE BORROWER.

SUBSEQUENTLY, ON DECEMBER 23, 1977, AND FEBRUARY 9, 1978, THE B OF A, ALLEGEDLY IN RELIANCE ON SBA'S LETTER OF DECEMBER 21, ADVANCED $30,000 TO NESCO. (AN EARLIER $6,000 LOAN BY B OF A TO NESCO ON DECEMBER 12, 1977 IS NOT IN ISSUE.) ON JANUARY 3, 1978, SBA ISSUED A FORMAL LOAN AUTHORIZATION AND, ON JANUARY 12,

AGAIN ADVISED NESCO BY LETTER THAT ITS LOAN APPLICATION HAD BEEN APPROVED. THE JANUARY 3 LOAN AUTHORIZATION, WHICH CONTAINED NO REFERENCE TO THE B OF A, WAS MODIFIED BY SBA ON FEBRUARY 9, WITH THE ADDITION OF SEVERAL AMENDMENTS INCLUDING THE FOLLOWING:

"APPROXIMATELY $25,000.00 TO PAY OFF BANK OF AMERICA FOR INTERIM LOAN USED TO PURCHASE INVENTORY. APPROXIMATELY $6,000.00 TO PAY OFF BANK OF AMERICA FOR INTERIM LOAN FOR VARIOUS EXPENSES OF BUSINESS."

THE FILE CONTAINS NO EXPLANATION OF THIS MODIFICATION. IN FACT, THERE IS NOTHING THAT INDICATES THERE WAS EVER ANY DIRECT COMMUNICATION BETWEEN SBA AND THE B OF A.

ON FEBRUARY 16, 1978, NESCO EXECUTED A NOTE TO SBA WHICH READ IN PERTINENT PART AS FOLLOWS:

"THE UNDERSIGNED AGREES TO USE PROCEEDS OF THE LOAN SOLELY FOR THE PURPOSE SET FORTH IN THE AUTHORIZATION FOR THE LOAN ISSUED BY PAYEE, AND COMPLY WITH 'OTHER CONDITIONS' AS THEREIN SET OUT."

THEN, ON MARCH 21, 1978, SBA NOTIFIED NESCO THAT IT WAS CANCELLING ITS LOAN AUTHORIZATION AS FOLLOWS:

"BASED UPON YOUR FAILURE TO DISCLOSE ALL PERTINENT INFORMATION IN CONNECTION WITH YOUR APPLICATION FOR AN SBA LOAN IN THE AMOUNT OF $90,000.00, WE ARE HEREBY CANCELLING YOUR LOAN AUTHORIZATION DATED JANUARY 3, 1978."

SBA NEVER MADE ANY DISBURSEMENTS TO NESCO. THE B OF A IS NOW SEEKING REIMBURSEMENT FROM SBA OF $30,000, PLUS INTEREST.

THE ONLY LEGAL ISSUE IS WHETHER SBA IS LIABLE TO THE B OF A ON THE BASIS OF A THEORY OF PROMISSORY ESTOPPEL, AS URGED BY SBA. 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 (1916), THE SUPREME COURT SAID THAT "*** THE UNITED STATES IS NEITHER BOUND NOR ESTOPPED 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). OUR OFFICE HAS OFTEN RELIED ON THIS RATIONALE. COMP.GEN. 271 (1974); 46 COMP.GEN. 348 (1966); 44 COMP.GEN. 337 (1964); B-184130, JULY 3, 1975; B-182730, MAY 20, 1975; AND OTHER CASES CITED IN THOSE DECISIONS.

HOWEVER, AS POINTED OUT IN THE SUBMISSION FROM SBA, AN ESTOPPEL ARGUMENT HAS BEEN SUCCESSFULLY EMPLOYED AGAINST THE UNITED STATES IN CERTAIN CIRCUMSTANCES. FOR EXAMPLE, IN THE LEADING CASE OF UNITED STATES V. GEORGIA PACIFIC COMPANY, 421 F.2D 92 (9TH CIR. 1970), THE SAME FOUR ESSENTIAL ELEMENTS WHICH GIVE RISE TO ESTOPPEL IN TRANSACTIONS BETWEEN PRIVATE PARTIES 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 UNITED STATES V. WHARTON, 514 F.2D 406 (9TH CIR. 1975); EMECO INDUSTRIES, INC. V. UNITED STATES, 485 F.2D 652, 202 CT.CL. 1006 (1973); UNITED STATES V. LAZY FC RANCH, 481, F.2D 985 (9TH CIR. 1973); CALIFORNIA PACIFIC BANK V. SMALL BUSINESS ADMINISTRATION, 557 F.2D 218 (9TH CIR. 1977); AND UNITED STATES V. RUBY CO., 588 F.2D 697 (9TH CIR. 1978).

OUR OFFICE HAS RECOGNIZED AND APPLIED THIS SAME FOUR-STEP TEST IN DETERMINING WHETHER OR NOT AN ESTOPPEL CAN BE ESTABLISHED AGAINST THE GOVERNMENT. FN1 55 COMP.GEN. 911 (1976); 53 COMP.GEN. 502 (1974); B-181432, FEBRUARY 19, 1976; B-187445, JANUARY 27, 1977; B-188607, JULY 19, 1977; AND B-181432, OCTOBER 20, 1978.

ALTHOUGH THE QUESTION IS A CLOSE ONE, ON BALANCE THIS IS NOT A CASE IN WHICH ESTOPPEL AGAINST THE GOVERNMENT CAN BE JUSTIFIED. REDUCING THE ISSUE TO ITS MOST BASIC ELEMENTS, THE ARGUMENT FAVORING ESTOPPEL IS THAT THE B OF A FURNISHED INTERIM FINANCING TO NESCO IN REASONABLE RELIANCE ON THE REPRESENTATIONS CONTAINED IN SBA'S LETTER OF DECEMBER 21, 1977, IN WHICH SBA ASSURED NESCO THAT ITS APPLICATION FOR A DIRECT LOAN HAD BEEN APPROVED. THEREFORE, THE ARGUMENT CONTINUES, SBA SHOULD NOW BE LEGALLY BARRED OR "ESTOPPED" FROM REFUSING TO FULFILL THAT COMMITMENT TO THE EXTENT OF THE B OF A'S DETRIMENTAL RELIANCE ON THOSE REPRESENTATIONS. FN2

WE BELIEVE THIS ARGUMENT IS FUNDAMENTALLY FLAWED. AS RECOGNIZED IN THE SUBMISSION, SBA NEVER MADE ANY REPRESENTATIONS TO THE B OF A REGARDING THE STATUS OF THE BORROWER'S LOAN APPLICATION OR ANYTHING ELSE IN CONNECTION WITH THIS MATTER. THE THEORY OF ESTOPPEL "OPERATES ONLY ON THE PARTIES TO THE TRANSACTION OUT OF WHICH IT ARISES AND THEIR PRIVIES." POTWIN STATE BANK V. J. B. HOUSTON AND SON LUMBER CO., 183 KAN. 475, 327 P.2D 1091 (1958). ALSO SEE YOUNGER V. ESTATE OF YOUNGER, 198 KAN. 547, 426 P.2D 67 (1967); CRUMPLER V. BOARD OF ADMINISTRATION EMPLOYEES' RETIREMENT SYSTEM, 32 CAL.APP.3D 567, 108 CAL. RPTR. 293 (1973); BRUNSDALE V. BAGGE, 224 N.W.2D 384 (1974); AND OTHER CASES CITED IN THOSE DECISIONS. BASED ON THE DEFINITION OF "PRIVITY" AS "A RELATIONSHIP IN WHICH A PERSON IS SO IDENTIFIED IN INTEREST WITH ANOTHER THAT HE IS SAID TO REPRESENT THE SAME LEGAL RIGHT, ***" IT IS EVIDENT THAT NESCO AND THE B OF A WERE NOT "PRIVIES" IN THIS TRANSACTION, HAVING IN FACT VERY DIFFERENT INTERESTS, I.E. THOSE OF BORROWER AND LENDER. SEE CRUMPLER V. BOARD OF ADMINISTRATION EMPLOYEES' RETIREMENT SYSTEM, SUPRA, AT P. 305.

RECOGNIZING THIS PROBLEM, SBA MAKES THE FOLLOWING ARGUMENT:

"*** WE BELIEVE THAT B OF A MAY BE ABLE TO MAKE A STRONG ARGUMENT THAT A COMMITMENT LETTER SUCH AS THE ONE EXECUTED ON DECEMBER 21, 1977, MAY BE RELIED UPON BY A BANK EVEN THOUGH SUCH LETTER WAS NOT ADDRESSED TO IT. THIS ARGUMENT, COMBINED WITH ALL THE OTHER FACTORS IN THIS CASE, MAY SUPPORT ESTOPPEL AGAINST SBA.

"WE BELIEVE THAT IT SHOULD MAKE NO DIFFERENCE THAT B OF A ADVANCED FUNDS TO BORROWER ON THE BASIS OF A LETTER TO BORROWER, NOT TO B OF A. SBA KNEW THAT THE PURPOSE OF ITS LETTER WAS TO OBTAIN INTERIM FINANCING. IT SHOULD MAKE NO DIFFERENCE THAT B OF A WAS NOT SPECIFICALLY MENTIONED IN THE LETTER. IT WAS REASONABLE FOR B OF A TO RELY ON SUCH LETTER. A FORMAL LOAN AUTHORIZATION WAS ISSUED AND B OF A ADVANCED ADDITIONAL FUNDS. SUBSEQUENTLY THE ORIGINAL LOAN AUTHORIZATION WAS AMENDED TO REFLECT THAT PART OF THE PROCEEDS OF SBA'S LOAN WOULD BE USED TO REIMBURSE B OF A. YET THE CASE RECORD REFLECTS NO COMMUNICATIONS BETWEEN SBA AND B OF A. IT IS REASONABLE TO CONCLUDE THAT PERHAPS

SBA HAD BEEN AWARE OF B OF A'S INTEREST FROM THE BEGINNING."

IN ADDITION TO THE CASE LAW, CITED ABOVE, WHICH GENERALLY OPPOSES THIS INTERPRETATION, WE DO NOT AGREE WITH IT FOR ANOTHER REASON. IN ORDER TO BE SUCCESSFUL IN AN ESTOPPEL CASE, THE PARTY CLAIMING THE ESTOPPEL MUST BE ABLE TO DEMONSTRATE NOT ONLY THAT HE RELIED ON THE REPRESENTATIONS OF THE PARTY TO BE ESTOPPED, BUT THAT HIS RELIANCE WAS REASONABLE UNDER THE CIRCUMSTANCES. SEE RUST V. WESTERN WASHINGTON STATE COLLEGE, 11 WASH. APP. 410, 523 P.2D 204 (1974); AND B-187445, SUPRA.

THE B OF A'S ALLEGED RELIANCE ON SBA'S LETTER OF DECEMBER 21, 1977 WAS NOT REASONABLE UNDER THESE CIRCUMSTANCES. THAT LETTER WAS NEITHER ADDRESSED TO THE B OF A NOR DID IT CONTAIN ANY REFERENCE, EXPLICIT OR IMPLICIT, TO THE POSSIBILITY OF ITS BEING USED BY NESCO FOR THE PURPOSE OF OBTAINING INTERIM FINANCING. APPARENTLY, B OF A MADE NO ATTEMPT TO OBTAIN ASSURANCE FROM SBA - FORMAL OR INFORMAL - THAT THE BORROWER WOULD BE REQUIRED TO USE THE LOAN TO REPAY THE INTERIM LOAN. WITHOUT SOME DIRECT ASSURANCE FROM SBA, WE DO NOT BELIEVE IT WAS REASONABLE FOR THE B OF A TO ADVANCE $30,000 TO NESCO MERELY IN RELIANCE ON SBA'S LETTER OF DECEMBER 21 ADDRESSED TO NESCO. (FOR PURPOSES OF DETERMINING THE REASONABLENESS OF THE B OF A'S RELIANCE, THE EMPHASIS IN THE SUBMISSION ON SBA'S MOTIVES OR KNOWLEDGE WHEN IT EXECUTED THE DECEMBER 21 LETTER TO NESCO IS MISPLACED, SINCE THE RELIANCE ISSUE MUST BE CONSIDERED FROM THE PERSPECTIVE OF THE PARTY CLAIMING THE ESTOPPEL RATHER THAN THE PARTY TO BE ESTOPPED.)

WITH RESPECT TO THE FEBRUARY 9, 1978, MODIFICATION OF THE LOAN AUTHORIZATION, THERE IS NO EVIDENCE TO SUGGEST THAT THE B OF A RELIED UPON, OR WAS EVEN AWARE OF, THAT MODIFICATION PRIOR TO ADVANCING FUNDS TO NESCO. TO THE CONTRARY, BASED ON THE LANGUAGE OF THE AMENDMENT, AS WELL AS THIS DATE, IT APPEARS THAT THE ONLY PURPOSE OF THE AMENDMENT WAS TO ALLOW NESCO TO USE A PORTION OF THE FUNDS FROM THE SBA LOAN TO REIMBURSE THE B OF A FOR MONEYS THE BANK HAD ALREADY DISBURSED, OR WAS THEN COMMITTED TO DISBURSE, TO NESCO. OBVIOUSLY THEREFORE, SBA CANNOT ARGUE, NOR DOES IT EVEN ATTEMPT TO, THAT THE B OF A REASONABLY RELIED ON THE LANGUAGE OF THE AMENDED LOAN AUTHORIZATION IN DISBURSING ITS LOAN TO NESCO.

ALTHOUGH SBA'S SUBMISSION ANALYZES SEVERAL OF OUR DECISIONS TO JUSTIFY ITS POSITION, THE HOLDINGS IN THOSE DECISIONS DO NOT SUPPORT THE VIEW THAT THE B OF A'S RELIANCE ON SBA'S LETTER WAS REASONABLE AND THAT SBA THEREFORE MUST REIMBURSE THE BANK. TO THE CONTRARY, FOR THE MOST PART, THOSE DECISIONS TEND TO SUPPORT OUR CONCLUSION THAT THE BANK'S RELIANCE HERE WAS NOT REASONABLE AND THAT ESTOPPEL DOES NOT APPLY.

FOR EXAMPLE, IN 54 COMP.GEN. 219 (1974), OUR OFFICE CONSIDERED SBA'S AUTHORITY TO REPAY SEVERAL DIFFERENT LENDERS WHO HAD MADE INTERIM LOANS AT THE REQUEST, OR WITH THE APPROVAL, OF SBA EMPLOYEES AND IN RELIANCE ON PROMISES THAT THE BANKS WOULD BE REIMBURSED BY SBA. OF THE THREE DIFFERENT SITUATIONS WE CONSIDERED IN THAT DECISION, THE ONE CLOSEST TO THE INSTANT CASE INVOLVED A DIRECT SBA LOAN. SBA HAD APPROVED A LOAN TO THE BORROWER - BILL JAMES AUTO, INC. (JAMES) - AND ISSUED A FORMAL LOAN AUTHORIZATION. HOWEVER, ACTUAL DISBURSEMENT OF THE LOAN BY SBA WAS DELAYED AND THE DEPUTY REGIONAL DIRECTOR OF SBA WROTE TO THE GIRARD TRUST BANK REQUESTING INTERIM FINANCING FOR THE BORROWER. SBA'S LETTER TO THE BANK READ IN PERTINENT PART AS FOLLOWS:

"THIS AGENCY HAS APPROVED A $100,000 DIRECT LOAN TO WILLIAM A. JAMES, JR. ***. RELATIVE TO PRELIMINARY CONVERSATIONS WITH YOUR BANK, WE UNDERSTAND THAT YOU WILL ADVANCE $50,000 TO THE LOAN APPLICANT FOR THE INTERIM PERIOD UNTIL WE

COMPLETE THE CASE AND ESTABLISH A SETTLEMENT DATE. THE CHECK WILL BE DRAWN TO YOUR BANK AND THE $50,000 MAY BE WITHDRAWN WITH THE ACCRUED INTEREST AND THE BALANCE OF THE TOTAL WILL BE DEPOSITED IN THE ACCOUNT OF THE BORROWER FOR HIS BUSINESS ACCOUNT."

AFTER RECEIVING SBA'S LETTER, THE BANK MADE THE INTERIM LOAN BUT SBA LATER REFUSED TO DISBURSE ITS DIRECT LOAN BECAUSE THE BORROWER DISAPPEARED AND HIS BUSINESS FAILED. WE HELD THAT SINCE A PROPERLY AUTHORIZED SBA OFFICIAL HAD ADVISED THE BANK IN WRITING THAT THE LOAN HAD BEEN APPROVED AND THAT SBA'S CHECK WOULD BE DISBURSED DIRECTLY TO THE BANK, THUS ASSURING REPAYMENT OF THE INTERIM LOAN, SBA WAS LEGALLY OBLIGATED TO REIMBURSE THE BANK FOR "ANY ADVANCES MADE IN REASONABLE AND JUSTIFIABLE RELIANCE THEREON." (ALTHOUGH OUR DECISION IN 54 COMP.GEN. 219 WAS NOT BASED ON APPLICATION OF ESTOPPEL THEORY AS SUCH, THE ANALYSIS FOLLOWED TRADITIONAL ESTOPPEL LINES.)

COMPARING THE JAMES CASE WITH THIS ONE, SEVERAL CRITICAL DIFFERENCES EMERGE. VIRTUALLY ALL OF THE FACTORS WHICH WERE PRESENT IN JAMES AND UPON WHICH WE BASED OUR DETERMINATION THAT SBA WAS LIABLE IN THAT CASE ARE ABSENT HERE. FIRST, IN JAMES THE LETTER WAS ADDRESSED DIRECTLY TO THE LENDER AND IMPLIED THAT SBA HAD SPECIFICALLY INTENDED THAT THE LENDER PROVIDE THE BORROWER WITH INTERIM FINANCING. THIS DIFFERENCE, STANDING ALONE, IS SUFFICIENT JUSTIFICATION TO DISTINGUISH THE TWO CASES.

FURTHERMORE, THE LETTER IN JAMES WAS SIGNED BY A PROPERLY AUTHORIZED SBA OFFICIAL, WHEREAS IN THIS CASE THE LETTER WAS SIGNED BY SBA'S FINANCE DIVISION "UNDER THE APPARENT AUTHORITY OF THE LOS ANGELES DISTRICT DIRECTOR." AS A GENERAL RULE, COURTS ARE ESPECIALLY RELUCTANT TO ESTOP THE FEDERAL GOVERNMENT WHEN THE REPRESENTATIONS UPON WHICH THE ESTOPPEL IS BASED WERE MADE BY A GOVERNMENT AGENT ACTING ONLY WITH APPARENT AUTHORITY BEYOND THE SCOPE OF HIS ACTUAL AUTHORITY. SEE FEDERAL CROP INSURANCE CORPORATION V. MERRILL, SUPRA. ALSO, SEE HICKS V. HARRIS, 606 F.2D 65 (5TH CIR. 1979); AND WEST VIRGINIA HOUSING DEVELOPMENT FUND V. SROKA, 415 F.SUPP. 1107 (W. D. PA. 1976).

FINALLY, IN THE JAMES CASE, SBA'S LETTER ADVISED THE BANK THAT THE $100,000 CHECK REPRESENTING THE SBA LOAN WOULD BE DRAWN TO THE BANK, THUS ASSURING THE BANK THAT IT WOULD BE ABLE TO RECOVER ITS $50,000 LOAN DIRECTLY FROM THE PROCEEDS OF THE SBA LOAN BEFORE THE BORROWER HAD ACCESS TO THOSE FUNDS. IN THE CASE AT HAND, SINCE SBA'S LETTER TO NESCO WAS NOT ADDRESSED TO THE B OF A AND DID NOT SEEM TO CONTEMPLATE NESCO'S USE OF THE LETTER TO OBTAIN INTERIM FINANCING FROM A BANK (NOTWITHSTANDING SBA'S CONTENTION THAT THAT WAS THE PURPOSE OF THE LETTER), IT DID NOT ENABLE A BANK THAT DID FURNISH INTERIM FINANCING TO NESCO TO HAVE ANY CONTROL OVER THE PROCEEDS FROM THE SBA LOAN.

THIS LAST DISTINCTION BETWEEN THE TWO CASES LENDS FURTHER SUPPORT TO OUR POSITION THAT THE B OF A'S RELIANCE ON SBA'S LETTER OF DECEMBER 21 WAS NOT REASONABLE UNDER THESE CIRCUMSTANCES. EVEN IF SBA HAD COMPLETED ITS LOAN TO NESCO, THE B OF A WOULD HAVE HAD NO WAY TO BE CERTAIN THAT NESCO WOULD IN FACT USE THOSE FUNDS TO PAY OFF THE BANK'S LOAN AND SBA, HAVING NO UNDERSTANDING OR ARRANGEMENT WITH THE B OF A, WOULD NOT BEAR ANY LIABILITY TO THE BANK IN THE EVENT THE BORROWER, FOR WHATEVER REASON, FAILED TO USE THE PROCEEDS OF THE SBA LOAN TO REPAY THE INTERIM LOAN. WITHOUT ASSURANCES FROM SBA, THE BANK WAS IMPLICITLY AGREEING TO LOOK SOLELY TO THE BORROWER FOR REPAYMENT - USING WHATEVER RESOURCES WERE AVAILABLE TO THE BORROWER, INCLUDING PERHAPS THE PROCEEDS OF AN SBA LOAN. BY DOING SO, THE B OF A WAS NECESSARILY ACCEPTING ALL OF THE RISKS INHERENT IN FOLLOWING SUCH A COURSE OF ACTION.

IN THIS CONNECTION, THE SITUATION HERE IS IN MANY RESPECTS LIKE THE SITUATION IN SEVERAL OTHER DECISIONS IN WHICH WE HELD THAT SBA BORE NO LIABILITY TO THE BANKS INVOLVED. IN B-164162, SEPTEMBER 20, 1968, EMPLOYEES OF A NON-FEDERAL INSTITUTION - THE FEDERAL SMALL BUSINESS DEVELOPMENT CENTER - WHO WERE AUTHORIZED BY SBA TO PROCESS SBA LOANS, PROMISED THE BANK THAT ITS INTERIM LOAN TO THE BORROWER WOULD BE REPAID FROM THE PROCEEDS OF THE SBA LOAN. WHEN SBA DISBURSED ITS LOAN TO THE BORROWER, THE SBA ATTORNEY WHO CLOSED THE LOAN REQUESTED THE BORROWER TO PROVIDE A CERTIFIED CHECK PAYABLE TO THE BANK THAT HAD MADE THE INTERIM LOAN. ALTHOUGH THE BORROWER DID OBTAIN A CERTIFIED CHECK, HE FAILED TO DELIVER IT TO THE BANK AS AGREED. NEVERTHELESS, WE HELD THAT, SINCE SBA'S ONLY INVOLVEMENT IN THE TRANSACTION BETWEEN THE LENDER AND THE BORROWER WAS PURSUANT TO A REQUEST FROM A NON-FEDERAL ENTITY TO AUTHORIZE A PORTION OF THE SBA LOAN PROCEEDS TO BE USED TO REPAY THE LENDER'S INTERIM LOAN, WHICH SBA IN FACT DID, SBA HAD NO AUTHORITY TO ASSUME THE BORROWER'S OBLIGATION TO THE LENDER.

OUR HOLDING IN B-178250, AUGUST 6, 1973 (CITED IN SBA'S SUBMISSION) APPEARS TO BE EVEN CLOSER TO THIS CASE. THAT CASE ALSO INVOLVED AN INTERIM LOAN MADE BY A BANK AFTER SBA'S APPROVAL OF A DIRECT LOAN TO THE BORROWER. ALTHOUGH THE BANK CLAIMED THAT AN SBA OFFICIAL HAD ORALLY PROMISED ITS EXECUTIVE VICE PRESIDENT THAT SBA WOULD MAKE THE BANK CO- PAYEE ON THE FINAL SBA CHECK DISBURSED TO THE BORROWER, WE BASED OUR DECISION ON THE ADMINISTRATIVE VERSION OF THE FACTS, WHEREIN IT WAS ASSERTED THAT NO SUCH COMMITMENT HAD BEEN MADE. IN OUR DECISION, WE STATED THE FOLLOWING:

"*** ACCORDINGLY, WE ARE REQUIRED TO ASSUME THAT MR. CHANDLER AN SBA OFFICIAL *** DID NOT AGREE THAT THE BANK WOULD BE MADE CO-PAYEE ON THE LOAN NOR DID HE PURPORT TO COMMIT THE SBA TO REPAY THE LOAN TO THE BANK IN THE EVENT THE BORROWER DID NOT.

"FROM THE RECORD BEFORE US WE FIND NO BASIS FOR CONCLUDING THAT THE SMALL BUSINESS ADMINISTRATION IS IN ANY WAY OBLIGATED TO THE *** BANK. RATHER, IT APPEARS FROM MR. CHANDLER'S STATEMENT AND FROM THE DIRECTOR'S LETTER TO US THAT THE BANK'S EXECUTIVE VICE PRESIDENT WAS NOT INFORMED THAT THE BANK WOULD BE MADE A CO-PAYEE ON THE CHECK. *** WE FIND NO EVIDENCE WHICH WOULD ESTABLISH A LEGAL DUTY ON THE PART OF SBA TO ASSURE THE REPAYMENT OF THE BANK'S LOAN THROUGH ITS OWN INDEPENDENT ACTION."

THUS, ALTHOUGH NEITHER OF THESE CASES SPECIFICALLY CONSIDERED THE ISSUE OF ESTOPPEL, OUR HOLDING IN BOTH DECISIONS THAT SBA WAS NOT LIABLE WAS BASED ON THE FACT THAT NO OFFICIAL FROM SBA HAD MADE ANY COMMITMENTS DIRECTLY TO THE BANKS THAT THE SBA LOAN, IF FORTHCOMING, WOULD BE MADE AVAILABLE TO THE BANK TO REPAY THE INTERIM LOANS. THE SIGNIFICANCE OF THIS FACTOR WAS EMPHASIZED IN THE JAMES DECISION, IN WHICH WE JUSTIFIED OUR DETERMINATION THAT SBA WAS LIABLE TO THE LENDER THERE BY DISTINGUISHING THE FACTS IN JAMES FROM THE FACTS IN B-178250, SUPRA, SPECIFICALLY ON THAT BASIS. 54 COMP.GEN. 219, SUPRA AT P. 230.

IN ANOTHER CASE, B-187445, JANUARY 27, 1977, ALSO CITED IN SBA'S SUBMISSION, WE SPECIFICALLY CONSIDERED AND REJECTED AN ESTOPPEL ARGUMENT IN CIRCUMSTANCES SOMEWHAT ANALOGOUS TO THESE. WE CONSIDERED WHETHER SBA COULD REIMBURSE A BANK FOR A $10,000 LOSS ON A LOAN TO MR. ROBERT SOTO, WHO WAS, AT THE TIME OF THE LOAN, A SMALL BUSINESS CONTRACTOR UNDER SECTION 8(A) OF THE SMALL BUSINESS ACT, 15 U.S.C. SEC. 637(A). THE BANK MAINTAINED THAT IT HAD MADE THE LOAN SOLELY ON THE BASIS OF REPRESENTATIONS, BOTH ORAL AND WRITTEN, FROM SBA EMPLOYEES. THE BANK MADE THE LOAN TO MR. SOTO AFTER AN SBA EMPLOYEE WENT TO THE BANK WITH A

LETTER ADDRESSED TO IT FROM AN SBA OFFICIAL IN THE SAN ANTONIO DISTRICT OFFICE, WHICH READ IN PERTINENT PART AS FOLLOWS:

"THE SMALL BUSINESS ADMINISTRATION ANTICIPATES PLACING APPROXIMATELY $10,000.00 IN YOUR BANK FOR BUSINESS DEVELOPMENT USE BY STANDARD MACHINE WORKS, AN AUSTIN FIRM OWNED AND OPERATED BY MR. ROBERT SOTO. A SPECIAL ACCOUNT WILL BE REQUIRED FOR WHICH ALL WITHDRAWALS ARE TO BE APPROVED OR CO-SIGNED BY THE SAN ANTONIO SBA DISTRICT DIRECTOR OR HIS DESIGNEE."

IN OUR DECISION, WE SAID THE FOLLOWING WITH RESPECT TO THE LETTER:

"*** ONLY THE OCTOBER 20 LETTER LENDS ANY SUPPORT TO THE ESTOPPEL ARGUMENT, AND ALL THAT LETTER INDICATES, GIVING IT THE MOST FAVORABLE INTERPRETATION POSSIBLE, IS THAT SBA HAD APPROVED THE PAYMENT OF BDE BUSINESS DEVELOPMENT EXPENSE FUNDS TO MR. SOTO. HOWEVER, THIS LETTER DOES NOT SUGGEST, EXPLICITLY OR IMPLICITLY, THAT THE BDE MONEY WOULD BE MADE AVAILABLE TO THE BANK TO ASSURE REPAYMENT OF MR. SOTO'S LOAN. IN THE ABSENCE OF SATISFACTORY PROOF THAT SUCH REPRESENTATIONS CONCERNING THE AVAILABILITY OF BDE FUNDS AS A SOURCE OF SECURITY FOR THE LOAN WERE ACTUALLY MADE, THE BANK WOULD CLEARLY NOT HAVE BEEN JUSTIFIED IN MAKING THE LOAN ON THE ASSUMPTION THAT THE BDE FUNDS COULD BE USED BY THE BANK TO REPAY THE LOAN. *** WE DO NOT BELIEVE THAT IT HAS BEEN DEMONSTRATED THAT WHATEVER ORAL REPRESENTATIONS WERE MADE REASONABLY LED THE BANK TO BELIEVE THAT ANY BDE FUNDS WHICH MIGHT BE FORTHCOMING COULD BE USED TO REPAY THE LOAN."

ALTHOUGH THERE WERE SOME OTHER DISTINGUISHING FACTORS IN THAT CASE UPON WHICH WE ALSO RELIED IN REACHING OUR CONCLUSION THAT SBA WAS NOT LIABLE TO THE BANK ON THE BASIS OF AN ESTOPPEL THEORY, THE APPLICABILITY OF THE FOREGOING QUOTATION TO THE MATTER AT HAND IS CLEAR. TOGETHER WITH OUR DECISIONS IN THE OTHER CITED CASES, OUR HOLDING IN B-187455, SUPRA, INDICATES THAT SBA, EXCEPT IN CERTAIN LIMITED CIRCUMSTANCES, HAS NO LEGAL OBLIGATION TO REIMBURSE A BANK FOR A LOSS SUFFERED ON AN INTERIM LOAN MADE BY THE BANK WITH THE EXPECTATION THAT THE BORROWER WAS GOING TO RECEIVE FUNDS DIRECTLY FROM SBA THAT HE WOULD USE TO REPAY THE BANK'S LOAN. SPECIFICALLY, BEFORE SBA CAN ASSUME ANY LIABILITY IN SUCH SITUATIONS, ON THE BASIS OF ESTOPPEL OR ANY SIMILAR THEORY, IT MUST BE DEMONSTRATED THAT THE LOAN WAS MADE IN RELIANCE ON REPRESENTATIONS FROM A PROPERLY AUTHORIZED SBA OFFICIAL DIRECTLY TO THE BANK, STATING THAT THE SBA FUNDING HAD BEEN APPROVED AND WOULD BE DISBURSED IN SUCH A MANNER AS TO PROVIDE THE BANK WITH SOME ASSURANCE THAT THE FUNDS WOULD BE MADE AVAILABLE TO THE BANK TO REPAY ITS LOAN. APPLYING THIS "TEST" TO THE CASE AT HAND, SBA IS NOT LIABLE TO THE B OF A UNDER AN ESTOPPEL THEORY, SINCE NO SBA OFFICIAL MADE ANY REPRESENTATIONS DIRECTLY TO THE B OF A CONCERNING THE STATUS OF THE BORROWER'S LOAN APPLICATION OR THE AVAILABILITY OF THE PROCEEDS FROM THE SBA LOAN TO REPAY THE BANK.

IN ACCORDANCE WITH THE FOREGOING, WE CANNOT CONCUR IN SBA'S VIEW THAT IT BEARS ANY LEGAL OBLIGATION TO REIMBURSE THE B OF A ON ITS LOAN TO NESCO.

FN1 IN ADDITION TO THE FOUR-STEP TEST ENUCIATED IN GEORGIA PACIFIC, IT IS GENERALLY RECOGNIZED THAT IN ORDER TO ESTOP THE GOVERNMENT "ONE MUST DEMONSTRATE THAT THE GOVERNMENT AGENT'S ACTION CONSTITUTED 'AFFIRMATIVE MISCONDUCT'." CALIFORNIA PACIFIC BANK V. SMALL BUSINESS ADMINISTRATION, SUPRA, AT P. 224. ALSO, SEE UNITED STATES V. WHARTON, SUPRA, AT P. 412; UNITED STATES V. RUBY CO., SUPRA, AT P. 703; AND B-181432, OCTOBER 20, 1978, SUPRA. AS IMPLIED IN SBA'S LETTER TO US, IT IS NOT CLEAR THAT ANY OF THE ACTIONS OF SBA EMPLOYEES IN CONNECTION WITH THIS MATTER COULD HAVE SATISFIED THE "AFFIRMATIVE MISCONDUCT"

REQUIREMENT. NEVERTHELESS, SINCE WE CONCLUDED THAT THE BASIC FOUR-STEP TEST FOR ESTOPPEL WAS NOT SATISFIED HERE, WE DID NOT BELIEVE IT TO BE NECESSARY TO ADDRESS THE "AFFIRMATIVE MISCONDUCT" ISSUE.

FN2 FOR PURPOSES OF THIS DECISION, WE ARE NOT QUESTIONING THE ALLEGATIONS MADE ON BEHALF OF THE B OF A THAT ITS LOAN TO NESCO WAS MADE TOTALLY IN RELIANCE ON THE SBA LETTER OF DECEMBER 21, 1977, THAT CONFIRMED APPROVAL OF THE DIRECT SBA LOAN TO THE BORROWER. HOWEVER, ON DECEMBER 12, 1977, PRIOR TO ANY INDICATION FROM SBA THAT THE BORROWER'S APPLICATION FOR AN SBA LOAN WAS GOING TO BE APPROVED, THE B OF A MADE A $6,000 LOAN TO THE BORROWER. WE WERE UNABLE TO OBTAIN ANY ADDITIONAL INFORMATION AS TO THE CIRCUMSTANCES SURROUNDING THAT LOAN. SIMILARLY, WE HAVE NO INFORMATION AS TO THE CURRENT STATUS OF THE B OF A'S LOAN TO NESCO. IF NESCO HAS NOT DEFAULTED ON THAT LOAN, A SERIOUS QUESTION WOULD ARISE AS TO WHETHER THE B OF A HAD SUFFERED THE TYPE OF FINANCIAL INJURY THAT MUST BE DEMONSTRATED TO BE SUCCESSFUL IN AN ESTOPPEL CASE. HOWEVER, SINCE WE WERE ABLE TO RESOLVE THE MATTER ON OTHER GROUNDS, WE DID NOT FIND IT NECESSARY TO PURSUE THIS LINE OF INQUIRY.