BRIEF FOR DEFENDANT-APPELLEE, THE UNITED STATES

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

00-5022

MELROSE ASSOCIATES, L.P.,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT
OF FEDERAL CLAIMS IN 97-415C ENTERED SEPTEMBER 30, 1999
JUDGE MARION BLANK HORN

STATEMENT OF THE ISSUES

1. Whether the Court of Federal Claims correctly held that the Government's rescission of a 443 % rent increase under a rent subsidy contract between plaintiff-appellant and the United States, acting through the Department of Housing and Urban Development (HUD) with respect to plaintiff-appellant's low-income rental housing project did not breach the rent subsidy contract, where the rent adjustment was based upon a putative amendment to the rent subsidy contract that was approved by a HUD field office employee who was not authorized to do so, inasmuch as the contract amendment purported to establish a method of adjusting subsidized rents that was incon-sistent with the rent adjustment method mandated by applicable regulations, which the HUD offi-cial who approved the amendment lacked the power to waive.

2. Whether the Court of Federal Claims correctly held that the illegality associated with the unauthorized amendment of plaintiff-appellant's rent subsidy contract is plain, inasmuch as the illegality is clear on the face of the applicable statute and regulations.

3. Whether the Court of Federal Claims correctly held that plaintiff-appellant could not invoke the doctrine of equitable estoppel to prevent the Government from raising as a defense to Melrose's contract claims the lack of authority of the HUD field official to bind the Government to the putative amendment of plaintiff-appellant's rent subsidy contract and resulting unlawful increase of subsidized rents.

4. Whether the Court of Federal Claims correctly rejected plaintiff-appellant's equitable estoppel defense to the Government's counterclaim for the recovery of rent subsidy payments erroneously made to plaintiff-appellant as a result of the unauthorized amendment of plaintiff-appellant's rent subsidy contract and resulting unlawful rent increase.

STATEMENT OF THE CASE

I. Nature Of The Case

Plaintiff-appellant, Melrose Associates, L.P. (Melrose) is the owner of Melrose Apart-ments, a low-income rental housing project in Providence, Rhode Island, consisting of 42 one-, two-, and three-bedroom dwelling units, the mortgage for which was insured by the Department of Housing and Urban Development (HUD) pursuant to section 221(d)(4) of the National Hous-ing Act, as amended (12 U.S.C. § 1715*l*(d)(4)). Melrose and the United States, acting through HUD, entered a rent subsidy agreement – denominated a "Housing Assistance Payments Con-tract" (HAP Contract) – with respect to Melrose Apartments, pursuant to section 8 of the United States Housing Act of 1937, as amended (42 U.S.C. § 1437f).

Melrose brought an action against the United States in the Court of Federal Claims seek-ing to recover damages for an alleged breach by the Government of an amendment to the HAP Conract's rent adjustment provision under which the subsidized rents of the low-income tenants were adjusted pursuant to a "budget-based" method instead of the "annual adjustment factor" method specified by applicable HUD regulations. The Government counterclaimed for the am-ount by which rent subsidy payments from the Government to Melrose based upon contract rents established under the "budget-based" rent formula exceeded the amount of the rent subsidy that Melrose would have received if the contract rents had been adjusted using the "annual adjustment factor" method mandated by the HUD regulations.[1/]

II. Statutory, Regulatory, And Contractual Background

A. The Section 221(d)(4) Insured Housing Program

Melrose renovated Melrose Apartments between August 1982 and December 1983 with the proceeds of a mortgage loan from a private lending institution that was insured by HUD pur-suant to section 221(d)(4) of the National Housing Act, as amended (12 U.S.C. § 1715*l*(d)(4) (1994)). Jt. St. ¶¶ 6, 7, 9, 10, JA 65-67. Section 221 of the National Housing Act was enacted, among other things, for the purpose of "[a]ssisting private industry in providing housing for low and moderate income families . . . ." 12 U.S.C. § 1715*l*(a) (1994). The renovation was per-formed by Harwol Construction Co., Inc., a firm with which Melrose had an identity of

[1] In this brief, "Pl-App. Br. ____" refers to the referenced page(s) of the "Brief for the Plaintiff-Appellant" dated June 21, 2000; "JA ____" refers to the referenced page(s) of the sep-arately-bound joint appendix to be filed in this appeal; "Compl. ¶ ____" refers to the referenced paragraph(s) of the "Amended Complaint" dated September 4, 1997, filed by Melrose; and "Jt. St. ¶ ____" refers to the referenced paragraph(s) of the "Uncontroverted Facts" section of the "Joint Statement Regarding Facts" filed by the parties in conjunction with the cross motions for summary judgment.

interest. JA 375, 378.

B. The Section 8 Substantial Rehabilitation Program

Section 8 of the United States Housing Act of 1937, as amended (42 U.S.C. § 1437f) (the Section 8 statute) creates a scheme pursuant to which the United States, acting through HUD, subsidizes the rents of low-income persons living in privately-owned rental housing. HUD im-plements the Section 8 statute through several rent subsidy programs established by a separate set of regulations for each program. One of these rent subsidy programs is the "Section 8 Hous-ing Assistance Payments Program for Substantial Rehabilitation," the regulations for which are codified at part 881 of title 24, Code of Federal Regulations.

The vehicle for payment of the rent subsidy authorized by the Section 8 statute is a hous-ing assistance payments contract (HAP contract) between either HUD or a state or local public housing agency and the landlord. The HAP contract specifies the monthly rent for each of the different types of dwelling units covered by the HAP contract, referred to as the "contract rent." 24 C.F.R. § 881.201 (1996) ("Contract Rent" defined). Under the HAP contract, the tenant

pays the owner a portion of the contract rent that is based upon the tenant's income. 42 U.S.C. § 1437a(a) (1994); 24 C.F.R. § 881.201 (1996) ("tenant rent" defined). The United States pays a rent subsidy to the owner equal to the difference between the tenant rent and the contract rent. 42 U.S.C. § 1437f(c)(3)(A) (1994); 24 C.F.R. § 881.501(d)(1) (1996); see also National Leased Housing Ass'n v. United States, 105 F.3d 1423, 1425 (Fed. Cir. 1997).

Regarding the adjustment of HAP contract rents, the version of 24 C.F.R. Part 881 in effect prior to 1996 provided:

§ 881.609 Adjustment of contract rents.

(a) *Automatic annual adjustment of contract rents.* Upon re-quest from the owner to [HUD], contract rents will be adjusted on the anniversary date of the [HAP contract] in accordance with 24 CFR, Part 888.

(b) *Special Additional Adjustments.* For all projects, special additional adjustments will be granted, to the extent determined necessary by HUD, to reflect increases in the actual and necessary expenses of owning and maintaining the assisted units which resulted from substantial general increases in real property taxes, assessments, utility rates, and utilities not covered by regulated rates, ands which are not adequately compensated for by annual adjustments under paragraph (a). The owner must submit to [HUD] required supporting data, financial statements and cer-tifications.

(c) *Overall limitation.* Any adjustments of contract rents for a unit after [HAP contract] execution or cost certification, where ap-plicable, must not result in material differences between the rents charged for assisted units and comparable unassisted units except to the extent that the differences existed with respect to the contract rents set at [HAP contract] execution or cost certification, where applicable.

24 C.F.R. § 881.609 (1980).[1/]

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[2] This rent adjustment regulation appeared in subpart F of part 881 of title 24, Code of Federal Regulations. Effective on April 26, 1996, in response to a presidential directive that Fed-eral agencies review their regulations with an eye to determining which of them might be elimi-nated, consolidated, or improved, HUD revised part 881. See 61 Fed. Reg. 13586, 13592 (March 27, 1996). Subpart F of the revised part 881 provided that "[a]ll of the provisions of part 880, subpart F, of this chapter apply to projects assisted under [part 881], subject to the requirements of § 881.104." 24 C.F.R. § 881.601 (1996). Insofar as rent adjustments are concerned, the provi-sions of 24 C.F.R. § 881.609 (1980), quoted above, and the provisions of 24 C.F.R. § 880.609 (1996) are, in all material respects, identical. As the preamble to the 1996 revision of subpart F of part 881 indicates, the revised rule consolidated existing Code of Federal Regulation parts and eliminated obsolete regulations, but it did "not establish or affect substantive policy." 61 Fed. Reg. 13586 (March 27, 1996). For ease of reference, therefore, in this brief, we cite to the ver-sion of the rent adjustment regulations for projects governed by part 881 appearing at 24 C.F.R.

§ 881.609 (1980), as the trial court did.

C. The "Annual Adjustment Factor" Rent Adjustment Method

Under the method of adjusting HAP contract rents set forth at 24 C.F.R. Part 888, the ad-justed monthly amount of the contract rent of a dwelling unit "shall" be determined by multiply-ing the contract rent in effect on the anniversary date of the HAP contract by the applicable an-nual adjustment factor published in the Federal Register. 24 C.F.R. § 888.203(b) (1996). For example, if the monthly rent under a HAP contract in effect during the previous year was $100 per dwelling unit and the applicable annual adjustment factor is 1.05, the monthly contract rent for the current year, adjusted in accordance with the annual adjustment factor (effective on the HAP contract anniversary date), would be the product of $100 multiplied by 1.05, i.e., $105.

D. The HAP Contract For Melrose Apartments

Effective on September 26, 1983, Melrose and the United States, acting through HUD, entered the HAP Contract for Melrose Apartments. Jt. St. ¶ 11, JA 67. The HAP Contract was a standard-form agreement made generic to cover several different Section 8 rent subsidy pro-grams, each of which was governed by a separate body of regulations. On the first page of each of the two parts of the HAP Contract, there was provision for the parties to select from a list of these governing regulatory schemes. Melrose and HUD designated Melrose Apartments a sub-stantial rehabilitation "Part 881" project, i.e., a HUD Section 8 project administered pursuant to 24 C.F.R. Part 881. Jt. St. ¶ 12, JA 67, 98, 109; Pl-App. Br. 4-5. By selecting "Part 881," Mel-rose and HUD intended to incorporate in the HAP Contract the regulations codified at 24 C.F.R. Part 881 (1980). See HAP Contract, part I, § 1.1(g) (concerning "scope of contract"), JA 100; National Leased Housing, 105 F.3d at 1433 ("any applicable regulations" language in the

HAP contract was meant to incorporate the regulations included within the selected "Part" of title 24, Code of Federal Regulations).

With respect to rent adjustments, the HAP Contract provided, in relevant part, that, "[u]p-on request from [Melrose] to [HUD], Contract Rents will be adjusted on the anniversary date of the Contract[1/] in accordance with 24 CFR 888 and this Contract," subject to an "overall limita-tion" that prohibited any rent adjustment which resulted in a "material difference" between the rents charged for subsidized dwelling units and "comparable unassisted rents, as determined by HUD[.]" HAP Contract, part II, § 2.7(b)(1), (d), JA 115.[1/]

III. Statement Of The Facts

Immediately prior to November 7, 1996, the contracts rents under the HAP Contract for Melrose Apartments ranged from $610 per month for one of the two types of one-bedroom dwelling units to $741 per month for a three-bedroom unit. Jt. St. ¶ 34, JA 73. On November 7, 1996, Luisa G. Osborne, Director of the HUD Rhode Island State Office's Housing Management Division, approved contract rents under the HAP Contract for Melrose Apartments that ranged from $2,704 per month for one of the two types of one-bedroom dwelling units to $3,285 for a three-bedroom unit, retroactive to September 1, 1996. Jt. St. ¶¶ 44, 47, JA 76. This rent adjust-ment, which represented a 443 % hike in the contract rents for Melrose

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[3] The anniversary date of the HAP Contract for Melrose Apartments is September 26 of each year that the contract is in effect. Jt. St. ¶ 11, JA 67.

[4] The HAP Contract also provided that, "[i]n the case of previously-owned projects, the Contract Rents shall be adjusted in accordance with 24 CFR 886, Subpart C and this Contract." HAP Contract, part II, § 2.7(c), JA 115. This provision did not apply because Melrose Apart-ments is not a project that was previously owned by HUD, Jt. St. ¶ 5, JA 65, and, as noted above, in the HAP Contract, Melrose Apartments was designated a substantial rehabilitation "Part 881" project, not a previously HUD-owned "Part 886, Subpart C" project. See JA 109.

Apartments, was not based upon the "annual adjustment factor" method of adjusting contract rents prescribed by

24 C.F.R. § 881.609 (1980) discussed above. Rather, the new rent levels were the product of an agreement between Ms. Osborne and Melrose to amend the method of adjusting contract rents from the "annual adjustment factor" method specified at section 2.7(b)(1) of part II of the HAP Contract to the so-called "budget-based" rent adjustment method, hereinafter referred to as "the Conversion." Jt. St. ¶ 48, JA 77. Under the "budget-based" rent adjustment method, contract rents were established based upon an annual operating budget submitted by Melrose to, and approved by, the HUD Rhode Island State Office, without regard for the applicable annual rent adjustment factors or the rents of comparable unassisted housing. Id. Application of the annual adjustment factor applicable to Melrose Apartments would have resulted in a 0.004 % increase in the contract rents for Melrose Apartments. Jt. St. ¶ 72, JA 83.

In December 1996, the Government began making rent subsidy payments to Melrose in accordance with the rent increase approved by the HUD Rhode Island State Office on November 7, 1996, resulting from the Conversion. Jt. St. ¶ 54, JA 78. Between December 1996 and May 1997, the Government paid rent subsidies to Melrose in accordance with those rent levels. Jt. St. ¶ 55, JA 78-79.

On May 8, 1997, shortly after becoming aware of the elevated rent levels for Melrose Apartments, John H. "Chris" Greer, Deputy Assistant Secretary for Multifamily Housing Pro-grams, HUD Headquarters, Washington, D.C., directed the Rhode Island HUD State Office, among other things, to reverse the contract rent increase for Melrose Apartments approved by Ms. Osborne on November 7, 1996. Jt. St. ¶ 62, JA 80-81, 165. On May 20, 1997, Ms.

Osborne rescinded the Conversion. Jt. St. ¶ 63, JA 81, 169-170.

IV. Response To Plaintiff's Statement Of Facts

The cross-motions for summary judgment in this case were accompanied by a stipulation of uncontroverted facts, see JA 63-83, upon which the Court of Federal Claims based its rulings. The statement of "facts" contained in Melrose's opening brief, however, goes well beyond the stipulated facts and the trial court's findings.

We specifically except to Melrose's statements that, when Ms. Osborne approved the Conversion, Melrose was unaware that the Conversion had not been submitted to HUD Head-quarters, Pl-App. Br. 14, or that "Melrose relied on the knowledge, expertise and experience of the Rhode Island HUD office to implement the Conversion." Pl-App. Br. 41. There is nothing

in the record to support either of those statements or, for that matter, any evidence of the extent of Melrose's knowledge about the circumstances under which the Conversion was approved. The parties merely stipulated that, relying upon Ms. Osborne's approval of the Conversion and related rent increase, Melrose engaged an architect and a general contractor and began renovations to Melrose Apartments. See Jt. St. ¶ 50, JA 77.[1/]

V. Course Of Proceedings Below

Melrose filed a two-count complaint against the United States in the Court of Federal Claims. In the first count, Melrose alleged that the Government breached the HAP Contract for Melrose Apartments when, in May 1997, HUD rescinded an adjustment of contract rents ap-proved by an official of the Rhode Island HUD State Office in November 1996 that was based

[5] There also is no support in the portions of the deposition transcripts to which Melrose points for Melrose's assertion about what HUD counsel advised Ms. Osborne in January 1997 relative to the Conversion. See Pl-App. Br. 17, 31.

upon the "budget-based" rent adjustment method. In the second count, Melrose avers that the Government breached a subsequent implied-in-fact contract between Melrose and the Govern-ment under which the same HUD field office employee supposedly agreed to increase by $1 mil-lion the rent subsidy to be paid by the Government under the HAP Contract to Melrose for the period to which the November 1996 rent adjustment applied. The Government counterclaimed for the amount by which rent subsidy payments made to Melrose based upon the November 1996 rent adjustment exceeded the amount of the rent subsidy to which Melrose would have been enti-tled if the contract rents had been adjusted using the "annual adjustment factor" method specified by applicable HUD regulations.

Melrose filed a motion for partial summary judgment upon its contract claims, and the Government filed a cross-motion for summary judgment upon those claims and, in addition, for summary judgment upon its counterclaim. In an initial decision, the trial court denied Melrose's motion for partial summary judgment and granted the Government's motion for summary judg-ment regarding Melrose's claims. Melrose Associates v. United States, 43 Fed. Cl. 124, 151 (1999) (Melrose I). Regarding the Government's counterclaim, the Court of Federal Claims denied Melrose's affirmative defenses of waiver, "unclean hands," and laches, but requested additional briefing upon Melrose's affirmative defense of equitable estoppel. Id. After supple-mental briefing and oral argument, the Court of Federal Claims rejected Melrose's equitable estoppel defense and awarded the Government $693,757.50 upon its counterclaim. Melrose Associates v. United States, 45 Fed. Cl. 56, 63 (1999) (Melrose II). This appeal followed.

SUMMARY OF THE ARGUMENT

The Court of Federal Claims did not err in granting summary judgment for the Govern-ment upon Melrose's contract claims. The Court of Federal Claims correctly held that the Gov-ernment's rescission of a 443 % rent increase under a rent subsidy contract between plaintiff and the United States, acting through the Department of Housing and Urban Development (HUD) with respect to Melrose Apartments did not breach the HAP Contract between Melrose and the Government. The rent adjustment was based upon a putative amendment to the rent subsidy contract, i.e., the Conversion, that was approved by Luisa G. Osborne, a HUD field office em-ployee who was not authorized to approve the amendment, inasmuch as the contract amendment purported to establish a method of adjusting subsidized rents that was inconsistent with the rent adjustment method mandated by applicable regulations, which Ms. Osborne lacked the power to waive.

Melrose's argument that there was a genuine issue of fact which precluded summary judgment is based upon the contentions that Ms. Osborne had actual implied authority to approve the Conversion by virtue of the "broad powers" delegated to her to oversee Section 8 rent sub-sidy programs, including the authority to approve all forms of rent increases, and that Ms. Os-borne was authorized by the regulations codified at 24 C.F.R. Part 886, Subpart A, to approve the Conversion. Neither of these contentions was presented to, or considered by, the trial court. Regardless, the doctrine of implied actual authority does not apply in the circumstances of this case because Ms. Osborne was precluded by statute and the relevant delegation of authority from waiving HUD regulations such as 24 C.F.R. § 881.609 (1980), and the regulations codified at 24 C.F.R. Part 886, Subpart A, which establish a Section 8 rent subsidy program distinct and separate from the Section 8 program in which Melrose participated, do not apply to Melrose

Apartments.

The illegality associated with the Conversion and resulting rent increase was "plain." The method of adjusting contract rents contemplated by the Conversion did not comport with the rent adjustment method specified by governing regulations, i.e., 24 C.F.R. § 881.609(a) (1980). The relevant published delegation of authority to Ms. Osborne explicitly withheld from her the auth-ority to waive the requirements of regulations such as section 881.609(a), which was not only consistent with but required by 42 U.S.C. § 3535(q)(2) (1994).

The Court of Federal Claims also correctly rejected Melrose's claims of equitable estop-pel. The Government is not estopped by its agents who act beyond their authority or contrary to statute and regulations, and, moreover, equitable estoppel may not be invoked against the Gov-ernment in a suit by a claimant seeking to recover public funds in violation of law, or in a suit by the Government for the recoupment of public funds paid by the Government in violation of law, based upon the misrepresentations or other conduct of Government agents. In addition, Mel-rose's estoppel claims are flawed because Melrose failed to demonstrate that the conduct of Ms. Osborne upon which it relied constitutes "affirmative misconduct," that such reliance was rea-sonable, or that Melrose relied upon Ms. Osborne's conduct in such a manner as to change its position for the worse. The judgment of the Court of Federal Claims, therefore, should be affirmed.

ARGUMENT

I. Scope Of Judicial Review

This Court reviews a grant of summary judgment by the Court of Federal Claims *de novo* to determine whether the summary judgment standard has been correctly applied. Cienega Gar-dens v. United States, 194 F.3d 1231, 1238 (Fed. Cir. 1998), cert. denied, 120 S.Ct. 62

(1999). This Court also reviews decisions of the Court of Federal Claims upon matters of law *de novo*. Brighton Village Associates v. United States, 52 F.3d 1056, 1059 (Fed. Cir. 1995). Whether a contract exists is a mixed question of fact and law. Cienega, 194 F.3d at 1239. In the absence of factual disputes, the question of contract formation is a question of law. Trauma Service Group v. United States, 104 F.3d 1321, 1325 (Fed. Cir. 1997).

II. The Trial Court Did Not Err In Entering Summary Judgment For The Government Upon Melrose's Breach-Of-Contract Claims.

Melrose contends that the Court of Federal Claims erred in granting summary judgment for the Government upon Melrose's contract claims because a genuine issue of material fact alle-gedly exists as to whether Luisa G. Osborne was authorized to approve the Conversion. Pl-App. Br. 47. This contention is based upon two arguments neither of which was presented to or con-sidered by the trial court: (1) by virtue of the "broad powers" delegated to Ms. Osborne "to over-see Section 8 programs, including the authority to approve all forms of rent increases," Ms. Os-borne had actual implied authority to approve the conversion, citing H. Landau & Co. v. United States, 886 F.2d 322 (Fed. Cir. 1989), Pl-App. Br. 49, and (2) Ms. Osborne was authorized by regulations codified at 24 C.F.R. Part 886, Subpart A, to approve the Conversion. Pl-App. Br. 50-51. Assuming for the sake of argument that these arguments may be raised on appeal,[1/] they are without merit.

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[6] As a rule, this Court does not consider arguments raised for the first time on appeal, e.g., Southfork Systems, Inc. v. United States, 141 F.3d 1124, 1131 n.3 (Fed. Cir. 1998); Brown Park Estates-Fairfield Development Co. v. United States, 127 F.3d 1449, 1459 n.14 (Fed. Cir. 1997), especially where the issue raised for the first time on appeal is based upon disputed facts. Black & Decker, Inc. v. Hoover Service Center, 886 F.2d 1285, 1289-90 (Fed. Cir. 1989); see also Cheyenne River Sioux Tribe v. United States, 806 F.2d 1046, 1053 (Fed. Cir. 1986) (appel-late court declined to consider issues not raised before, or decided by, the lower court),

Summary judgment is appropriate if "there is no genuine issue as a to any material fact and . . . the moving party is entitled to judgment as a matter of law." RCFC 56(c). A dispute is "genuine" if, on the entirety of the record, the evidence is such that a reasonable jury could resolve a factual matter in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Sweats Fashions, Inc. v. Pennill Knitting Co., 833 F.2d 1560, 1562 (Fed. Cir. 1987). Thus, when the record as a whole would not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). A fact is "material" if it could affect the outcome of the suit, and its materiality is determined by the substantive law applicable to the case. Ander-son, 477 U.S. at 248.

There is no genuine issue of fact that precluded summary judgment for the Government upon Melrose's contract claims. As the trial court recognized, to establish an express or implied-in-fact contract enforceable against the United States, a claimant must demonstrate, in addition to the usual requirements for a binding contract, that "the Government representative who entered or ratified the agreement had actual authority to bind the United States." Trauma Service Group, 104 F.3d at 1325; accord City of El Centro v. United States, 922 F.2d 816, 820 (Fed. Cir. 1990), cert. denied, 501 U.S. 1230 (1991); Landau, 886 F.2d at 324; H.F. Allen Orchards v. United States, 749 F.2d 1571, 1575 (Fed. Cir. 1984), cert. denied, 474 U.S. 818 (1985). The award or modification of a contract in violation of statutory or regulatory

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cert. denied, 482 U.S. 913 (1987). A narrow exception to this rule exists where "the ground urged is one of law, and that issue has been fully vetted by the parties on appeal[.]" Glaxo, Inc. v. Torp-harm, Inc., 153 F.3d 1366, 1371 (Fed. Cir. 1998). In that case, "an appellate court may choose
to decide the issue even if not passed on by the trial court." Id.

requirements constitutes action in excess of delegated authority that nullifies the award or modification. Total Medical Manage-ment, Inc. v. United States, 104 F.3d 1314, 1319 (Fed. Cir.), cert. denied, 522 U.S.857 (1997); CACI, Inc. v. Stone, 990 F.2d 1233, 1236 (Fed. Cir. 1993); United States v. Amdahl Corp.,
786 F.2d 387, 392-93 (Fed. Cir. 1986); Schoenbrod v. United States, 410 F.2d 400, 403 (Ct.Cl. 1969).

The Court of Federal Claims found, and Melrose does not dispute, that "[Melrose's] HAP contract was entered into pursuant to, and is governed by, regulations codified at 24 C.F.R. Part 881, which in turn dictates that the adjustment of contract rents must be pursuant to 24 C.F.R. [Part] 888[.]" Melrose I, 43 Fed. Cl. at 144. The "budget-based" method of adjusting contract rents contemplated by the Conversion was inconsistent with the "annual adjustment factor" rent adjustment method mandated by 24 C.F.R. § 881.609(a) (1980).[1/] Because the Conversion viola-ted section 881.609(a), it and the resulting November 1996 rent increase were unauthorized and, thus, unenforceable against the United States.

Melrose does not suggest that the Conversion comported with 24 C.F.R. § 881.609(a) (1980), but it argues, in effect, that Ms. Osborne had the power to waive the "annual adjustment factor" rent adjustment method specified by section 881.609(a) and that, in approving the Con-version, she implicitly waived the regulation. The Court of Federal Claims, however, correctly held that Ms. Osborne lacked authority to waive the regulations at 24 C.F.R. § 881.609

[7] Section 881.609(a) was an exercise of rulemaking authority delegated to HUD that im-plemented the Section 8 statute, and as such it had "the force and effect of law." Paul v. United States, 371 U.S. 245, 255 (1963); Jackson v. United States, 573 F.2d 1189, 1194 (Ct.Cl. 1978); Schoenbrod, 410 F.2d at 403.

(1980). Under the applicable delegation of authority published in the Federal Register, Directors of Mul-tifamily Housing Divisions in HUD field offices of the type to which Ms. Osborne was assigned exercised the authority of the HUD Assistant Secretary for Housing-Federal Housing Commis-sioner with respect to multifamily housing projects within the geographic area for which the field office was responsible, including the Section 8 Substantial Rehabilitation Housing Assistance Payments Program. See "Revocation and Redelegation of Authority," 59 Fed. Reg. 62739, 62740, 62741 (Dec. 6, 1994), JA 366-368. But this delegation of authority, however, explicitly withheld from Directors of Multifamily Housing Divisions, such as Ms. Osborne, "the authority to issue or waive regulations." Id. at 62745, JA 372.

The Assistant Secretary for Housing-Federal Housing Commissioner's explicit reserva-tion of the power to waive regulations such as 24 C.F.R. § 881.609 (1980) was consistent with, and indeed required by, statute. Section 7(q)(2) of the Department of Housing and Urban Devel-opment Act prohibited the Secretary of Housing and Urban Development from delegating the au-thority to approve the "waiver" of a HUD regulation to anyone other than an "individual of Assis-tant Secretary rank or equivalent rank, who is authorized to issue the regulation to be waived." 42 U.S.C. § 3535(q)(2) (1994).[1/] Thus, any attempt by the Assistant Secretary for Housing-Federal Housing Commissioner to delegate the authority to waive a regulation, such as section 881.609, to Directors of Multifamily Housing Divisions, such as Ms. Osborne, would have

been a nullity.

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[8] Section 7(q)(2) of the Department of Housing And Urban Development Act was en-acted as part of the Department of Housing and Urban Development Reform Act of 1989.

A. The Doctrine Of Implied Actual Authority Does Not Apply In The Circumstances Of This Case.

In Landau, this Court held that, "[a]lthough apparent authority will not suffice to hold the government bound by the acts of its agents, implied actual authority, like expressed actual authority, will suffice." 886 F.2d at 324 (citation omitted). Authority to bind the Government may be implied when such authority is considered to be an integral part of the duties assigned to a Government official. Id.

The doctrine of implied actual authority, however, "cannot be used to create an agent's actual authority to bind the government in contract when the agency's internal procedures speci-fically preclude that agent from exercising such authority." Cruz-Pagan v. United States, 35 Fed. Cl. 59, 62 (1996). The doctrine of implied actual authority "serves to fill in the gap when an agency reasonably must have intended certain representatives to possess contracting authority but failed expressly to grant that authority." Id. at 62-63. "But in situations where . . . an agency adopts internal procedures that preclude the employee from exercising such authority, it is totally inconsistent with the agency's actions to imply that the agency delegated or granted actual con-tracting authority." Id. at 63; accord Roy v. United States, 38 Fed. Cl. 184, 189-90 (1997) (infor-mant payment regulations, which vested only certain agency officials with authority to make en-forceable compensation promises, precluded a finding that agency officials not enumerated had implied actual authority, by virtue of their assigned duties, to make binding promises); see also Buffalo National Bank v. United States, 26 Cl. Ct. 1436, 1445-46 (1992) (regulations that set forth scope of authority of agency employees who allegedly promised to

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See Pub. L. No. 101-235, § 106, 103 Stat. 1987, 2000 (1989).

indemnify plaintiff bank did not include entering agreements to indemnify banks or guaranty loans provided by banks to recipients of Farmers Home Administration loans).

In the present case, Ms. Osborne was precluded by statute and the agency's published delegation of authority from waiving HUD regulations, such as 24 C.F.R. § 881.609 (1980). Therefore, the doctrine of implied actual authority may not be invoked to establish the authority of Ms Osborne to approve the Conversion.

A case that resembles the present suit which illustrates the point well is Hicks v. Harris, 606 F.2d 65 (5th Cir. 1979). That case involved a financial institution that participated in the Federally Insured Student Loan Program under which the Federal Government insured the repay-ment of student loans that conformed to the requirements of the Higher Education Act of 1965 and relevant regulations. Among other things, the regulations conditioned the Government's loan guarantee upon the lender's receipt of an "issuance of insurance" from the Department of Health, Education and Welfare (HEW). 606 F.2d at 66. The dispute in Hicks arose when the Govern-ment rejected claims of the lender for repayment by the Government of defaulted student loans upon the ground that the lender had disbursed the loan funds before it had received a certificate of insurance for each loan from the Commissioner of Education. Id. The lender contended that the Government had waived the requirement that the lender not disburse loan funds before re-ceiving an "issuance of insurance" because subordinate employees of HEW's Office of Guaran-teed Student Loans had stamped the loan applications for approval and allegedly made state-ments approving the practice of disbursing loan proceeds prior to the stamping of the loans. Id.

The court of appeals for the Fifth Circuit, however, affirmed the district court's grant of

summary judgment in favor of the Government, observing that "none of the persons to whom [the lender] seeks to attribute the waiver of the applicable government regulation were empow-ered to waive or make an express exception to the regulatory provisions of the Federally Insured Student Loan Program, including 45 C.F.R. § 177.42(b)." 606 F.2d at 67. The court of appeals noted that relevant agency regulations prohibited any official, agent, or employee of the Office

of Education from waiving or altering any provision of the office's regulations, except through amendment by publication in the Federal Register, and that uncontradicted affidavits of present and former senior agency officials stated that the authority to waive or make an express excep-tion to the student loan program regulatory provisions had not been delegated to subordinate employees below the associate commissioner level, such as the employees named by the lender as having made statements to the lender approving its practice of disbursing student loan money prior to having the loans stamped. Id. at 67-68. "Therefore," the court explained, "even if the government employees purported to waive the requirements for obtaining federal student loan insurance, either by express statements or stamping the loans 'approved,' they were acting outside the bounds of their authority and could not bind the government to repay the defaulted loans." Id. at 68.[1/]

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[9] Hicks is not an aberration. Courts frequently have employed similar reasoning in holding that agency officials lacked authority to bind the Government in contract. See, e.g., Essen Mall Properties v. United States, 21 Cl. Ct. 430, 445 (1990) (Postal Service regulations prohibited delegation of contracting authority to agency official upon whose conduct plaintiff relied); Durant v. United States, 16 Cl. Ct. 447, 451 (1988) (applicable regulations provided that agent upon whose conduct plaintiffs relied was not authorized to waive or modify regulations); Pasternack v. United States, 12 Cl. Ct. 707, 710 (1987) (although agency officials were author-ized to sign travel orders, they lacked authority to waive requirements of applicable travel

regu-lations).

Similarly, the relevant published delegation of authority and 42 U.S.C. § 3535(q)(2) (1994) precluded Ms. Osborne from waiving the requirements of 24 C.F.R. § 881.609 (1980). Thus, even assuming that, in approving the Conversion, Ms. Osborne purported to waive the requirement of section 881.609(a) that rent adjustments under the HAP Contract for Melrose Apartments be made in accordance with the "annual adjustment factor" method, she was acting outside the bounds of her authority and could not bind the Government to the Conversion.[1/]

B. The Regulations Codified At 24 C.F.R. Part 886, Subpart A, Do Not Apply To Melrose Apartments.

The regulations at 24 C.F.R. Part 886, Subpart A, establish the Section 8 "Loan Manage-ment Set-Aside Program" (LMSA Program), which is separate and distinct from the "Section 8 Substantial Rehabilitation Housing Assistance Payments Program" established through regula-tions appearing at 24 C.F.R. Part 881. The LMSA Program regulations contemplate that the pro-ject owner and HUD will enter a written HAP Contract and that any dwelling units "currently assisted under . . . section 8 shall be converted and included under the [HAP] Contract pursu-ant to this subpart . . . ." 24 C.F.R. §§ 886.102 ("Section 8 Contract" defined), 886.108(a) (1996). The method of adjusting contract rents specified by the

[10] Melrose also argues that Ms. Osborne was authorized to approve the Conversion be-cause, as an officer empowered to bind the Government to the HAP Contract in the first instance, she had implied authority to modify the agreement, citing Branch Banking & Trust Co. v. United States, 98 F.Supp. 757, 766 (Ct.Cl.), cert. denied, 342 U.S. 893 (1951). Pl-App. Br. 49-50. But while a contracting officer has implied power to modify a contract, this does not mean that in doing so he or she may disregard the requirements of governing statutes or regulations. As this Court noted in City of Alexandria v. United States, 737 F.2d 1022, 1028 (Fed. Cir. 1984), where the Court held that agency officials lacked authority to bind the Government to a sale of public land because of the failure to comply with a statutory "report and wait" provision: "To be sure, the [agency] officials [upon whose conduct the plaintiff relied] had 'authority' to make the state-ments they did, in that they were within the official's subject matter jurisdiction. They did not have 'authority' to nullify a congressional enactment."

regulations governing the LMSA Program differ from the rent adjustment method prescribed by 24 C.F.R. § 881.609 (1980) for Section 8 projects like Melrose Apartments. Whereas section 881.609(a) mandates use of the "annual adjustment factor" method, the regulations applicable to LMSA projects provide that "contract rents may be adjusted annually, or more frequently, at HUD's option, either (1) on the basis of a written request for a rent increase submitted by the owner and properly supported by substantiating evidence, or (2) by applying, on each anniversary date of the contract, the appli-cable Automatic Annual Adjustment Factor most recently published by HUD in the FEDERAL REGISTER in accordance with 24 C.F.R. part 888, subpart B." 24 C.F.R. § 886.112(b) (1996).

Melrose concedes that Melrose Apartments is a "Part 881" project, but nevertheless con-tends that Ms. Osborne had the authority under 24 C.F.R. Part 886, Subpart A, to approve the Conversion. Pl-App. Br. 50-51. Melrose implies that, in approving the Conversion, Ms. Os-borne intended to exercise authority delegated to her to administer the Section 8 LMSA Program. We disagree.

There is nothing in the record to support the notion that, through the Conversion, Melrose and the HUD Rhode Island State Office intended a transformation of Melrose Apartments from a Section 8 project administered pursuant to 24 C.F.R. Part 881 to a LMSA project administered under 24 C.F.R. Part 886, Subpart A, as opposed to a modification of the method of calculating rent adjustments under the existing HAP Contract for Melrose Apartments, which was entered into pursuant to, and therefore subject to, 24 C.F.R. Part 881. Melrose never suggested anything like that in the proceedings before the trial court, and none of the documents relating to the Con-version, including Ms. Osborne's November 7, 1996 letter approving the Conversion and

related rent increase, intimates that Melrose or Ms. Osborne intended such a transformation. If the intent had been to bring Melrose Apartments under the Section 8 LMSA Program, the parties would have had to execute an entirely new HAP contract for Melrose Apartments, which they did not do.[1/] Instead, Melrose and Ms. Osborne purported to amend the method of adjusting contract rents under the existing HAP Contract, which Ms. Osborne lacked the authority to do.

[11] As discussed above, the HAP Contract for Melrose Apartments was a standard-form agreement made generic to cover several Section 8 rent subsidy programs. The "Part 886, Sub-part A" program, however, is not included in the list of regulatory schemes from which the par-ties were to select. See JA 98, 109.

Moreover, it is incorrect to say, as Melrose implies, that the rent increase for Melrose Apartments in November 1996 could have been sustained under the rent adjustment method specified by the Section 8 LMSA Program regulations. According to Melrose, under the LMSA Program, "there are no caps on budget-based rent increases other than [a] reasonableness stan-dard." Pl-App. Br. 51. The regulations, however, provided that, where "HUD requires that the owner submit a written request [for a rent increase], HUD . . . shall approve a rental schedule that is necessary to compensate the owner for any increase in taxes (other than income taxes) and operating and maintenance costs over which owners have no effective control" and that "[i]ncrea-ses in taxes and maintenance and operating costs shall be measured against levels of such expen-ses in comparable assisted and unassisted housing in the area to ensure that adjustments in the Contract Rents shall not result in material differences between the rents charged for assisted and comparable unassisted units." 24 C.F.R. § 886.112(b) (1996).[1/] The suggestion by Melrose that the 443 % rent increase for Melrose Apartments from a range of $610 to $741 per month to a range of between $2,704 and $3,285 per month did not result in rents that were materially differ-ent from the rents of comparable, unassisted rental housing is ridiculous. None of the Section 8 rent subsidy programs, not even the LMSA Program, is intended to do what Melrose and the HUD Rhode Island State Office attempted through the Conversion, which is to underwrite the cost of renovating a housing project with a gratuity from the Government in the form of an agreement to subsidize artificially high rents.

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[12] This "rent comparability" limitation stems from the Section 8 statute itself, the present version of which provides that rent adjustments under HAP contracts "shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, as determined by [HUD]." 42 U.S.C. § 1437f(c)(2)(C)

There is, thus, no genuine issue of material fact with respect to Ms. Osborne's authority to approve the Conversion that precluded summary judgment. The Court of Federal Claims correctly concluded that "there was no delegation by the Assistant Secretary to Ms. Osborne, to waive the regulations at issue . . . and the Assistant Secretary, or any other authorized official, had not acted to approve waivers of the applicable regulations." Melrose I, 43 Fed. Cl. at 144-45. The Conversion and resulting November 1996 rent increase, therefore, were unauthorized. Because the rescission of an invalid contract award or modification "does not give rise to a legal claim," Alabama Rural Fire Insurance Co. v. United States, 572 F.2d 727, 736 (Ct.Cl. 1978); accord Squirrel Creek Associates v. United States, 11 Cl. Ct. 212, 215 (1986) ("A null agree-ment cannot be breached."), the subsequent rescission of the Conversion and rent increase did

not breach any contract between Melrose and the Government.

III. The Illegality Associated With The Conversion And Resulting November 1996 Rent Adjustment Is Plain.

Melrose contends that, even if the Conversion is deemed illegal, it nevertheless may be enforced against the Government because the illegality was not "plain" or "palpable," citing John Reiner & Co. v. United States, 325 F.2d 438 (Ct.Cl. 1963), cert. denied, 377 U.S. 931 (1964). Pl-App. Br. 52-53. In Reiner, the Court of Claims stated that, "[i]n testing the enforceability of an award made by the Government, where a problem of validity of the invitation or the respon-siveness of the accepted bid arises after the award, the court should ordinarily impose the bind-ing stamp of nullity only when the illegality is plain." Id. at 440. Thus, "[i]f the

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(1994).

contracting has viewed the award as lawful, and it is reasonable to take that position under the legislation and regulations, the court should normally follow suit." Id.

In Total Medical Management, this Court stated that "[a] contract is 'plainly illegal' when made contrary to statute or regulation either because of some action or statement by the contrac-tor, or when the contractor is on 'direct notice that the procedures being followed were violative of such requirements.'" 104 F.3d at 1319; see also Schoenbrod, 410 F.2d at 404 (plain illegality exists where "the illegality in the award [is] plain on the face of the statute and the regulations."). Total Medical Management involved a situation where the purported contract was not binding upon the Government because the agreement established a standard of remuneration for health care provider services that this Court held was "in direct conflict with" the measure of compensa-tion for such services prescribed by governing CHAMPUS regulations appearing in the Federal Register. 104 F.3d at 1320-21. This Court found that the illegality was "plain" under the Reiner test because the plaintiff "was on constructive and actual notice that the CHAMPUS regulatory scheme would be used in determining payment rates." Id. at 1321.

The present case involves a similar situation where the "budget-based" method of adjust-ing contract rents for Melrose Apartments under the purported amendment of the HAP Contract (i.e., the Conversion), which directly affects the amount of the rent subsidy to be paid by the Government, did not comport with the "annual adjustment factor" rent adjustment method speci-fied by applicable regulations, i.e., 24 C.F.R. § 881.609(a) (1980). The rent adjustment method mandated by section 881.609(a), as well as Ms. Osborne's lack of authority to waive that require-ment, are clear from section 881.609(a), the relevant delegation of authority discussed above, and 42 U.S.C. § 3535(q)(2) (1994).

At the very least, Melrose was on constructive notice of the limits of the delegation of authority and the requirements of the statute and regulations. Everyone is charged with know-ledge of the contents of statutes of the United States. See, e.g., Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947). Likewise, publication in the Federal Register of regulations and other matter, including delegations of, and limits upon, the scope of a Government official's authority, gives legal notice of their contents to all who may be affected thereby. 44 U.S. § 1507 (1994); Merrill, 332 U.S. at 385; Peters v. United States, 694 F.2d 687, 696 (Fed. Cir. 1982); Porter v. United States, 496 F.2d 583, 590 (Ct.Cl. 1974); Wolfson v. United States, 492 F.2d 1386, 1392 (Ct.Cl. 1974). Published regulations of HUD are no exception. See, e.g., Prevado Village Partnership v. United States, 3 Cl. Ct. 219, 224 n.2 (1983) (developer who allegedly en-tered contract with HUD under Section 8 New Construction Housing Assistance Payments Pro-gram was "charged with having knowledge of the law and regulations governing the formation
of such contracts," including regulations codified at 24 C.F.R. Part 880).

The required method of adjusting HAP contract rents for projects such as Melrose Apart-ments is set forth in regulations that were published initially in the Federal Register, see 45 Fed. Reg. 7085, 7104 (Jan. 31, 1980), and then in the Code of Federal Regulations. The delegation of authority to Ms. Osborne from which the HUD Assistant Secretary for Housing-Federal Housing Commissioner explicitly withheld the power to waive regulations also appeared in the Federal Register. See 59 Fed. Reg. 6245 (Dec. 6, 1994), JA 372. The reservation of the authority to waive regulations was not only consistent with but required by 42 U.S.C. § 3535(q)(2) (1994), which prohibited any HUD official other than the Secretary, Deputy

Secretary, and Assistant Secretary for Housing-Federal Housing Commissioner from waiving the requirements of regu-lations such as 24 C.F.R. § 881.609 (1980). The Court of Federal Claims, therefore, correctly held that the illegality associated with the Conversion and related November 1996 rent increase was "plain."

IV. The Government Cannot Be Estopped From Raising, As A Defense To Melrose's Contract Claims, Ms. Osborne's Lack Of Authority To Approve The Conversion.

Regarding Melrose's contract claims, the Court of Federal Claims held that Melrose "is not permitted to invoke the doctrine of equitable estoppel to enforce the remainder of the pay-ments under the budget-based calculation which was not approved by a properly authorized gov-ernment official." Melrose I, 43 Fed. Cl. at 149. In an attempt to overcome this ruling, Melrose cites alleged misconduct by Ms. Osborne, but the trial court's holding is supported by ironclad precedent. This Court and its predecessor, the Court of Claims, repeatedly have held that the Government is not estopped by its agents who act beyond their authority or contrary to statute and regulations. E.g., S.J. Amoroso Construction Co., Inc. v. United States, 12 F.3d 1072, 1075 (1993); New America Shipbuilders, Inc. v. United States, 871 F.2d 1077, 1080 (Fed. Cir. 1989); Thanet Corp. v. United States, 591 F.2d 629, 635 (Ct.Cl. 1979); L.B. Samford, Inc. v. United States, 410 F.2d 782, 788 (Ct.Cl. 1969).[1/] This is so even if the Government's agent

[13] See also Emeco Industries, Inc. v. United States, 485 F.2d 652, 657 (Ct.Cl. 1973) ("[I]t is essential to a holding of estoppel against the United States that the course of conduct or repre-sentations be made by officers or agents of the United States who are acting within the scope of their authority."); Bornstein v. United States, 345 F.2d 558, 562 (Ct.Cl. 1965) ("It is a settled principle of law that the United States is not bound by the unauthorized acts of its agents, that it is not estopped to assert the lack of authority as a defense, and that persons dealing with an agent of the government must take notice of the limitations of his authority."); Colorado State Bank of Walsh v. United States, 18 Cl. Ct. 611, 632 (1989) (where agency official was not authorized to

instigated the inclusion of the unauthorized provision in the contract. See Urban Data Systems, Inc. v. Uni-ted States, 699 F.2d 1147, 1153 (Fed. Cir. 1983) ("Even if we accept the truth of [the contractor's contentions that the unlawful price provision was inserted in the contracts at the insistence of the Government and that the contractor acted to its detriment in reliance upon the Government's con-duct], we cannot estop the Government from showing that it had no power to enter into the chal-lenged price terms."). The alleged misconduct of Ms. Osborne, therefore, does not dispense with the need for a showing by Melrose that Ms. Osborne had the authority to approve the Conver-sion, as a condition of enforcing it against the Government.

In addition, Melrose's estoppel claim is foreclosed by Office of Personnel Management v. Richmond, 496 U.S. 414 (1990), in which the Supreme Court held that equitable estoppel does not apply against the United States in a suit to recover public funds in violation of law, based up-on the misrepresentations or other conduct of Government agents. Although the Court declined to accept the Government's argument for an "across-the-board-no-estoppel rule," it adopted a strict approach to estoppel claims involving public funds, concluding that, "[a]s for monetary claims, it is enough to say that this Court has never upheld an assertion of equitable estoppel against the Government by a claimant seeking public funds." Id. at 434; accord United States v. Walcott, 972 F.2d 323, 327-28 (11th Cir. 1992); United States v. Fowler, 929 F.2d 1382, 1385-86 (9th Cir. 1990).

The present case involves a similar attempt by Melrose to estop the United States in a suit to recover public funds in violation of law. The source of the funds for the rent subsidy

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waive requirements of government loan program, United States was not estopped from showing the lack of authority to act), aff'd, 904 F.2d 45 (Fed. Cir. 1990) (Table).

programs established by HUD pursuant to the Section 8 statute is congressional appropriations. 42 U.S.C. §§ 1437c(c), 1437f(b)(1), 1437g (1994). Acting pursuant to delegated rulemaking authority, see 42 U.S.C. § 3535(d) (1994), HUD has defined the conditions under which Section 8 funds may be paid to landlords, such as Melrose, though regulations such as 24 C.F.R. § 881.609(a) (1980). By specifying the method for adjusting rents under HAP contracts to which it applies, absent a waiver by an authorized HUD official, section 881.609(a) limits the amount of rent subsidy for which the United States is liable under the HAP contract. Melrose's estoppel claim, therefore, is foreclosed by Richmond.

V. The Government Cannot Be Estopped By The Unauthorized Conduct Of Ms. Osborne From Recovering Section 8 Rent Subsidies Erroneously Paid To Melrose In Violation Of Applicable Regulations.

The Court of Federal Claims also correctly rejected Melrose's estoppel defense to the Government's counterclaim for the recovery of rent subsidy overpayments made to Melrose as a result of the unauthorized Conversion and resulting November 1996 rent increase for Melrose Apartments. It is "a well-settled principle that the Government has inherent authority to recover sums illegally or erroneously paid, and that it cannot be estopped from doing so by the mistakes of its officers or agents." Aetna Casualty & Surety Co. v. United States, 526 F.2d 1127, 1130 (Ct.Cl. 1975), cert. denied, 425 U.S. 973 (1976)).

The Court of Federal Claims denied Melrose's estoppel defense to the Government's counterclaim because Melrose failed to demonstrate either that the conduct of Ms. Osborne am-ounted to "affirmative misconduct" or that Melrose reasonably relied upon her conduct. 45 Fed. Cl. at 59-61. Quite apart from that basis for rejecting the estoppel defense, as discussed

above, this Court and its predecessor, the Court of Claims consistently have held that the Government

is not estopped by the unauthorized acts of its agents. E.g., S.J. Amoroso Construction, 12 F.3d at 1075; Thanet, 591 F.2d at 635. This restriction upon the availability of estoppel against the Government applies with equal force to claims by the United States for affirmative relief, such as the counterclaim to recoup overpayments in this case. Walcott, 972 F.2d at 325-27; United States v. Killough, 848 F.2d 1523, 1526-27 (11th Cir. 1988); United States v. Vonderau, 837 F.2d 1540, 1541 (11th Cir. 1988); United States v. Lancaster, 898 F.Supp. 320, 323-24 (E.D. N.C. 1995); United States v. Swick, 836 F.Supp. 442, 445-46 (S.D. Ohio 1993).

In Walcott, for example, the Government brought an action against the guarantor of a $500,000 loan by the Small Business Administration (SBA), following the borrower's default. The defendant contended that the Government was estopped from maintaining the suit based upon a purported settlement of the claim for $75,000 between the plaintiff and an SBA official. The district court agreed, but the Eleventh Circuit reversed, noting that, "if the SBA agent who negotiated the settlement acted outside the scope of his authority, the United States cannot pro-perly be held to be estopped from repudiating that agent's actions and the $75,000 settlement." 972 F.2d at 326.

In addition, Melrose's estoppel defense to the Government's counterclaim is precluded by Richmond. Thus, for example, in Fowler, the defendants had obtained a government flood insurance policy upon their property pursuant to the National Flood Insurance Program, despite the fact that their property was not eligible for the flood insurance. The defendants incurred flood damage, and the Government erroneously paid defendants for their loss. Following an

audit, the erroneous payment was discovered and the Government brought an action against the defendants to recover payment. The district court granted summary judgment to the United States, finding, among other things, that the Government was not estopped to recover the erro-neous payment. The Ninth Circuit affirmed upon the basis of Richmond, noting that it was undisputed that defendants' property was not eligible for flood insurance under the National Flood Insurance Act, 929 F.2d at 1385, and concluding:

> [I]f we were to permit the [defendants] to estop the United States, we would be permitting them to retain public funds that Congress had not appropriated. We have no authority to grant such an ex-penditure. In this context, the United States cannot be estopped.

Id. at 1386. As the Ninth Circuit observed, "[t]he limitations on a government agent's ability to bind the government apply to reimbursement of erroneously expended funds such as in the instant case, as well as to the initial distribution." Id. at 1387 n.4.

The present case involves an analogous attempt by Melrose to estop the United States from recovering an erroneous payment of public funds. Melrose's estoppel defense, therefore, is barred by Richmond.

VI. The Court Of Federal Claims Correctly Held That Melrose Failed To Show That The Conduct Of Ms. Osborne In Approving The Conversion And Related Rent Increase Amounted To Affirmative Misconduct, That Melrose Reasonably Relied Upon Her Conduct, Or That Melrose Relied Upon Ms. Osborne's Conduct So As To Change Its Position For The Worse.

In addition to the infirmities discussed above, Melrose's estoppel claims are flawed be-cause Melrose did not demonstrate that the conduct of Ms. Osborne upon which it relied consti-tutes "affirmative misconduct," that such reliance was reasonable, or that Melrose relied

upon Ms. Osborne's conduct so as to change its position for the worse.

A. Melrose Has Not Demonstrated Affirmative Misconduct.

It is "settled that to estop the Government there must at least be affirmative misconduct, leading to unfairness, on the part of a Government official." Hanson v. Office of Personnel Man-agement, 833 F.2d 1568, 1569 (Fed. Cir. 1987). This requirement is *in addition to* the traditional elements of equitable estoppel. E.g., United States v. Bloom, 112 F.3d 200, 205 (5th Cir. 1997); United States v. Omdahl, 104 F.3d 1143, 1146 (9th Cir. 1997); Henry v. United States, 870 F.2d 634, 637 (Fed. Cir. 1989).

The Court of Federal Claims opined that "a demanding definition of affirmative miscon-duct [is] appropriate, in accord with the strong adherence by the courts, including the Supreme Court, to the general rule restricting application of the equitable estoppel doctrine against the government." 45 Fed. Cl. at 60. The trial court concluded that Ms. Osborne's conduct did not amount to the affirmative misconduct necessary to invoke the doctrine of equitable estoppel against the Government (assuming that the other elements of an estoppel are satisfied and that

the restrictions upon the availability of estoppel discussed above do not apply):

> Ms. Osborne's failure to confirm her authority in advance, her ignorance of the limitations on her authority and her inaction by not notifying the plaintiff once she was made aware of the possible limitations on her authority before she was instructed by senior HUD officials that the Budget Based formula would not be ap-proved in the case of plaintiff's HAP contract are not to be con-doned. It does not appear, however, that Ms. Osborne acted in bad faith or recklessly, with an intent to injure plaintiff or with know-ledge of the true facts. Moreover, inaction by a government offi-cial has been found not to constitute affirmative misconduct. This court, therefore, is unconvinced by the

> plaintiff that the circum-stances presented in the above captioned case justify an exception to the general rule severely restricting application of the estoppel principles against the government.

Id. (citation omitted).

Melrose does not dispute that, to estop the Government, the conduct of the Government agent relied upon must rise to the level of "affirmative misconduct." It argues that "the Court of Federal Claims erred as a matter of law by holding [Melrose] to an inappropriate standard of affirmative misconduct." Pl-App. Br. 27. Melrose asserts that "the trial court's definition [of affirmative misconduct] is too restrictive and effectively precludes relief against the Government in all but the most egregious cases of fraud or other criminal activity." Pl-App. 28. According to Melrose, "while affirmative misconduct requires something more than an isolated instance of negligence or misinformation on the part of the government," the standard applied by the Court of Federal Claims "is incompatible with the fundamental premise of estoppel which requires a case by case determination designed to avoid injustice." Pl-App. Br. 30. We disagree.

To be considered affirmative misconduct sufficient to estop the Government, "an indivi-dual's actions must go beyond innocent or negligent misrepresentations." Lancaster, 898 F.Supp. at 323. "Although courts have been less than forthcoming in defining what a government official must do to satisfy the affirmative misconduct element of an estoppel defense, the cases support the conclusion that at minimum the official must intentionally or recklessly mislead the estoppel claimant." United States v. Marine Shale Processors, 81 F.3d 1329, 1350 (5th Cir. 1996); but see Watkins v. United States Army, 875 F.2d 699, 707 (9th Cir. 1989) (en banc) ("Affirmative

misconduct does require an affirmative misrepresentation or affirmative concealment of a mat-erial fact by the government, although it does not require that the government intend to mislead

a party." (citations omitted)). Inaction by a Government official does not constitute affirmative misconduct. See, e.g., Lehman v. United States, 154 F.3d 1010, 1017 (9th Cir. 1998), cert. den-ied, 119 S.Ct. 1336 (1999); Donahue v. United States, 33 Fed. Cl. 600, 607 (1995); Peters v. United States, 28 Fed. Cl. 162, 170 (1993).

Melrose argues that "[t]he [equitable estoppel] doctrine must be understood to include circumstances where, as here, the government's conduct involves a pattern of representations, omissions, and silence that conceals material facts, advances governmental interests at the ex-pense of some, but not all of its citizens, and is misleading, regardless of whether there is affirm-ative proof that the government intended to harm the plaintiff." Pl-App. Br. 29. While such con-duct may suffice to estop a private party, it does not rise to the level of affirmative misconduct required to estop the Government. "[C]ontrolling court decisions have consistently held that affirmative conduct is not sufficient, but rather, that affirmative *mis*conduct is necessary to fulfill the first additional estoppel requirement." Lancaster, 898 F.Supp. at 323 (italics in original). Insofar as Watkins suggests otherwise, it cuts against the grain of judicial authority in this area and should not be followed.

Melrose asserts that "evidence of the affirmative misconduct of [Ms.] Osborne and her staff is clear and compelling on the record below, which established a knowing and pervasive pattern of deception and concealment practised [sic] on Melrose . . . ." Pl-App. Br. 30. In that regard, Melrose contends that, when she approved the Conversion, Ms. Osborne knew that:

(1) the Conversion had not been submitted to HUD Headquarters for approval, which allegedly was contrary to previous representations to Melrose; (2) she (Ms. Osborne) had not disclosed to Melrose that "she was purporting to approve the Conversion on her own authority;" (3) there were "internal issues still under discussion as to whether she had authority;" and (4) she (Ms. Osborne) did not execute the written amendments to the HAP Contract and Regulatory Agree-ment for Melrose Apartments that Melrose had prepared in conjunction with the Conversion

and signed and delivered to the HUD Rhode Island State Office. Pl-App. Br. 30-31. Again, we disagree.

The portions of the record to which Melrose points are not clear or compelling evidence of intentionally deceptive conduct by Ms. Osborne in approving the Conversion. While, in a let-ter to the Providence Housing Court in March 1996, Ms. Osborne stated that the HUD Rhode Island State Office "expected the conversion package to be submitted for [HUD] Headquarters' consideration," JA 137, the testimony of Christine Keshura, a member of Ms. Osborne's staff, Jt. St. ¶ 30-32, JA 72, reflects that, subsequently, Ms. Osborne determined that HUD Headquarters approval of the Conversion was not necessary and that she herself was authorized to approve the Conversion. According to Ms. Keshura, Michael Watson, Chief of the HUD Rhode Island State Office's Asset Management Branch, Jt. St. ¶ 29, JA 71-72, advised Ms. Osborne that she had the authority to approve the Conversion, based upon his interpretation of an April 1994 Federal Reg-ister delegation of authority that, in December 1994, was superseded by the delegation of author-ity that was in effect on November 7, 1996, when Ms. Osborne approved the Conversion. See Keshura Deposition, pp. 97-100, JA 226-227. Consistent with Ms. Keshura's testimony and

the contents of a March 1997 electronic mail message from Ms. Osborne to a HUD Headquarters official about the Conversion, JA 162, Melrose and the Government stipulated, Jt. St. ¶ 37, JA 74, and the trial court found, Melrose I, 43 Fed. Cl. at 134-35, 144, Ms. Osborne predicated her authority to approve the Conversion on the superseded April 1994 Federal Register delegation of authority.

Ms. Osborne's mistaken reliance upon the April 1994 delegation of authority, however, is hardly tantamount to deceitful behavior, nor does it permit an inference of bad faith by Ms. Osborne toward Melrose. After all, Melrose itself argued that the very same delegation of auth-ority authorized Ms. Osborne to approve the Conversion. See "Plaintiff's Memorandum in Sup-port of Plaintiff's Motion for Partial Summary Judgment" dated December 1, 1997, pp. 24-26.[1/] As this Court recently reiterated in Clemmons v. West, 206 F.3d 1401, 1403-04 (Fed. Cir. 2000), "Government officials are presumed to carry out their duties in good faith and proof to the con-trary must be almost irrefragable to overcome that presumption."

Nor did Ms. Osborne "compound" any deception in January 1997 upon receipt of legal advice from a HUD field attorney regarding the Conversion. While, as the trial court stated, Ms. Osborne's "inaction by not notifying [Melrose] once she was made aware of the possible limita-tions upon her authority before she was instructed by senior HUD officials that the [Conversion] would not be approved in the case of [Melrose's] HAP contract [is] not to be

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[14] The argument was not accepted by the trial court. The April 1994 Federal Register delegation of authority was not in effect when Ms. Osborne approved the Conversion, inasmuch as it had been expressly *revoked* by the December 1994 Federal Register delegation of authority. See 59 Fed. Reg. 62739 (Dec. 6, 1994), JA 366. Moreover, the April 1994 delegation of auth-ority itself explicitly withheld from HUD field officials "the authority to issue or waive regula-tions." 59 Fed. Reg. 18284 (April 15, 1994), JA 365.

condoned," "[i]t does not appear that Ms. Osborne acted in bad faith or recklessly, with an intent to injure [Mel-rose], or with knowledge of the true facts." Melrose II, 45 Fed. Cl. at 60.[1/] The trial court, there-fore, correctly concluded that Melrose had failed to demonstrate that Ms. Osborne's conduct am-ounted to the affirmative misconduct necessary to estop the Government.

B. Melrose Has Not Demonstrated Reasonable Reliance.

In addition to the restrictions upon the availability of estoppel against the Government that foreclose Melrose's estoppel defense discussed above, Melrose must satisfy the traditional private law elements of estoppel, including reasonable reliance upon the conduct of the Govern-ment to its substantial injury. See, e.g., Bloom, 112 F.3d at 205; United States v. Guy, 978 F.2d 934, 938 (6th Cir. 1992). A party claiming estoppel must have relied upon his adversary's con-duct in such a manner as to change his position for the worse and "that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it reasonably have known that its adversary's conduct was misleading." Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 59 (1984). Moreover, insofar as reasonable reliance is con-cerned, "those who deal with the Government are expected to know the law and may not rely on

the conduct of Government agents contrary to law." Id. at 63.

The Court of Federal Claims held that Melrose "failed to demonstrate reasonable reliance on the government's conduct," 45 Fed. Cl. at 60, in view of Ms. Osborne's lack of authority to bind the Government to the Conversion and resulting November 1996 rent increase for Melrose

[15] As additional evidence of affirmative misconduct, Melrose argues that Ms. Osborne gave a "specious excuse" for rescinding the Conversion, Pl-App. Br. 37, but that is not the basis of Melrose's estoppel claims, i.e., the conduct upon which Melrose relied.

Apartments, which was apparent from applicable law and regulations:

> As party to a contract, Melrose was responsible for ascertaining whether Ms. Osborne possessed the requisite authority to convert their HAP contract to a Budget Based rent formula. This is espe-cially true in a case such as the one before the court in which the HUD had published regulations detailing that in HAP contracts, variance from the standard Annual Adjustment Factor rent com-putation methodology to Budget Based contract awards requires a waiver signed at the HUD Assistant Secretary level or above. This court, therefore, will not invoke the doctrine of estoppel to protect this plaintiff from the repercussions of its failure to act prudently.

Id. at 61. As the trial court stated, "[a] rigorous approach to determining at what level of official-dom a contract can be signed on behalf of the government is necessary due to the risks of inap-propriately draining public resources." Id. This "merely expresses the duty of all courts to ob-serve the conditions defined by Congress for charging the public treasury," including conditions imposed by Federal agencies through the exercise of delegated rulemaking authority. Id. (quo-ting Merrill, 332 U.S. at 385.).

The trial court's holding is supported by sound precedent. In Guy, the United States brought an action against a taxpayer to recover an erroneous tax refund on the taxpayer's 1983 tax return. Contrary to applicable Treasury regulations, the taxpayer had filed an amended sep-arate tax return for 1983, which resulted in the mistaken refund that was the subject of the liti-gation. 978 F.2d at 936. The taxpayer contended that the Government was estopped to bring

the claim to recover the refund because of alleged oral assurances by an Internal Revenue Ser-vice (IRS) official that the IRS would not seek to collect from the taxpayer any additional funds regarding his 1983 tax liability. Id. at 937. The court of appeals for the Sixth Circuit

affirmed the district court's rejection of the estoppel defense, observing that, "[i]n light of the treasury reg-ulations, the defendant cannot be deemed to have *reasonably* relied on any statements the IRS might have made regarding his right to retain the refund erroneously made to him." Id. (empha-sis in original).

Similarly, in Omdahl, the Government brought an action to foreclose upon the defend-ants' mortgage when they defaulted on promissory notes in the amount of $95,000 owed to the United States through the Farmers Home Administration (FmHA). Following the default, the FmHA County Supervisor had presented the debtors with a proposal to "write down" their debt to $6,307.51, which the debtors accepted. Six months later, FmHA informed the debtors that

the initial offer was a mistake due to a computer error and because it had not been approved by the State Director as required by Federal regulations. Another "write-down" was offered at $117,029, which the debtors did not accept. FmHA then accelerated the loans and filed the foreclosure action. 104 F.3d at 1145.

The debtors in Omdahl contended that the FmHA County Supervisor's mistaken "write-down" offer estopped the United States from foreclosing upon their property. 104 F.3d at 1146. The Ninth Circuit, however, disagreed:

> It is clear from the write-down document itself and from federal regulations that any write-down offer must be approved by the state director. 7 C.F.R. § 1951.903(b). Thus, [the debtors] are charged with the knowledge that the state director's approval was required for the write-down offer, and, because such approval was not the United States is not bound by the offer conveyed by the County Supervisor.

Id. at 1147.

Melrose contends that it was "lulled into believing that it could rely on HUD to take all steps necessary to implement the Conversion in a lawful manner." Pl-App. Br. 41. The trouble with that contention is that it rests upon the erroneous assumption that a contractor, such as Mel-rose, may rely upon the apparent authority of the Government official with whom the contractor deals. Quite the contrary, as the Supreme Court held in Merrill, 332 U.S. at 384, "[w]hatever the form in which the Government functions, anyone entering into an arrangement with the Govern-ment takes the risk of having accurately ascertained that he who purports to act for the Govern-ment stays within the bounds of his authority." 332 U.S. at 384; accord Harbert/Lummus Agri-fuels Projects v. United States, 142 F.3d 1429, 1432 (Fed. Cir. 1998); Trauma Service Group, 104 F.3d at 1325; Total Medical Management, 104 F.3d at 1321. This rule reflects the pragmatic policy concern that, given the large number of persons employed by the United States, "federal expenditures would be wholly uncontrollable if Government employees could, of their own voli-tion, enter into contracts obligating the United States." City of El Centro, 922 F.2d at 820.

Aside from the fact that the law cast upon Melrose the risk that Ms. Osborne was not authorized to agree to the Conversion, as discussed above, Melrose is charged with knowledge

of applicable law and regulations and, consequently, could not reasonably have concluded, based upon Ms. Osborne's conduct, that the Conversion had been approved by a HUD Headquarters official empowered to waive the mandate of 24 C.F.R. § 881.609 (1980) with respect to the ad-justment of contract rents under the

HAP Contract for Melrose Apartments. In that regard, the relevant published delegation of authority expressly withheld from field officials such as Ms. Osborne the power to waive regulations such as section 881.609. See 59 Fed. Reg. 62739, 62745 (Dec. 6, 1994), JA 372. Moreover, the Department of Housing and Urban Development Act pre-cluded any HUD official other than the Assistant Secretary for Housing-Federal Housing Com-missioner, the Deputy Secretary of Housing and Urban Development, and the Secretary of Hous-ing and Urban Development from approving a waiver of 24 C.F.R. § 881.609 (1980), 42 U.S.C. § 3535(q)(2) (1994), and the Act also required that any such approval be in writing, setting forth the ground(s) for waiver, and published in the Federal Register. Id. at § 3535(q)(1),(3).

There was, however, no publication in the Federal Register of any waiver by the Secre-tary, Deputy Secretary, or Assistant Secretary of the requirements of 24 C.F.R. § 881.609 (1980) in conjunction with the Conversion.[1/] In light of the statutory mandate that any such waiver be published in the Federal Register, the absence of publication

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[16] If notice of any such approval had been published, it undoubtedly would have appeared in one of the quarterly listings of waivers of HUD regulations appearing in the Federal Register between December 1994 and September 1997, which, in the aggregate, concern waivers granted during the period from December 26, 1993, through March 31, 1997. These listings, however, do not contain notice of a waiver of 24 C.F.R. Part 881.609 (1980) or 24 C.F.R. § 609.880 (1996) in connection with the Conversion or the related November 1996 rent increase for Mel-rose Apartments. See 60 Fed. Reg. 4427 (Jan. 23, 1995) (12/26/93-6/30/94); 60 Fed. Reg. 10598 (Feb. 27, 1995) (7/1/94-9/30/94); 60 Fed. Reg. 28462 (May 31, 1995) (10/1/94-12/31/94); 60 Fed. Reg. 35040 (July 5, 1995) (1/1/95-3/31/95); 60 Fed. Reg. 51840 (Oct. 3, 1995) (4/1/95-6/30/95); 61 Fed. Reg. 7394 (Feb. 27, 1996) (7/1/95 -9/30/95); 61 Fed. Reg. 29886 (June 12, 1996) (10/1/95-12/31/95); 61 Fed. Reg. 41928 (Aug. 12, 1996) (1/1/96-3/31/96); 61 Fed. Reg. 58110 (Nov. 12, 1996) (4/1/96-6/30/96); 62 Fed. Reg. 6082 (Feb. 10, 1997) (7/1/96-9/30/96);
62 Fed. Reg. 18236 (April 14, 1997) (10/1/96-12/31/96); 62 Fed. Reg. 42632 (Aug. 7, 1997) (1/1/97-3/31/97).

undermines the reasonableness of the assumption by Melrose, based upon Ms. Osborne's approval of the Conversion, that a HUD Headquarters official with authority to waive 24 C.F.R. § 881.609 (1980) had approved the Con-version. At the very least, before agreeing to the Conversion or accepting any resulting benefits, Melrose should have demanded to see a written waiver by the Secretary, the Deputy Secretary, or the Assistant Secretary.[1/]

While the reasonable reliance requirement, as applied in the context of estoppel claims against the Government, admittedly is restrictive, contrary to Melrose's assertion, Pl-App. Br. 38, it does not altogether foreclose the possibility of an estoppel against Government. On several occasions (none of which, however, involved unauthorized conduct by Government officials), this Court and its predecessor, the Court of Claims, have invoked the doctrine of equitable estop-pel against the United States. See USA Petroleum Corp. v. United States, 821 F.2d 622, 625-26 (Fed. Cir. 1987); American Electronic Laboratories, Inc. v. United States, 774 F.2d 1110, 1113-16 (Fed. Cir. 1985); Emeco Industries, 485 F.2d at 657; Manloading & Management Associates, Inc. v. United States, 461 F.2d 1299, 1302-03 (Ct.Cl. 1972); Branch Banking, 98 F.Supp. at 765-66.

C. Melrose Did Not Rely Upon Ms. Osborne's Conduct

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[17] The uncontroverted declaration of Nicolas P. Retsinas, the HUD Assistant Secretary for Housing-Federal Housing Commissioner at the time, establishes that he did not waive the re-quirements of 24 C.F.R. § 881.609 (1980) in conjunction with the Conversion, and that he nei-ther approved the Conversion nor ratified the actions of the Rhode Island HUD State Office. See Retsinas Declaration, ¶¶ 12, 13, JA 384. The Assistant Secretary further declared that he was not aware of any instance in which the Secretary of Housing and Urban Development or the Deputy Secretary of Housing and Urban Development had exercised the authority to approve waivers of regulations issued by the Assistant Secretary, it being the custom in such cases that the decision to approve a waiver would be made by the Assistant Secretary. Id., ¶ 11, JA 383.

So As To Change Its Position For The Worse.

Melrose has not demonstrated that it was in a significantly worse position than if it had not obtained the excessive rent subsidy payments in the first place, as required by Community Health Services. In that case, the plaintiff, a Medicare provider, relying upon the erroneous oral advice of an employee of the Travelers Insurance Companies (Travelers), a fiscal intermediary, included in its Medicare cost reports the salary expense of certain employees funded by a grant under the Comprehensive Employment and Training Act (CETA), for which the plaintiff was reimbursed. 467 U.S. at 56-57. With those additional funds, the plaintiff expanded its annual number of home health care visits twenty-fold. Id. at 57. Thereafter, the Department of Health and Human Services (HHS) advised Travelers that Community Health was not entitled to be re-imbursed for the salaries of its CETA-funded employees, and Travelers, in turn, demanded that the plaintiff repay the disputed amount. Id.

The plaintiff sued the Secretary of HHS and Travelers, seeking to avoid having to repay the salary expenses of the CETA-funded employees. 467 U.S. at 57. The district court ruled in favor of the Secretary, rejecting the plaintiff's claim that HHS should be estopped to deny that the plaintiff was entitled to reimbursement for the salary costs of CETA-funded employees because of the actions of the Secretary's agent, Travelers. Id. at 58. The Third Circuit reversed, conclud-ing that Travelers' erroneous advice coupled with its failure to refer the funding eligibility inquiry to HHS constituted "affirmative misconduct." The court of appeals rejected the district court's finding that it was unreasonable for the plaintiff to rely upon Travelers for advice. Id. at 58-59.

The Supreme Court reversed, holding that the plaintiff had not demonstrated the

"tradi-tional elements" of an estoppel with respect to either the plaintiff's change in position or its reli-ance upon Travelers' advice. The Court opined that to establish a detrimental change of position, the plaintiff was required to demonstrate that it would be "significantly worse off than if it had never obtained the CETA funds in question." Id. at 63. The Court explained that

> [t]o analyze the nature of a private party's detrimental change in position, we must identify the manner in which reliance on the Government's misconduct has caused the private citizen to change his position for the worse. In this case the consequences of the Government's misconduct were not entirely adverse. [The plain-tiff] did receive an immediate benefit as a result of the double reimbursement. Its detriment is the inability to retain money that it should never have received in the first place. Thus, this is not a case in which [the plaintiff] has lost any legal right, either vested or contingent, or suffered any adverse change in its status. When a private party is deprived of something to which it was entitled of right, it has surely suffered a detrimental change in its position. Here [the plaintiff] lost no rights but merely was induced to do something which could be corrected at a later time.

Id. at 61-62 (footnotes omitted).

In Melrose's case, the consequences of the Conversion likewise are not "entirely adverse." Melrose received an immediate benefit of hundreds of thousands of dollars from the excessive rent subsidy payments. Under the Regulatory Agreement and HAP Contract for Melrose Apart-ments, Melrose undertook the responsibility to maintain the project "in good condition and re-pair" and to provide decent, safe, and sanitary housing. See Regulatory Agreement, ¶ 10, JA 95; HAP Contract, part II, § 2.5(a), JA 113. The project had been in poor - according to Melrose "deplorable" - physical condition since at least July 1991, Jt. St. ¶ 20, JA 69, which was a breach of both agreements. The rent subsidy overpayments facilitated the performance by Melrose of necessary repairs to Melrose Apartments in satisfaction of its existing contractual obligations.

Just as in the case of the Medicare provider in Community Health Services, Melrose did not lose any legal right or suffer any adverse change in its status as a result of its receipt of the unauthorized rent subsidy funds. Melrose's detriment is the inability to retain money that it never should have received in the first place. Melrose lost no rights; at most, it was induced to do something that could be corrected at a later time.

Insofar as Melrose contends that it suffered an adverse change of status because, relying upon Ms. Osborne's agreement to the Conversion and the related contact rent increase approved by her, Melrose entered contracts with third parties to perform repairs or for related services that it otherwise would not have undertaken, the argument is without merit. Melrose did not have the luxury of not performing the repairs. As noted above, under the Regulatory Agreement and HAP contract, Melrose was obliged to maintain Melrose Apartments in good condition and repair and to provide decent, safe, and sanitary housing. Absent receipt of the rent subsidy overpayments, Melrose could not have ignored the need for the repairs. It would have had the duty to take what-ever steps were necessary to make the property habitable, including making the needed repairs. The rent subsidy overpayments by the Government were the equivalent of an interest-free loan that Melrose could not have obtained from a private lender.

In Community Health Services, the Supreme Court remarked that "[a] for-profit corpor-ation could hardly base an estoppel on the fact that the Government wrongfully allowed it the interest-free use of taxpayers' money for two or three years, enabling it to expand its operation." 467 U.S. at 62. Similarly, Melrose should not be heard to base an estoppel upon the fact that the Government paid it excessive rent subsidy funds, which helped Melrose to satisfy its contractual obligations to maintain Melrose Apartments in good condition and repair

and to provide decent, safe, and sanitary housing. Melrose, thus, has not demonstrated that it changed its position for the worse in reliance upon the rent subsidy overpayments for Melrose Apartments.

The Court of Federal Claims, therefore, correctly rejected Melrose's estoppel defense to the Government's counterclaim for recovery of the erroneous, excessive rent subsidy payments.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims should be affirmed.

Respectfully submitted,

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JULY 31, 2000

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 31st day of JULY, 2000, I caused to be delivered by hand copies of "BRIEF FOR DEFENDANT-APPELLEE, THE UNITED STATES" addressed as follows:

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