**United States Bankruptcy Court**
**Western District of Wisconsin**

Cite as: [Unpublished]

**In re Stephen F. & Laurinda K. Kundert, Debtors**
Bankruptcy Case No. 94-33545-12

United States Bankruptcy Court
W.D. Wisconsin

September 24, 1996

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Steven Pray O'Connor, Assistant U.S. Attorney, Madison, WI, for Commodity Credit Corp.
William A. Chatterton, Ross & Chatterton, Madison, WI, Trustee.

Robert D. Martin, United States Bankruptcy Judge.

**MEMORANDUM DECISION**

The Commodity Credit Corporation (CCC), of the United States Department of Agriculture, moved for relief from stay to setoff $2,728 in post-petition payments, due to the debtors for their participation in the Conservation Reserve Program (CRP). At trial I continued the stay until the setoff issue was resolved.

When the debtors, Stephen and Laurinda Kundert, contracted with CCC to enter the Conservation Reserve Program ("CRP") on April 28, 1987, they were already in default on loans due CCC. The CRP contract entitled the Kunderts to receive "rent" of $2,728 per year for ten years in exchange for letting slightly less than 40 acres of highly-erodible land lie fallow and keeping the land clear of weeds and other growth. Should the Kunderts default in those terms, they would be subject to liquidated damages, which provided that CCC could terminate the contract, make no further payments, and demand that the Kunderts refund all payments made during the life of the contract. The contract also incorporated by reference a number of federal regulations including 7 C.F.R. Part 13 ("Setoffs and Withholding"), which allows CCC to setoff payments to the Kunderts against debts incurred through their participation in other agricultural programs administered by CCC.[(1)] The Kunderts fulfilled their yearly CRP obligations until they filed for reorganization under chapter 12 on December 12, 1994. CCC filed an unsecured non-priority claim for $86,769.23, and a supplemental claim for $21,824.00 as liquidated damages should the Kunderts reject the CRP contract ($2,728 x 8 payments made, 1987-1994).

In late March, 1995, Levi Wood, who reviews bankruptcy filings for CCC, called Michael Kepler, the Kunderts' attorney, to suggest that the Kunderts assume the CRP contract. Mr. Kepler interpreted Mr. Wood's suggestion as a promise that the Kunderts would receive cash payments from CCC after assumption and relayed this interpretation to the Kunderts by letter and then telephone. The Kunderts' revised chapter 12 plan, confirmed on May 5, 1995, expressly assumed the CRP contract.

Throughout 1995, the Kunderts fulfilled their obligations under the contract and the 1995 payment became due after October 1, 1995. Shortly thereafter, the United States moved for relief from stay pursuant to 11 U.S.C. § 362(d) in order to offset the payment due against the CCC's pre-petition claim.

A creditor's right to setoff in bankruptcy is governed by 11 U.S.C. § 553(a), which provides in relevant part:

Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case[.]

Setoff is appropriate only where the parties owe each other mutual debts which need not be of the same character, based on mutual obligations incurred prior to filing. In re Express Freight Lines, Inc., 130 B.R. 288, 291 (Bankr. E.D. Wis. 1991).

Section 553(a) creates no substantive rights on its own. The underlying right, in the nature of a self-help remedy, is conferred by state or federal law. Sylvester v. Martin, 130 B.R. 930, 938 (Bankr. N.D. Ill. 1991); In re Express Freight Lines, Inc., 130 B.R. at 290-91. In this case, CCC's right to setoff is conferred by a federal statute and is incorporated into the CRP contract. The parties agree that the Kunderts owe pre-petition debts to CCC. Therefore, the sole inquiry is whether CCC's post-petition rent obligation arose, or became absolutely owed, pre-petition.

That question has divided the courts. The first line of decisions, epitomized by In re Walat Farms, 69 B.R. 529 (Bankr. E.D. Mich. 1987), adheres to the doctrine that a debtor-in-possession is a completely "new entity" whose assumption of an executory contract converts unmatured pre-petition obligations into post-petition obligations. Walat Farms concerned deficiency payments due under the Price Support and Production Adjustment Programs, one-year contracts in which the payments could not be ascertained pre-petition. After concluding that the subsidy contract was executory,[(2)] the court denied setoff because at filing, "the debtor still owed performance of its duties in a number of substantial ways." Therefore, any payments due were due to the "debtor-in-possession *qua* trustee, and not the debtor. Consequently, mutuality would not exist and setoff would be disallowed." Walat Farms, 69 B.R. at 531 (citations omitted). Following Walat Farms, another Michigan court held that where the deficiency payment due under a Price Support contract had "matured" -- that is, the amount of the debt was known and fixed -- prior to commencement of the case, the debt was pre-petition and mutuality was preserved because the contract was no longer executory. In re Hazelton, 85 B.R. 400, 403-04 (Bankr. E.D. Mich. 1988), rev'd on other grounds, 96 B.R. 111 (E.D. Mich. 1988). Two other decisions have extended Walat Farms' reasoning to CRP contracts, which create a ten-year obligation. In re Evatt, 112 B.R. 405 (Bankr. W.D. Okl. 1989), aff'd 112 B.R. 417 (W.D. Okl. 1990); In re Gore, 124 B.R. 75 (Bankr. E.D. Ark. 1990).

The competing line of decisions, beginning with In re Matthieson, 63 B.R. 56 (D. Minn. 1986) (Magnuson, D.J.), takes a completely different approach to the farm subsidy contracts. These decisions reject the notion, crucial to the Walat Farms line, that the debtor's performance is a condition precedent to CCC's duty to pay. Rather, the CRP and similar government subsidy contracts contain express, mutual, non-conditional promises to perform which absolutely obligate the parties from the contract's inception. Therefore, whether the debtor performs pre- or post-petition is irrelevant to determining setoff. See In re Matthieson, supra; In re Greseth, 78 B.R. 936 (D. Minn. 1987); In re Allen, 135 B.R. 856 (Bankr. N.D. Iowa 1992); In re Mohar, 140 B.R. 273 (Bankr. D.

Mont. 1992); United States v. Gerth, 991 F.2d 1428 (8th Cir. 1993).

This court addressed this issue in In re Lundell Farms, 82 B.R. 582 (Bankr. W.D. Wis. 1988). Lundell Farms reviewed, without expressly taking sides, the analyses undertaken by Walat Farms on the one hand, and Matthieson and Greseth on the other. The Lundells had completed performance of their 1987 CRP obligations prior to filing bankruptcy and were awaiting payment. Thus, "every act related to setoff had been completed prior to bankruptcy except the actual transfer of funds[.]" Lundell Farms, 82 B.R. at 588, and either line of analysis would have permitted setoff. Although the debtor and debtor-in-possession *are* distinct entities in many ways, the filing of a bankruptcy petition does not destroy all vestiges of the pre-petition debtor:

Obviously, if the [debtor-in-possession] were a wholly "new entity," it would be unnecessary for the Bankruptcy Code to allow it to reject executory contracts, since it would not be bound by such contracts in the first place. For our purposes, it is sensible to view the debtor-in-possession as the same "entity" which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing.

NLRB v. Bildisco & Bildisco, Inc., 465 U.S. 513, 528 (1984). The Seventh Circuit's description is particularly apt. "It is as if the bankruptcy process creates two separate firms -- the pre-bankruptcy firm that pays off old claims against pre-bankruptcy assets, and the post-bankruptcy firm that acts as a brand new venture." Boston & Maine Corp. v. Chicago Pacific Corp., 785 F.2d 562, 565 (7th Cir. 1986) (involving setoff of interline balances between bankrupt railroads). Thus, when a debtor-in-possession assumes an executory contract it does not affect the mutuality element of setoff. Mutuality involves at heart a narrow inquiry. "[T]he one feature of all definitions [of mutuality] is that the debts on both sides must predate the bankruptcy[.]" Id. at 564. Even after assumption, pre-petition obligations under an executory contract remain pre-petition obligations, owed (as the Seventh Circuit puts it) to the pre-petition debtor.

The fact that the CRP contract is executory and is assumed by a "new entity" (the debtor-in-possession) is immaterial to the setoff analysis. The "mere assumption of an executory contract does not alter when the obligations under the contract arose." Gerth, 991 F.2d at 1432. This is consistent with a fundamental policy of both bankruptcy and contract law, that "when assuming a contract, the debtor assumes all the benefits and burdens under the contract." Id., citing NLRB v. Bildisco & Bildisco, Inc., 465 U.S. 513, 531 (1984) ("Should the debtor-in-possession elect to assume the executory contract, however, it assumes the contract cum onere . . . ."). Further, the assumption of a contract cannot change the obligation from pre- to post-petition because that would constitute a material modification of the contract, which is disallowed under 11 U.S.C. § 365. Allen, 135 B.R. at 864. And, as a practical matter, it would make no sense to restrict setoff in reorganization cases to non-executory contracts. Id., at 869.

Thus, CCC's duty to pay in 1995 was absolutely owed pre-petition even though the Kunderts performed some of their contract obligations after the petition was filed. Although several courts have framed the issue as one turning primarily, if not solely, on the timing of the debtor's performance, see In re Brooks Farms, 70 B.R. 368, 371 (Bankr. E.D. Wis. 1987) (finding setoff of CRP payments against the debtor's pre-petition corn storage loan debts was appropriate where all of the acts of contractual performance relevant to the determination of setoff, except for payment, occurred pre-petition); In re Gore, 124 B.R. at 77-78 (finding setoff not allowed for CRP payments owed to debtors for their post-petition performance), these decisions relied to some extent on Walat Farms.

Under the competing approach, as established by Matthieson and more elaborately refined in Allen and Gerth, the timing of the debtor's performance is irrelevant because CCC's obligation is fixed upon the signing of the contract and not dependent on or valued against the duties imposed on the Kunderts by virtue of the contract's assumption. Matthieson, et. al., begin by attacking the notion that a debt is not an absolute obligation merely because the amount of payment cannot be ascertained or is not due until after a bankruptcy petition is filed. A debt in bankruptcy is a "liability on a claim," 11 U.S.C. § (12), and a claim is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. . . ." 11 U.S.C. § 101(5)(A), in Gerth, 991 F.2d at 1433. Since debt is coextensive with claim, "a debt arises when all transactions necessary for liability occur, whether or not fixed or matured when the petition was filed." Id., citing Braniff Airways, Inc. v. Exxon Co., U.S.A., 814 F.2d 1030, 1036 (5th Cir. 1987); see also In re Express Freight Lines, Inc., 130 B.R. 288, 292-3 (Bankr. E.D. Wis. 1991) (McGarity, J.) (making the same argument in the context of a promissory note/leaseback arrangement and subsequently allowing setoff of post-petition payments against pre-petition debt).

The CRP contract establishes the obligations and determines when "all transactions necessary for [CCC's] liability occurr[ed];" therefore, the analysis must begin there. *Corbin on Contracts* provides some guidance in interpreting the CRP contract:

The first step . . . in interpreting an expression in a contract, with respect to condition as opposed to promise, is to ask oneself the question: Was this expression intended to be an *assurance* by one party to the other that some performance by the first would be rendered in the future and that the other *could rely upon* it? If the answer is yes, we have found the expression to be a promise that the specified performance will take place. The alternative question to be asked is: Was this expression intended to make the duty of one party conditional and dependent upon some performance by the other (or on some other fact or event)? If the answer to this question is yes, we have found that the specified performance is a condition of duty, but we have not found that anyone has promised that the performance will take place.

3A *Corbin on Contracts* § 633 at p. 32 (emphasis added), quoted in Allen, 135 B.R. at 865. In our case both parties were absolutely obligated to each other through mutual promises made upon formation of the contract. The express language of the contract states the parties' "intent" to be absolutely bound upon execution. The debtor "must" perform for the ten-year term of the contract, and the agency "agrees" to pay in ten annual installments for this performance.(3) Failure to perform may give rise to liquidated damages.(4) But CCC's obligation to pay annual rent is not conditioned on any of the debtor's obligations.(5) The mutuality predicate for setoff is therefore present and the obligations on both sides arose prior to the bankruptcy filing.

Even if the language were not dispositive, commentators agree that it is preferable to construe the contract as one of promises rather than conditions. In comparing covenants (promises) to conditions, one commentator recently noted:

Although one of the parties to the agreement may be able to influence the occurrence of a condition, its incidence usually is a matter of fate or of the decision of one or more third parties. In comparison, covenants are almost always within the control of the contracting parties. The parties make that tacit assumption upon entering their agreement. If a failure of a condition occurs, no performance is due. If the failure of a condition predates performance, the contract never comes into existence. If the condition fails to occur after performance has begun, the contract ceases to exist.

Hunter, *Modern Law of Contracts* ¶ 10.01[1] (1993). The contract is carefully drafted to insure that CCC can rely on a full ten-year commitment from farmers.[(6)] Farmers are also protected by the contract's unconditional language because they can rely on ten yearly payments that are absolutely due at the contract's inception.

The Kunderts argue that even if the 1995 CRP payment is a pre-petition obligation subject to setoff, the court should disallow setoff. Their argument might be expressed in one of three ways: (1) That CCC acted in bad faith by attempting through subterfuge to secure what would otherwise be an unsecured debt, (2) that CCC may not have acted in bad faith but should be estopped from setoff because it represented to the Kunderts that no setoffs would be taken if they assumed the contract, or (3) that setoff should be disallowed because to allow it would doom the Kunderts' reorganization plan.

Setoff is not an absolute right but is within the discretion of the court. Express Freight Lines, 130 B.R. at 290; see also In re Rosenbaum Grain Corp., 103 F.2d 656, 658 (7th Cir. 1939). Courts can and have denied setoff where the elements of § 553 are met for reasons of policy or equity. See In re Blanton, 105 B.R. 321, 336-338 (Bankr. E.D. Va. 1989) (surveying cases); Allen, 135 B.R. at 869-71 (same). Courts often deny setoff on grounds that to allow it would place an unreasonable burden upon the reorganized debtor. Blanton, 105 B.R. at 337; Braniff Airways, Inc. v. Exxon Co. U.S.A., 814 F.2d 1030, 1034 (5th Cir. 1987). Setoff may be disallowed because of its adverse effect on other creditors during reorganization. In re Lakeside Community Hosp., Inc., 151 B.R. 887, 893-94 (N.D. Ill. 1993). Setoff can also be disallowed where the creditor seeking setoff conducted itself in bad faith, Blanton, 105 B.R. at 337-38 (surveying cases), "purchased" setoff positions prior to bankruptcy in contravention of § 553(a)(2) or achieved an improvement in position in contravention of § 553(b)(1).

There is no reason to deny setoff on the grounds that setoff will irreparably harm the Kunderts' reorganization. The Kunderts' initial rejection of the CRP contract -- for which they weren't receiving cash payments in any case -- suggests that the Kunderts did not enter chapter 12 with any plans to rely on CCC. Nevertheless, the government's efforts to ensure that the Kunderts would assume the contract and the obligations therein, appears to have afforded it greater payment of a dischargeable pre-petition debt than available to other general creditors. Reduction of the amount of the debt to be discharged is hardly a quid pro quo for the costs of maintaining the fallow fields.

It is undisputed that Mr. Wood called Mr. Kepler to suggest that the debtors assume the CRP contract. According to Mr. Kepler, Mr. Wood suggested that by assuming the contract, the debtors would continue to receive payments, but that by rejecting it, they would forfeit not just the right to those payments but would be subject to a liquidated damages claim. Mr. Kepler said that he interpreted Mr. Wood's comments to be a promise of continued cash payments. According to Mr. Wood, however, he only suggested that they consider assuming the contract and made no promises about its post-confirmation effect.

Other than the parties' testimony, the only evidence of a promise of cash is Mr. Kepler's letter to the Kunderts on April 4, 1995, relating his conversation with Mr. Wood. That letter can be read to support either version. Mr. Kepler wrote, "I received a call from Levi Wood who stated that our Plan now would make you liable for CRP repayment and also result in monies not coming to you for the program that you are currently involved in." Mr. Kundert called Mr. Kepler after receiving this letter, and the plan was redrafted to expressly assume the CRP contract.

Mr. Wood's encouragement of assumption could be interpreted as an attempt by the government to be paid at least a portion of the Kunderts' pre-petition debt. Mr. Wood admitted that, in his experience with perhaps three hundred chapter 12 bankruptcies, the

government as unsecured creditor for debts incurred under the various loan and subsidy programs typically recaptured a small percentage of the debt. Mr. Wood was aware in February, 1995, before he spoke to Mr. Kepler, that the Kunderts' payments had been setoff in the past.[(7)] Nonetheless, having observed the witnesses and reviewed the evidence of the discussion regarding assumption of the CRP contract, I am convinced that all parties to the transaction, Mr. Wood, Mr. Kepler and Mr. Kundert, proceeded in good faith and good intentions although without a clear understanding of the effect of the assumption. Although there is no direct evidence of it, it is reasonable to believe that Woods and the government were principally concerned with achieving the stated objectives of the CRP program by keeping highly erodible land out of production, and to have counseled assumption without giving thoughtful consideration to who would receive the payments.

It is not necessary to assume that Mr. Wood's conduct was questionable or that the Kunderts have established the elements of equitable estoppel under the Portmann test[(8)] in order to find that the Kunderts' should be allowed some equitable relief. The net result of Mr. Wood's telephone call to Mr. Kepler is enough.

Some courts have held that setoff cannot be denied "merely because it would provide an unjust result." Blanton, 105 B.R. at 337, citing New Jersey Nat'l Bank v. Gutterman (In re Applied Logic Corp.), 576 F.2d 952, 957 (2d Cir. 1978); see also In re Ahlswede, 516 F.2d 784, 787 (9th Cir) ("[T]he [equity] chancellor never did, and does not now, exercise unrestricted power to contradict statutory or common law when he feels a fairer result may be obtained by application of a different rule."), cert. denied sub nom., Stebbins v. Crocker Citizens Nat. Bank, 423 U.S. 913 (1975), quoted in United States v. Noland, 28 BCD 1331, 1334 (1996). However, an equitable remedy, including setoff, is based fundamentally on a desire to provide a just result where the law would otherwise prove inadequate. A result need not be caused by one party's sharp practice in order to be unjust.

The Kunderts, having received no cash payments under the program for several years prior to filing, rejected the CRP contract in their original plan. They assumed the contract as a direct result of Mr. Wood's suggestion to Mr. Kepler. They did not exercise their option to leave the program without penalty in May of 1995 because, having just assumed the contract in their amended plan, they felt that they had given their word that they would perform. Of course, they also believed (wrongly, it turns out), that they would begin receiving cash payments from CCC where none had come in recent memory. In sum, the net effect of Mr. Wood's telephone call to Mr. Kepler is that the government benefitted more than the Kunderts. The government secured up to $5,428 in payments against pre-petition debt, assuming the Kunderts have performed in 1996 as they did in 1995. The government gained the benefit of two more years of erosion control on the Kunderts' farm. The Kunderts, on the other hand, found themselves obligated to expend time and resources performing under the contract for cash payments that would not be forthcoming. To the extent that the Kunderts expended funds out of pocket, they ought to be reimbursed and to the extent they performed labor, they ought to be paid at the minimum rate at which similar labor is valued in the market. Beyond those amounts, CCC should be permitted the offset provided by the assured contract.

If there is a dispute as to the amount of the offset authorized by this opinion a further hearing may be requested by either party. The § 362(a) stay may be modified to permit setoff to the extent described in this decision.

**END NOTES:**

1. Upon certain conditions, these regulations allow the government to setoff "amounts approved by Agricultural Stabilization and Conservation county committees for

disbursement to [program participants] . . . against debts of such [participants] owing to any department or agency of the United States. 7 C.F.R. § 13.1.

2. The court applied the Countryman definition of executory contract as "a contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance of the other." V. Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn.L.Rev. 439, 460 (1973), in Walat Farms, 69 B.R. at 531.

3. Allen construed a 1987 CRP contract, which is presumably identical in all material ways to the Kunderts' 1987 CRP contract. The relative obligations of the Kunderts and CCC are spelled out in the Appendix to CRP-1, ¶ 3 A-L (participants' obligations), and ¶ M (CCC's obligations). CCC's obligations, other than annual rent payments, are to share the cost of establishing conservation practices with program participants and to provide them with technical assistance. There are no specific provisions that offer the Kunderts damages or other consideration should CCC fail to perform.

4. The liquidated damages clause in the Kunderts' contract, entitled "Termination of Contract" (Appendix to Form CRP-1, ¶ 23), states:

A (1) If the participant fails to carry out the terms and conditions of this Contract, CCC may, after considering the recommendation of the CP and SCS, terminate this Contract.

(2) If this Contract is terminated by CCC in accordance with this paragraph 23A, the participant shall:

(i) Forfeit all rights to further payments under this Contract and refund all (1-payments received together with interest thereon, as determined by CCC, or

(ii) Forfeit all rights to payments under this Contract and pay liquidated damages to CCC at the rate of 25 percent of the annual rent payment specified in item 6 of Form CRP-1 multiplied by the eligible acreage which was offered to be placed in the CRP if no payments have been received by the participant under this Contract.

(3) The purpose of the CRP is to control erosion on highly erodible lands thereby protecting the Nation's soil and water resources for succeeding generations. Once this Contract has been entered into between CCC and the participant, CCC and other segments of the agricultural community will act based on the assumption that this Contract will be fulfilled and reduction in erosion and production will be obtained. CCC's action includes budgeting and planning for the CRP in subsequent crop years. A participant's failure to carry out the terms and conditions of this Contract undermines the basis for these actions, damages the credibility of CCC's programs with other segments of the agricultural community, and requires additional expenditures in subsequent crop years in order for the required levels of acreage to be placed in the CRP and in order for an adequate reduction in erosion to be obtained. While the adverse effects on CCC of the participants' failure to comply with the terms and conditions of this Contract are apparent, it would be impossible to compute the actual damage suffered by CCC.

Therefore, upon the termination of this Contract in accordance with paragraph 23A, participant's (sic) to such contract shall be required to refund all payments received, together with interest, or to pay liquidated damages in an amount specified in paragraph 23A(2)(ii) if no payments have been made.

B CCC may terminate this Contract if the participant agrees to such termination and CCC determines that termination would be in the public interest.

C If the participants fail to carry out the terms and conditions of this Contract but CCC determines that such failure does not warrant termination of this Contract, CCC may require such participant to refund payments received under this Contract or to accept such adjustments in the payments as are determined to be appropriate by CCC.

5. Performance that has been promised can be subject to a condition *subsequent*, wherein the failure of the Kunderts to perform extinguishes an existing duty. That is, in fact, the way the CRP contract works. Thus, it may not be entirely accurate, as Allen, et. al., contend, to say that the CRP contract is entirely free of conditions. On the other hand, an interpretation that an obligation is a condition *subsequent* is generally disfavored in modern contracts law. See e.g., Heritage Bank & Trust Co. v. Abdnor, 906 F.2d 292, 298 (7th Cir. 1990) (discussing the two types of conditions); see also, Restatement (Second) of Contracts § 227(3) ("In case of doubt, an interpretation under which an event is a condition of an obligor's duty is preferred over an interpretation under which the nonoccurrence of the event is a ground for the discharge of that duty after it has become a duty to perform."). In any case, such a construction would not alter the setoff analysis.

6. Strong evidence of that reliance is also found in the liquidated damages clause, which states clearly that CCC bargained for and relied upon a full 10-year performance because anything else would undercut the purpose of the conservation program, which is spelled out in the liquidated damages clause. See fn. 3 supra.

7. Assuming that his motivations were not entirely benign, his actions were not ameliorated by a desire to see the Kunderts preserve their right to the free-out option by assuming the plan because, as Mr. Wood explained to the court, he knew very little about the option and was not thinking of its applicability to the Kunderts when he called Mr. Kepler.

8. Under the Portmann test, the following requirements must be established by the party seeking estoppel against a government entity:

First, the party to be estopped must know the facts. Second, this party must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has a right to belief it is so intended. Third, the party asserting estoppel must have been ignorant of the facts. Finally, the party asserting estoppel must reasonably rely on the other's conduct to his substantial injury. In addition, the Ninth Circuit noted that 'the government's action upon which estoppel is to be based, must amount to affirmative misconduct,' which that court defined as 'something more than mere negligence.'

Portmann v. United States, 674 F.2d 1155, 1167 (7th Cir. 1982), quoting TRW, Inc. v. Federal Trade Commission, 647 F.2d 942, 950-51 (9th Cir. 1981); see also Azar v. United States Postal Service, 777 F.2d 1265, 1268 (9th Cir. 1985). See Lundell Farms, 86 B.R. at 589, applying Portmann.