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## NOTES

### EQUITABLE ESTOPPEL OF THE FEDERAL GOVERNMENT: AN APPLICATION OF THE PROPRIETARY FUNCTION EXCEPTION TO THE TRADITIONAL RULE.

#### INTRODUCTION

It is well settled that the federal government<sup>1</sup> may not be equitably estopped from asserting a claim or defense on the same terms as other litigants.<sup>2</sup> Although the Supreme Court has never held that equitable estoppel may lie against the federal government, in its most recent decision on this issue, the Court refused to lay down a flat rule that equitable estoppel may not in any circumstances be asserted against the government.<sup>3</sup> The absence of a clear guideline of the circumstances under which estoppel against the government may be appropriate has led to confusion in lower courts. Despite the growing trend among lower courts to allow equitable estoppel against the government, these courts use different approaches to circumvent the strict "no-estoppel" rule.<sup>4</sup>

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1. This Note addresses estoppel of only the federal government, although many of the issues examined here are no less relevant in cases involving actions by state and local government officials. For a discussion of estoppel against these latter group of government officials see Miller, *Estoppel and the Public Purse: A New Check on Government Taxing and Spending Powers in Florida Law*, 9 Fla. St. U.L. Rev. 33 (1981); Comment, *Estoppel Against State, County, and City*, 23 Wash. L. Rev. 51 (1948) [hereinafter *Estoppel Against State*].

2. See *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *INS v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383 (1947).

3. See *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984).

4. The Supreme Court has left open the question whether "affirmative misconduct" of a government agent is sufficient to support an estoppel of the government from enforcing the laws. See *INS v. Miranda*, 459 U.S. 14, 19 (1982) (per curiam); *Schweiker v. Hansen*, 450 U.S. 785, 788 (1981) (per curiam); *INS v. Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam); *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961).

In response to the dicta in these Supreme Court cases, lower courts have held that estoppel may only lie against the government if a party proves "affirmative misconduct" on the part of a government agent. See, e.g., *Green v. United States Dept. of Labor*, 775 F.2d 964, 970 (8th Cir. 1985); *Free Enter. Canoe Renters Ass'n v. Watt*, 711 F.2d 852, 857 (8th Cir. 1983); *Sun Il Yoo v. INS*, 534 F.2d 1325, 1328 (9th Cir. 1976); see also Braunstein, *In Defense of a Traditional Immunity—Toward an Economic Rationale for Not Estopping the Government*, 14 Rutgers L. J. 1, 13-14 (1982); Note, *Estoppel of the Federal Government: Still Waiting for the Right Case*, 53 Geo. Wash. L. Rev. 191, 195-97 (1984) [hereinafter *Waiting for the Right Case*].

What constitutes "affirmative misconduct" and whether "affirmative misconduct" must be proven to justify estoppel of the federal government, however, are unresolved questions. See *Grumman Ohio Corp. v. Dole*, 776 F.2d 338, 347 (D.C. Cir. 1985); *Deltona Corp. v. Alexander*, 682 F.2d 888, 891-92 (11th Cir. 1982); Comment, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. Chi. L. Rev. 1026, 1044-47 (1986) [hereinafter *Restrictive Rule*].

The Court of Appeals for the Ninth Circuit has played a leading role in balancing the

This Note focuses on recent applications and criticisms of one widely applied technique for limiting the "no-estoppel" rule—the distinction between sovereign and proprietary functions of federal agencies.<sup>5</sup> Gener-

public's interest that the government be immune from estoppel against the injustice that would result from a government agent's misconduct. See *Johnson v. Williford*, 682 F.2d 868, 872 (9th Cir. 1982) (government's conduct must threaten a serious injustice and the public's interest cannot be damaged for estoppel to be appropriate); *United States v. Ruby Co.*, 588 F.2d 697, 703 (9th Cir. 1978) ("estoppel should be applied where 'justice and fair play require it'") (quoting *U.S. v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973)); *United States v. Lazy FC Ranch*, 481 F.2d 985, 988 (9th Cir. 1973) (same); *Waiting for the Right Case*, *supra*, at 198.

Other courts have effectively estopped the government by invoking various other legal theories that yield the same result. See, e.g., *A.W.G. Farms Inc. v. Federal Crop Ins. Corp.*, 757 F.2d 720, 728-29 (8th Cir. 1985) (government not liable under an estoppel theory, but held liable for breach of implied covenant of good faith and fair dealing); *Patton v. Director Office of Workers Comp. Prog.*, 763 F.2d 553, 559-60 (3d Cir. 1985) (time period to appeal administrative decision does not run until notice of decision is sent to counsel of party, not when notice is sent to party as provided by relevant statute). *But see id.* at 560 (Weis, J., dissenting) (the majority in effect found the Secretary is estopped).

Still other courts have used a proprietary/sovereign distinction as an analytical tool in deciding whether estoppel may lie against the government. See *infra* notes 80-88 and accompanying text.

5. The distinction between "sovereign" (or governmental) and "proprietary" (or non-governmental) functions of federal agencies has been called "the most widely applied technique for limiting the no-estoppel rule." Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 555 (1979) [hereinafter *Equitable Estoppel*]. The distinction between a proprietary function and a sovereign function is that:

[p]roprietary governmental functions include essentially commercial transactions involving the purchase or sale of goods and services and other activities for the commercial benefit of a particular government agency. Whereas in its sovereign role, the government carries out unique governmental functions for the benefit of the whole public, in its proprietary capacity the government's activities are analogous to those of a private concern.

*Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984). This distinction has been used by courts to justify estoppel of the government in a number of different situations. See *id.* (FDIC subject to estoppel when it acts in its corporate capacity and performs essentially the same function as a private bank); see also *Azar v. United States Postal Serv.*, 777 F.2d 1265, 1275 (7th Cir. 1985) (customer claiming loss for EXPRESS MAIL package may estop Postal Service); *Portmann v. United States*, 674 F.2d 1155, 1168-69 (7th Cir. 1982) (Postal Service subject to estoppel when EXPRESS MAIL service is service in issue); *Emeco Indus., Inc. v. United States*, 485 F.2d 652, 657 (Ct. Cl. 1973) (government estopped from denying terms of purchase agreement); *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 100-01 (9th Cir. 1970) (government estopped from enforcing contract where owner of timberlands agreed to convey parcel to government at later date). One criticism of this approach is that the distinction between proprietary and sovereign functions is difficult to make. See *Portmann*, 674 F.2d at 1161 ("line between sovereign and proprietary functions is somewhat artificial and difficult to apply"); *Georgia-Pac.*, 421 F.2d at 101 ("[w]hile it is said that the Government can be estopped in its proprietary role, but not in its sovereign role, the authorities are not clear just about what activities are encompassed by each."); *United States v. City of San Francisco*, 112 F. Supp. 451, 454 (N.D. Cal. 1953) (characterizing distinction as "somewhat nebulous and perhaps attenuated"), *aff'd*, 223 F.2d 737 (9th Cir.), *cert. denied*, 350 U.S. 903 (1955); see also *Equitable Estoppel*, *supra*, at 557 (distinction often difficult to apply).

The distinction between the government acting in its proprietary capacity and sovereign capacity has been used in other contexts. See, e.g., *Hughes v. Alexander Scrap Corp.*, 426 U.S. 794, 808-10 (1976) (commerce clause inapplicable where the state enters

ally, courts using the proprietary/sovereign distinction favor equitable estoppel when the government activity can be classified as proprietary<sup>6</sup> and refuse to permit equitable estoppel when the government is acting in its sovereign capacity.<sup>7</sup>

This Note argues that the proprietary/sovereign distinction is a valid and useful approach to determine whether equitable estoppel may lie against the federal government. Part I discusses the reasons supporting the traditional "no-estoppel" rule and examines the relevant Supreme Court precedents. Part II analyzes the different kinds of equitable estoppel and the different types of government functions found in cases involving equitable estoppel of the government. Part III proposes a conceptual framework to identify the circumstances where equitable estoppel may be properly asserted against the federal government.

### I. THE TRADITIONAL RULE THAT THE GOVERNMENT MAY NOT BE EQUITABLY ESTOPPED

The doctrine of equitable estoppel precludes a party from asserting a claim or defense that otherwise is available to him against his opponent who has detrimentally altered her position in reliance on the party's misrepresentation or failure to disclose a material fact despite a duty to do so.<sup>8</sup> The fundamental principle underlying equitable estoppel is that no one should benefit from his own wrong.<sup>9</sup> Despite this principle, the gov-

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the market as a purchaser); L. Tribe, *American Constitutional Law* 336-38 (1978) (discussing distinction in terms of state immunity from commerce clause scrutiny when state acts in its proprietary capacity); see also *Owen v. City of Independence*, 445 U.S. 622, 644-48 (1980) (governmental-proprietary distinction used to determine whether state is liable for constitutional tort under 42 U.S.C. § 1983).

6. See, e.g., *Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984) (federal government may be estopped when it serves an essentially proprietary role and its agents act within the scope of their authority); *Portmann v. United States*, 674 F.2d 1155, 1161-62 (7th Cir. 1982) ("[T]he 'proprietary' or commercial character of the government activity in issue militates in favor of allowing an estoppel . . .").

7. See, e.g., *United States v. Federal Ins. Co.*, 805 F.2d 1012, 1016 (Fed. Cir. 1986) ("equitable estoppel, even if available in cases involving the Government in its proprietary capacity, is not available against the Government in cases involving the collection of duties or refunds on imports" (quoting *Air-Sea Brokers v. United States*, 596 F.2d 1008, 1011 (C.C.P.A. 1979)); *Buccaneer Point Estates, Inc. v. United States*, 729 F.2d 1297, 1299 n.2 (11th Cir. 1984) ("The rule in this circuit has been firmly established: the United States is not subject to an estoppel when it acts in its sovereign capacity.").

8. See *Portmann v. United States*, 674 F.2d 1155, 1158 (7th Cir. 1982) (citing 3 J. Pomeroy, *Equity Jurisprudence* § 804, at 189 (5th ed. 1941)); Note, *Equitable Estoppel of the Government*, 47 *Brooklyn L. Rev.* 423, 424 (1981). Proof of the following elements is necessary to trigger the operation of the doctrine: The party to be estopped must know the facts; he must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe it is so intended; the party asserting estoppel must be ignorant of the true facts; and he must rely to his detriment on the conduct of the party to be estopped. See *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 96 (9th Cir. 1970); see also *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir. 1960); *Sinclair Prairie Oil Co. v. Campbell*, 164 F.2d 907, 910 (5th Cir. 1947).

9. Justice Cardozo stated the principle: "no one shall be permitted to found any

ernment had traditionally been immune from equitable estoppel.<sup>10</sup> Governmental immunity from equitable estoppel, part of American common law for almost two centuries,<sup>11</sup> arose as an incidence of sovereign immunity.<sup>12</sup> Under the sovereign immunity doctrine the government can not be sued unless it consents.<sup>13</sup> A corollary to sovereign immunity is that the government may not be estopped from asserting its rights when it has not consented to its defeat.<sup>14</sup> As Congress passed legislation waiving sovereign immunity in limited circumstances,<sup>15</sup> other rationales replaced sovereign immunity to justify the traditional rule.<sup>16</sup>

The justification for refusal to estop the government today rests primarily on two considerations. First, equitable estoppel of the government interferes with the separation of powers between the judicial and legislative branches of the federal government. If the government were estopped to deny a representation made by an agent or official that is

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claim upon his own inequity or take advantage of his own wrong." R.H. Stearns Co. v. United States, 291 U.S. 54, 61-62 (1934).

10. See *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-09 (1917); K. Davis, *Administrative Law Treatise* §§ 17.01-06, at 491-525 (1958); Berger, *Estoppel Against the Government*, 21 U. Chi. L. Rev. 680, 683 (1954).

11. The Supreme Court's earliest pronouncements of the rule are found in *United States v. Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824) and *Lee v. Munroe*, 11 U.S. (7 Cranch) 368-69 (1813). In *Munroe*, the Court justified the rule by reasoning that allowing the government to be bound by the unauthorized acts of its agents might lead to fraud and collusion between claimant's and government agents. "It is better that an individual should now and then suffer by such mistakes than to introduce a rule against an abuse of which, by improper collusions, it should be very difficult for the public to protect itself." *Munroe*, 11 U.S. (7 Cranch) at 369.

The principle that the government could not be estopped by the unauthorized acts of its agents became widely accepted by the early part of this century. In 1917, the Supreme Court dismissed an attempt to estop the United States by stating "that the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power and Light Co. v. United States*, 243 U.S. 389, 409 (1917); see also Berger, *supra* note 10, at 680 n.6 (citing cases).

12. See *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 99 (9th Cir. 1970); 2 K. Davis, *Administrative Law Treatise* § 17.01 (1958). Professor Davis states;

"[t]he theory that the government cannot be estopped is no doubt a part of the broad doctrine of sovereign immunity. In the early days of the American Republic, the government was liable neither for breach of contract nor for torts of its agents. Sovereign immunity from contract and tort liability naturally carried with it sovereign immunity from equitable estoppel."

*Id.* at 492; see also Berger, *supra* note 10, at 683.

13. See *United States v. Sherwood*, 312 U.S. 584, 586 (1941); W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 131, at 1033 (5th ed. 1984).

14. *Trustees of Philip Exeter Academy v. Exeter*, 90 N.H. 472, 495-96, 27 A.2d 569, 586 (1940). Although the case involves estoppel of a subdivision of a state government, the issues are parallel to estoppel of the federal government. See *supra* note 1.

15. See, e.g., *Federal Tort Claims Act*, 28 U.S.C. §§ 1346(b), 2671-80 (1982) (tort liability and suit procedures against the federal government); *Postal Service Reorganization Act*, 39 U.S.C. § 401(1) (1975) (Congress authorized the Postal Service to sue and be sued).

16. See *infra* notes 17-20 and accompanying text.

contrary to congressional legislation, then the judiciary would be usurping the legislative function by deciding that an act of the agent or official shall be the law rather than an act of Congress.<sup>17</sup>

Second is concern for the protection of the public fisc.<sup>18</sup> There is a need to protect the federal government fisc against binding commitments made by the improper conduct of its agents.<sup>19</sup> Estoppel may amount to forcing the government to provide a benefit or service for which there are no congressionally authorized funds. Courts refuse to estop the government in order to prevent "unauthorized" and "unprovided for" raids on the public treasury.<sup>20</sup>

The starting point for discussing the Supreme Court's modern application of the traditional rule is *Federal Crop Insurance Corp. v. Merrill*.<sup>21</sup> The Merrill brothers purchased crop insurance from the Federal Crop Insurance Corporation (FCIC), a government owned enterprise.<sup>22</sup> The government agent who sold the insurance mistakenly informed the Merrells that their reseeded wheat crop was covered under the policy.<sup>23</sup> Drought later destroyed the entire crop.<sup>24</sup> The FCIC denied the Merrells' claim for the insurance proceeds on the ground that the Wheat Crop Insurance regulations expressly prohibited insuring reseeded wheat.<sup>25</sup>

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17. See *Community Health Servs. v. Califano*, 698 F.2d 615, 633 (3d Cir. 1983) (Meador, J., dissenting) ("[w]here no substantive entitlement exists, to estop the government amounts to no more than a court authorized raid on the public treasury."), *rev'd sub nom. Heckler v. Community Health Servs.*, 467 U.S. 51 (1984). Estoppel of the government can also interfere with the separation of powers between the executive and legislative branches of the federal government. If the government is estopped from denying an unauthorized act of a government agent, then the act of the official functions as the law, rather than the law set forth by Congress. See *Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 17 (1st Cir. 1986); *United States v. Medico Indus., Inc.*, 784 F.2d 840, 845-46 (7th Cir. 1986); *Equitable Estoppel*, *supra* note 5, at 566. *But see* *Portmann v. United States*, 674 F.2d 1155, 1159 (7th Cir. 1982) ("[a]lthough this rationale has some logical appeal, applied literally and generally, it would seem to preclude any application of estoppel against the government . . .") (emphasis in original). For a detailed discussion of estoppel of the government and its effect on the separation of powers. See *Equitable Estoppel*, *supra* note 5, at 565-68.

18. See *Heckler v. Community Health Servs.*, 467 U.S. 51, 63 (1984); *Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 17 (1st Cir. 1986).

19. See *Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 17 (1st Cir. 1986); *Equitable Estoppel*, *supra* note 5, at 557.

20. See *Heckler v. Community Health Servs.*, 467 U.S. 51, 62-63 (1984) (estoppel is not justified when the expansion of an operation is achieved through unlawful access to governmental funds); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (recognizing "the duty of all courts to observe the conditions defined by Congress for charging the public treasury"); see also *Equitable Estoppel*, *supra* note 5, at 554 ("Fear of uncontrollable liability and crippling losses to the public treasury have also played a role in sustaining the rule.").

21. 332 U.S. 380 (1947).

22. See *id.* at 381-82.

23. See *id.* at 382.

24. See *id.*

25. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 382 (1947). The Wheat Crop Insurance regulations specifically stated that the term "wheat crop shall not include . . .

Although the Supreme Court acknowledged that not estopping the government would result in hardship,<sup>26</sup> it nonetheless declined to estop the government. The Court charged the Merrills with constructive notice of the regulations.<sup>27</sup> Over the dissent of Justice Jackson,<sup>28</sup> the Court held that because the regulation expressly stated that reseeded wheat was not covered, the FCIC was not bound by the unauthorized representation of its agent.<sup>29</sup>

Since its decision in *Merrill* the Supreme Court has never allowed a claim of equitable estoppel to lie against the government. Dicta in subsequent Supreme Court cases, however, appear to encourage lower courts to estop the government in certain limited circumstances.<sup>30</sup> The exact circumstances under which equitable estoppel may be appropriate have yet to be defined.<sup>31</sup>

The introduction of a limited use of equitable estoppel of the government came from ideas first expressed in Justice Jackson's dissent in *Merrill*.<sup>32</sup> Justice Jackson opined that the government should be held to a certain level of honor and reliability in dealing with its citizens.<sup>33</sup> Since

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spring wheat which has been reseeded on winter wheat acreage in the 1945 crop year. (Sec. 414.37 (v) of Wheat Crop Insurance Regulations, 10 Fed. Reg. 1591)." *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 386 (1947). Reseeded spring wheat was what the Merrills were seeking to insure. *See id.*

The current regulations regarding wheat crop insurance are found at 7 C.F.R. § 418 (1986). Interestingly, section 418.5 currently provides in part, where a party believed that he was insured, basing that belief on the misrepresentation of an agent of the FCIC, suffers a crop loss, he shall be paid as though he were otherwise entitled. *See* 7 C.F.R. § 418.5 (1986).

26. *See* *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383 (1947).

27. "[T]he Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance." *Id.* at 385.

28. *See id.* at 386.

29. *See id.* at 385. The Court took a strong stance. "Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Id.* at 384.

30. *See* *Heckler v. Community Health Servs.*, 467 U.S. 51, 68 (1984) (Rehnquist, J., concurring) ("our cases have left open the possibility of estoppel against the Government only in a rather narrow possible range of circumstances."); *Fano v. O'Neill*, 806 F.2d 1262, 1264-65 (5th Cir. 1987) ("The Supreme Court has indicated, without deciding, that equitable relief may be available to a private party aggrieved by certain conduct of government officials.").

31. *See* *Fano v. O'Neill*, 806 F.2d 1262, 1265 (5th Cir. 1987); *Grumman Ohio Corp. v. Dole*, 776 F.2d 338, 347 (D.C. Cir. 1985); *Meister Bros. v. Macy*, 674 F.2d 1174, 1177 (7th Cir. 1982).

32. *See* *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 386 (1947) (Jackson, J., dissenting).

33. "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street." *Id.* at 387-88. Justice Jackson, joined by Justice Douglas in dissent, felt that the principles of fairness that developed to govern the business relations between private corporations and their customers should apply to a certain degree to the transactions between the government and its citizens. *See id.* at 387-88. *See also* 2 K. Davis, Adminis-

*Merrill*, courts have used this concern to justify circumventing the no-estoppel rule.<sup>34</sup>

After *Merrill*, the Supreme Court decided three cases in which the issues were whether the government could be estopped from enforcing the citizenship and immigration laws because of the conduct of immigration officials.<sup>35</sup> In all three cases the Court ruled that the government could not be estopped from asserting strict compliance with the citizenship and immigration laws set forth by Congress.<sup>36</sup> The Court noted that the agents' actions fell short of misconduct that would give rise to equitable

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trative Law Treatise § 17.02 (1958), at 492 (discussing Justice Jackson's dissent in *Merrill*).

34. See, e.g., *Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984) (FDIC required to deal fairly with its debtors as would any other private bank and thus subject to being equitably estopped); *Meister Bros. v. Macy*, 674 F.2d 1174, 1177 (7th Cir. 1982) (court invokes equitable estoppel partly because "the 'public has an interest in seeing its government deal carefully, honestly and fairly with its citizens' ") (quoting *United States v. Wharton*, 514 F.2d 406, 413 (9th Cir. 1975)); *Corneil-Rodriguez v. INS*, 532 F.2d 301, 307 (2d Cir. 1976) (refusing "to sanction a manifest injustice occasioned by the Government's own failures"); *Brandt v. Hickel*, 427 F.2d 53, 56 (9th Cir. 1970) ("some forms of erroneous advice are so closely connected to the basic fairness of the administrative decision making process that the government may be estopped"); *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 103 (9th Cir. 1970) (morality and justice dictate that the Government is not entitled to immunity from equitable estoppel). *But see Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 17 (1st Cir. 1986) ("for pragmatic policy reasons, however, the Supreme Court does not weigh equitable considerations in government estoppel cases").

35. See *INS v. Miranda*, 459 U.S. 14 (1982) (per curiam); *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam); *Montana v. Kennedy*, 366 U.S. 308 (1961).

In *Miranda*, 459 U.S. 14 (1982) (per curiam), a Philippine citizen, entered the country on a temporary visa. *Id.* at 14-15. He filed an application requesting that the INS adjust his status to that of an immigrant visa holder. The INS did not act on his application for eighteen months. Ultimately, the INS denied his application and ordered him deported. *Id.* He argued that the INS was estopped from denying his application because of its unreasonable delay. *Id.* at 16.

In *Hibi*, 414 U.S. 5 (1973) (per curiam), a Philippine citizen was entitled under the Nationality Act to become a United States citizen due to his service in the United States Army in World War II. *Id.* at 5-6. He did not petition for citizenship, however, until the time for him to do so under the Act had expired. He alleged that the government's failure to advise him of his eligibility estopped it from asserting the untimeliness of his claim. *Id.* at 7-8.

In *Montana*, 366 U.S. 308 (1961), Montana's mother had been prevented from leaving Italy by a United States consular official who mistakenly told her she could not return to the United States while she was pregnant and refused to issue her a passport. *Id.* at 314. Montana argued that the Attorney General should be estopped from claiming that Montana was born outside of the United States because of the consular agent's misconduct. *Id.*

36. See *INS v. Miranda*, 459 U.S. 14, 19 (1982) (per curiam) (government not estopped from asserting that the non-availability of an immigrant visa must be proven to obtain permanent resident status); *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam) (government not estopped from asserting that application for citizenship must be filed before deadline set forth in § 335 of the Immigration and Nationality Act, 66 Stat. 255, 8 U.S.C. § 1446 (1972)); *Montana v. Kennedy*, 366 U.S. 308, 314 (1960) (government not estopped from enforcing statutory requirement that person be born within boundaries of the United States to qualify for citizenship).

estoppel against the government.<sup>37</sup> The Court left open the issue of what level of misconduct, if any, would give rise to an equitable estoppel.<sup>38</sup>

The Supreme Court in *Schweiker v. Hansen*<sup>39</sup> seems to have retreated from its position in *Merrill*. In *Hansen* the claimant, Mrs. Hansen had been erroneously informed by a representative of the Social Security Administration (SSA) that she was ineligible to receive benefits.<sup>40</sup> The agent, contrary to the SSA's claims manual, failed to advise the claimant that she should file a written application.<sup>41</sup> One year later, the claimant discovered that she had been eligible to receive benefits.<sup>42</sup> After she filed a written application and began receiving benefits, the claimant sued the SSA for retroactive benefits.

The claimant argued that because the agent misinformed her, the Secretary of Health and Human Services should be estopped from denying the retroactive benefits to which she was entitled.<sup>43</sup> The majority opinion reflects the Court's concern that the public fisc could be threatened if the government was bound every time an agent of the SSA failed to follow instructions to the last detail.<sup>44</sup> The Court reasoned that allowing the agent's mistake to estop the government might deprive the SSA of the benefit of the written application requirement.<sup>45</sup> The potential flood of claims that would result if the Court were to hold that the SSA was liable for the mistake of one of its agents motivated the majority to uphold the traditional no estoppel rule.<sup>46</sup>

Scholars and courts have commented that the Court's short per curiam opinion in *Hansen* left open more questions than it answered about the level of government employee misconduct required for equita-

37. See *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (even if the government's misconduct may, in some instances, estop it from enforcing the immigration laws, an eighteen month delay in considering a visa application did not amount to such misconduct); *INS v. Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam) (estoppel is not even arguably applicable because there was no "affirmative misconduct" on part of the United States agent); *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961) (agent's action "falls far short of misconduct" that would give rise to an estoppel against the government).

38. See *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam); *INS v. Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam); *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961). The Court in these cases consistently left open the issue of whether even "affirmative misconduct" would give rise to an estoppel against the United States. See *supra* note 4.

39. 450 U.S. 785 (1981) (per curiam).

40. See *id.* at 786.

41. See *id.*

42. See *id.*

43. See *id.* at 787.

44. See *id.* at 788-89. The majority in *Hansen* agreed with Judge Friendly's dissent in the decision below in the Court of Appeals for the Second Circuit. See *id.* at 788. Judge Friendly discussed his concern that to allow the Social Security Administration to be estopped from asserting the procedural requirements to claim benefits "opens the door of the federal fisc . . . to thousands." *Hansen v. Harris*, 619 F.2d 942, 949 (2d Cir. 1980) (Friendly, J., dissenting), *rev'd sub nom.* *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam).

45. *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) (per curiam).

46. See *id.* at 789-90; see also *supra* note 44.

ble estoppel.<sup>47</sup> *Hansen* implied that equitable estoppel might lie where a party could never correct the mistake made in reliance on the government agent's conduct.<sup>48</sup> Lower courts have interpreted *Hansen* as an indication that equitable estoppel might be properly asserted against the government where a government agent's misrepresentation causes an individual to commit an irrevocable error.<sup>49</sup>

The most recent Supreme Court decision on equitable estoppel of the federal government is *Heckler v. Community Health Services of Crawford County*.<sup>50</sup> In *Community Health* the government was suing for repayment of federal funds that Community Health Services (CHS), a charitable provider of health care, received to provide health care services to Medicare beneficiaries.<sup>51</sup> Because of the incorrect advice of a government agent, CHS received funds to which it was never entitled.<sup>52</sup> CHS argued that the government should be estopped from asserting ownership of the already expended funds. The Court ruled that CHS failed to establish the elements that would give rise to an equitable estoppel against even a private party.<sup>53</sup> The Court concluded that since CHS received funds to which it was never entitled, it did not suffer any detriment as a result of its reliance on the agent's mistake.<sup>54</sup>

The *Community Health* opinion strongly implies that equitable estoppel may be properly asserted against the government in certain limited circumstances. The court eschewed a flat rule that equitable estoppel

47. Justice Marshall in dissent noted that the majority failed to provide adequate guidance to the lower courts in an area of the law that, contrary to the majority's view, is far from settled. See *Schweiker v. Hansen*, 450 U.S. 785, 792 (1981) (per curiam) (Marshall, J., dissenting); see also *Meister Bros. v. Macy*, 674 F.2d 1174, 1177 (7th Cir. 1982); *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1338 (E.D. Ark. 1982); 4 K. Davis, *Administrative Law Treatise* §§ 20:5-20:6 (1983) (discussing *Hansen's* confusing effect on the lower courts). See, e.g., *infra* notes 75-79 and accompanying text.

48. See *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (per curiam) ("But at worst, [the agent's] conduct did not cause respondent to take action or fail to take action that respondent could not correct at any time.") (citations omitted).

49. See *Payne v. Block*, 714 F.2d 1510, 1518 (11th Cir. 1983); *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1338-39 (E.D. Ark. 1982).

50. 467 U.S. 51 (1984).

51. See *id.* at 53-57.

52. See *id.* CHS participated in the Medicare and CETA programs. CHS was doubly reimbursed for some expenses because of the overlap of these two programs. Government regulations prevented this double recovery unless the CETA funds were used as "seed money" for new health care agencies. The fiscal intermediary acting for the government misinformed CHS that these funds fell within the seed money exception. *Id.*

53. See *id.* at 61. The Court did not base its decision on the fact that estoppel was attempting to be asserted against a federal agency. "[H]owever heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present. We are unpersuaded that that has been done in this case. . . ." *Id.*

54. See *id.* at 63. "Respondent cannot raise an estoppel without proving that it will be significantly worse off than if it had never obtained the CETA funds in question." *Id.* For a detailed analysis of the Supreme Court's decision in *Community Health*, see *Waiting for the Right Case*, *supra* note 4, at 199-205.

may not, under any circumstances, lie against the government.<sup>55</sup> Rather, the Court acknowledged that the precise circumstances under which the government may be estopped are not yet settled.<sup>56</sup> Interestingly, the Court cited Justice Jackson's dissent in *Merrill* for the proposition that the government might be estopped where the interests of citizens in an honest and reliable government outweighs the public interest that the government can enforce the law immune from equitable estoppel.<sup>57</sup>

## II. ANALYSIS OF ESTOPPEL AND OF GOVERNMENT FUNCTION

There appear to be two variables in cases involving equitable estoppel of the federal government. The first is the type of equitable estoppel that is asserted against the government.<sup>58</sup> The second is the type of government activity involved in the case.<sup>59</sup> This section distinguishes between two different uses of equitable estoppel and among three different types of government activity found in the cases since *Merrill*.

### A. Different Uses of Estoppel

In order for an individual to obtain a benefit from a government agency two conditions must be met. First, he must be substantively entitled to the benefit, and second, he must follow the proper procedure to claim it.<sup>60</sup> The government may raise two corresponding types of defenses to an individual's claim for benefits: that an individual is not substantively entitled to the benefit,<sup>61</sup> or that the individual failed to follow requisite procedures.<sup>62</sup> This distinction yields two kinds of equitable estoppel—substantive equitable estoppel and procedural equitable estoppel.<sup>63</sup>

55. *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984).

56. *See id.*

57. *See id.* at 61 n.13.

58. *See infra* notes 64-77 and accompanying text.

59. *See infra* notes 79-94 and accompanying text.

60. *See, e.g.*, The Social Security Act 42 U.S.C. § 402 (g)(1)(A)-(C)(E)(F) (Supp. III 1985), setting forth the substantive requirement for an individual to be eligible for "mother's and father's insurance benefits" and 42 U.S.C. § 402 (g)(1)(D) (Supp. III 1985), which sets forth the procedural requirement that applicants file a written application.

61. *See, e.g.*, *Heckler v. Community Health Servs.*, 467 U.S. 51, 53 (1984) (repayment of medicare payments exceeded those allowed by statute); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 382, 384 (1947) (damaged crop not covered by written terms of insurance policy).

62. *See, e.g.*, *Schweiker v. Hansen*, 450 U.S. 785, 786 (1981) (per curiam) (failure to file written application); *INS v. Hibi*, 414 U.S. 5, 5 (1973) (per curiam) (failure to petition for citizenship within the required time period); *Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 15 (1st Cir. 1986) (failure to file a timely written proof of loss form as required by terms of government subsidized insurance policy).

63. *See infra* notes 64-78 and accompanying text. The terms "substantive equitable estoppel" and "procedural equitable estoppel" are coined for purposes of this Note. One commentator has made a similar distinction stating that estoppel against the government can act as either a sword or a shield. *See Note, Equitable Estoppel of the Government*, 47

## 1. Substantive Estoppel

Substantive equitable estoppel occurs when the government is estopped from asserting a claim or defense that an individual is not substantively entitled to a benefit or service. Individuals who attempt to estop the government on substantive grounds are seeking something to which they are not entitled by statute. Their claim is therefore not only against the will of Congress, but also fiscally unauthorized. Here, claimants argue that their reliance on the government's misrepresentation justifies receipt of benefits notwithstanding that the misrepresentation is in no way the cause of their disenfranchisement.<sup>64</sup>

Examples of attempted substantive equitable estoppel are found in the Supreme Court cases of *Merrill*<sup>65</sup> and *Community Health*.<sup>66</sup> In *Merrill*, the plaintiffs attempted to estop the government from asserting that their crop was not covered by the regulations governing the subsidized insurance.<sup>67</sup> Thus, plaintiffs were using equitable estoppel to try to gain something to which they were never substantively entitled. In *Community Health*, the health facility was attempting to estop the government agency from recovering funds paid out in excess of congressional authorization.<sup>68</sup>

The Court of Appeals for the Seventh Circuit has allowed substantive equitable estoppel to be asserted when the government activity involved was the EXPRESS MAIL service of the United States Postal Service.<sup>69</sup> In these cases, the Postal Service agents mistakenly informed the claimants that the Postal Service could provide insurance for the full value of their package.<sup>70</sup> The claimants argued that the Postal Service was estopped from asserting the substantive defense that its regulations forbade

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Brooklyn L. Rev. 423, 455-56 (1981). Following this analysis, a party who was granted a status or benefit to which he was not entitled invokes estoppel as a shield against the government when the government seeks to correct the error and reclaim the benefit. Alternatively, a private party, relying on governmental misrepresentation and thereby losing a benefit uses estoppel as a sword to recover the benefit. *See id.*

64. *See, e.g.,* Heckler v. Community Health Servs., 467 U.S. 51 (1984); Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947); Azar v. United States Postal Serv., 777 F.2d 1265 (7th Cir. 1985); Portmann v. United States, 674 F.2d 1155 (7th Cir. 1982).

65. 332 U.S. 380 (1947).

66. 467 U.S. 51 (1984).

67. *See supra* notes 22-25 and accompanying text.

68. *See supra* notes 50-52 and accompanying text.

69. *See* Azar v. United States Postal Serv., 777 F.2d 1265, 1267-68 (7th Cir. 1985); Portmann v. United States, 674 F.2d 1155, 1157 (7th Cir. 1982). In Azar v. United States Postal Serv., 777 F.2d 1265 (7th Cir. 1985), the Postal Service conceded that the Court of Appeals for the Seventh Circuit previously had permitted estoppel against the Postal Service when its EXPRESS MAIL operations were involved. *See id.* at 1269. The Postal Service contended that for estoppel to lie, plaintiff had to prove affirmative misconduct by the government agent. *See id.* at 1270. The court in Azar rejected the Postal Service's argument and held that affirmative misconduct need not be proved in order to invoke estoppel against the government when its EXPRESS MAIL service is involved. *See id.* at 1271.

70. *See* Azar v. United States Postal Serv., 777 F.2d 1265, 1268 (7th Cir. 1985) (merchandise sent EXPRESS MAIL insured only up to a maximum of \$500 although agent

the amount of coverage its agents promised.<sup>71</sup> The Seventh Circuit agreed holding that the Postal Service is estopped and the claimants may be paid an amount greater than Postal Service regulations provided.<sup>72</sup>

## 2. Procedural Estoppel

Procedural equitable estoppel occurs when the government is estopped from asserting that a claimant is precluded from receiving a service or benefit because he failed to follow the required procedure. Here the claimant is substantively entitled to the benefits. His equitable estoppel claim arises from a government agent's misrepresentation regarding procedural requirements. With procedural equitable estoppel the claimant would have received the benefits but for the misrepresentation.<sup>73</sup>

An example of procedural equitable estoppel is found in *Schweiker v. Hansen*.<sup>74</sup> In *Hansen*, the government admitted that the claimant was substantively entitled to benefits.<sup>75</sup> The claimant attempted to estop the government from asserting the procedural defense that she had failed to file a written application. The issue of whether procedural equitable estoppel can be asserted against the government also has arisen in the context of government subsidized flood insurance.<sup>76</sup> In these cases, the

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informed plaintiff that his package was insured for more); *Portmann v. United States*, 674 F.2d 1155, 1157 n.2 (7th Cir. 1982) (same).

71. See *Azar v. United States Postal Serv.*, 777 F.2d 1265, 1267-68 (7th Cir. 1985); *Portmann v. United States*, 674 F.2d 1155, 1157 (7th Cir. 1982).

72. See *Azar v. United States Postal Serv.*, 777 F.2d 1265, 1271 (7th Cir. 1985); *Portmann v. United States*, 674 F.2d 1155, 1169 (7th Cir. 1982).

73. See, e.g., *Schweiker v. Hansen*, 450 U.S. 785, 786 (1981) (plaintiff would have been eligible for benefits had she filed a written application); *Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 15 (1st Cir. 1986) (insured would have been eligible for insurance had they been correctly informed by government agent to file a written proof of loss form); *Meister Bros. v. Macy*, 674 F.2d 1174, 1176 (7th Cir. 1982) (same); *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1336 (E.D. Ark. 1982) (same).

74. 450 U.S. 785 (1981).

75. See *supra* notes 39-46 and accompanying text.

76. See *Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13 (1st Cir. 1986); *Meister Bros. v. Macy*, 674 F.2d 1174 (7th Cir. 1982); *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334 (E.D. Ark. 1982). The facts in these three cases were virtually identical. Because certain factors made it uneconomical for the private insurance industry to make flood insurance available to those in need of such protection from flood disasters on reasonable terms and conditions, Congress established a National Flood Insurance Program (NFIP). See 42 U.S.C. §§ 4001-4128 (1982). Under the NFIP the private insurance industry carries out the program to the maximum extent possible and the federal government subsidizes the insurance. See 42 U.S.C. § 4001(b) (1982). The Secretary of the Treasury is authorized to establish in the United States Treasury a National Flood Insurance Fund. See 42 U.S.C. § 4017 (1982). The Director of the Federal Emergency Management Agency (FEMA) is authorized to carry out the program. See *Meister Bros. v. Macy*, 674 F.2d 1174, 1175 n.1 (7th Cir. 1982). The plaintiffs in these cases purchased an insurance policy under the National Flood Insurance Program. While the policies were in full effect, plaintiffs sustained damages to the insured property as a result of a flood. See *Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 15 (1st Cir. 1986); *Meister Bros. v. Macy*, 674 F.2d 1174, 1175 (7th Cir. 1982); *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1336 (E.D. Ark. 1982). While investigating

government agency admitted that the claimants were substantively entitled to recover. The claimants attempted to estop the government from asserting the procedural defense that the claimants had failed to file timely written proof of loss forms.<sup>77</sup> These flood insurance cases provide an example of the confusion that surrounds the issue of whether estoppel can lie against the government for the procedural misrepresentation of a government agent.<sup>78</sup>

### B. *Type of Government Activity Involved*

Some courts find significance in the extent of the proprietary nature of the government activity involved when a litigant attempts to equitably estop the government.<sup>79</sup> Three categories of government activity have

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the plaintiffs' claims, the government agents made misrepresentations that caused the plaintiffs to fail to file a written proof of loss. *See Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 15 (1st Cir. 1986) (agent "assured Phelps that the information he had furnished fully reported the loss, that the investigative process would begin immediately, and that Phelps need do nothing further. Phelps inquired about filing a written report but [agent] told him it was unnecessary."); *Meister Bros. v. Macy*, 674 F.2d 1174, 1176 (7th Cir. 1982) (agent "stated it was not his practice to prepare a proof of loss [form] until the parties had reached an agreement on the amount of the loss"); *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1336 (E.D. Ark. 1982) (agency did not raise failure to file a written proof of loss form until Dempsey rejected a settlement claim). The plaintiffs in these cases had purchased a Standard Flood Insurance Policy (SFIP) that was issued under the National Flood Insurance Act 42 U.S.C. §§ 4001-4128 (1982). The SFIP stated that the insured could not recover under the policy unless he had submitted a proof of loss form within 60 days of the alleged loss. *See Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 15 (1st Cir. 1986); *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1336 (E.D. Ark. 1982). All three courts agreed that the traditional elements of equitable estoppel were present. The only issue discussed, therefore, was whether the insurer's status as a federally subsidized agency precluded the application of traditional equitable estoppel against it. *See Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 16 (1st Cir. 1986); *Meister Bros. v. Macy*, 674 F.2d 1174, 1176 (7th Cir. 1982); *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1338 (E.D. Ark. 1982).

77. *See Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 14 (1st Cir. 1986); *Meister Bros. v. Macy*, 674 F.2d 1174, 1175 (7th Cir. 1982); *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1336 (E.D. Ark. 1982).

78. *Compare Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 19 (1st Cir. 1986) (not allowing the government to be estopped from asserting the procedural defense of failure to file a written proof of loss form) *with Meister Bros. v. Macy*, 674 F.2d 1174, 1177 (7th Cir. 1982) (allowing plaintiffs to estop the government from asserting procedural defense of failure to file a written proof of loss form); *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1336 (E.D. Ark. 1982) (same).

79. *See, e.g., United States v. Federal Ins. Co.*, 805 F.2d 1012, 1016 (Fed. Cir. 1986) (equitable estoppel not available against government in cases involving sovereign act of collecting import duties); *Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984) (FDIC in its corporate capacity as receiver acts in a proprietary capacity and, therefore, is subject to the rules of equitable estoppel); *Meister Bros. v. Macy*, 674 F.2d 1174, 1177 (7th Cir. 1982) (equitable estoppel may lie against government when agency is not in any sense acting in a sovereign capacity but was engaged in essentially a private business); *Portmann v. United States*, 674 F.2d 1155, 1161-62 (7th Cir. 1982) (proprietary or commercial character of the government activity militates in favor of allowing estoppel); *Deltona Corp. v. Alexander*, 682 F.2d 888, 892 (11th Cir. 1982) (issuance of permits for developers' dredge and fill activities is unquestionably an exercise of govern-

emerged: proprietary in fact,<sup>80</sup> proprietary in form<sup>81</sup> and sovereign.<sup>82</sup> The extent of the proprietary nature of a government activity is determined by the extent to which private business also provides the goods or services that the government agency is providing.

### 1. Proprietary in Fact

Government activity can be classified as proprietary in fact when the government is providing precisely the same goods or services as are simultaneously provided by the private sector and is competing with private business for customers. An example of a governmental function that is proprietary in fact is the EXPRESS MAIL service provided by the Postal Service because it competes directly with private delivery services.<sup>83</sup> Indeed, legislative history indicates that Congress intended that the Postal Service operate as a "self-sustaining competitive enterprise."<sup>84</sup>

### 2. Proprietary in Form

Proprietary in form also denotes a situation in which the government engages in a type of business ordinarily conducted by private corporations. Here, however, because of certain economic realities, the particular goods or services the government provides are not simultaneously provided by the private sector. Government activity that is proprietary in form strongly resembles private sector activity but for its economic

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ment's sovereign power and, therefore, not subject to estoppel). *But see* Federal Deposit Ins. Corp. v. Roldan Fonseca, 795 F.2d 1102, 1108 (1st Cir. 1986) (finding no merit in argument that proprietary nature of government activity justifies assertion of equitable estoppel against it); Phelps v. Federal Emer. Mgt. Agency, 785 F.2d 13, 17 (1st Cir. 1986) (same).

80. *See infra* notes 83-84 and accompanying text.

81. *See infra* notes 85-88 and accompanying text.

82. *See infra* notes 89-94 and accompanying text.

83. *See* Azar v. United States Postal Serv., 777 F.2d 1265, 1271 (7th Cir. 1985); Portmann v. United States, 674 F.2d 1155, 1168 (7th Cir. 1982). In both cases, the Court of Appeals for the Seventh Circuit allowed substantive equitable estoppel to lie against the Postal Service when its EXPRESS MAIL service was in issue. The courts noted that the Postal Service was not performing an inherently sovereign function, but was competing directly with private carriers for the plaintiff's business. *See* Azar, 777 F.2d at 1271; Portmann, 674 F.2d at 1168. The courts concluded that the Postal Service should be held to the same level of liability in dealing with its customers as is an analogous private entity. *See* Azar, 777 F.2d at 1271; Portmann, 674 F.2d at 1169.

84. *See* Azar v. United States Postal Serv., 777 F.2d 1265, 1271 (7th Cir. 1985); *see also* Franchise Tax Bd. v. United States Postal Serv., 467 U.S. 512, 520 (1984) ("Congress has 'launched the Postal Service into the commercial world'"); National Ass'n of Greeting Card Publishers v. United States Postal Serv., 462 U.S. 810, 813-14 (1983) (Congress intended that Postal Service revenue match its cost to the extent practically possible); H.R. Rep. No. 1104, 91st Cong., 2d Sess. 5, reprinted in 1970 U.S. Code Cong. & Administrative News 3649, 3659-60, 3665-66; 116 Cong. Rec. 19846 (1970) (remarks of Rep. Corbett) ("The Postal office is a business and it ought to be self-sustaining.") *id.* at 2026 (remarks of Rep. Udall) ("We are going to turn the Post office into essentially a commercial operation."). For a discussion of estoppel of a proprietary in fact government agency, *see infra* notes 113-17 and accompanying text.

infeasibility. The government subsidizes the activity and carries it out in a form that is parallel to that of a private corporation.

Examples of proprietary in form government activity include those government agencies providing flood<sup>85</sup> and crop insurance.<sup>86</sup> The government has provided flood and crop insurance when it has been uneconomical for private entities to do so.<sup>87</sup> The laws applicable to private insurance contracts are largely applicable to these transactions.<sup>88</sup>

### 3. Sovereign Activity

Government activity is classified as sovereign when the government activity is unique, and without analogy in the private sector. Government activity that can be classified as sovereign for equitable estoppel purposes includes social security administration,<sup>89</sup> tax collection,<sup>90</sup> imposition of import duties,<sup>91</sup> granting citizenship<sup>92</sup> and permits,<sup>93</sup> and

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85. The director of the Federal Emergency Management Agency is authorized to carry out the National Flood Insurance Program. *See Meister Bros. v. Macy*, 674 F.2d 1174, 1175 n.1 (7th Cir. 1982). The government provides flood insurance because it is uneconomical for the private insurance agency to provide it. *See* 42 U.S.C. § 4001(b)(1). A policy under the National Flood Insurance Program is often purchased from and handled by a private insurance corporation. *See Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 15 (1st Cir. 1986) (agent listed on the Standard Flood Insurance Policy was an agent of private insurance company); 42 U.S.C. § 4071(a)(1) (1982) (Secretary of the Federal Emergency Management Agency shall utilize, for purposes of providing flood insurance coverage "(1) insurance companies and other insurers, insurance agents and brokers, and insurance adjustment organizations, as fiscal agents of the United States").

86. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383 n.1 (1947) (the government provides crop insurance because it is uneconomical for the private insurance industry to do so).

The Federal Crop Insurance Corporation (FCIC) is a wholly owned Government corporation within the Department of Agriculture. *See* 7 U.S.C. § 1504 (1980). Insureds purchase insurance policies and pay premiums to the Federal Crop Insurance Corporation. *See* 7 C.F.R. § 400.1-81 (1986).

Another example of a government agency undertaking an activity that is proprietary in form is the Federal Deposit Insurance Corporation, when it acts in its corporate capacity performing essentially the same function as any other assuming bank. *See Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984).

87. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383 n.1 (1947) (federal government is pioneer in providing crop insurance); 42 U.S.C. § 4001(b)(1) (1982) (government provides flood insurance because economic realities have made it unavailable in private market).

88. *See A.W.G. Farms Inc. v. Federal Crop Ins. Corp.*, 757 F.2d 720, 726 (8th Cir. 1985) (applying principles of insurance law to contract between FCIC and individuals who insured their sugar beet crop). For application of insurance law to the situations in the flood insurance cases, see *supra* notes 76-78 and accompanying text. *See generally* Couch on Insurance § 49 B:20, at 27 (2d ed. 1982) ("[I]f the notice of loss furnished the insurer are considered to be defective in any way and if the insurer fails to make its objection known within a reasonable time, . . . it is estopped from defending an action on the policy on the ground of noncompliance with the contract requirements.").

89. *See Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam).

90. *See Automobile Club v. Commissioner*, 353 U.S. 180, 183 (1957).

91. *See United States v. Federal Ins. Co.*, 805 F.2d 1012, 1020 (Fed. Cir. 1986); *Air-Sea Brokers, Inc. v. United States*, 596 F.2d 1008, 1011 (C.C.P.A. 1979).

purchasing munitions.<sup>94</sup>

These three classifications of government functions are not static categories into which all government activity fits. It is unrealistic to attempt to place the many and complex functions of the federal government into three categories. Rather, these categories represent parts of a continuum. This continuum serves to measure the extent of the proprietary nature of a particular government function.

### III. TOWARD A PRINCIPLED APPLICATION OF EQUITABLE ESTOPPEL AGAINST THE GOVERNMENT

This Note proposes a framework to determine the circumstances under which equitable estoppel should lie against the government. Courts should consider both the particular use of equitable estoppel—substantive or procedural—and the extent to which a government activity is proprietary in nature. This proposal rests on two ideas. First, the more proprietary the government activity, the more equitable estoppel should be favored. Second, the more procedural the agent's misrepresentation the more equitable estoppel should be favored.

Thus, when the government activity is proprietary in fact, both substantive and procedural equitable estoppel should lie; when the government activity is proprietary in form, only procedural equitable estoppel should lie; when the government activity in issue is purely sovereign, neither procedural nor substantive equitable estoppel should lie. This framework synthesizes the current state of the law on equitable estoppel of the federal government.

This framework makes crucial use of two distinctions: the proprietary or sovereign nature of government activity and the substantive or procedural use of equitable estoppel. The use of these distinctions are not without criticism. Some courts and commentators have rejected the use of the proprietary/sovereign distinction as a valid approach to determining whether equitable estoppel should lie against the government<sup>95</sup> citing *Federal Crop Insurance Corp. v. Merrill*.<sup>96</sup> In *Merrill*, the Court dismissed the idea that the government should be treated differently for equitable estoppel purposes when it takes over a business conducted by private enterprise or engages in competition with private ventures.<sup>97</sup>

92. See *INS v. Hibi*, 414 U.S. 5, 5 (1973) (per curiam); *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961).

93. See *Deltona Co. v. Alexander*, 682 F.2d 888, 892 (11th Cir. 1982).

94. See *United States v. Medico Indus. Inc.*, 784 F.2d 840, 846 n.2 (9th Cir. 1986).

95. See, e.g., *Federal Deposit Ins. Corp. v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986); *Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 17 (1st Cir. 1986); *Equitable Estoppel*, *supra* note 5, at 557.

96. 332 U.S. 380 (1947).

97. The Supreme Court of Idaho in this case had ruled that, on the facts of this case, recovery could be had against a private insurance company, therefore recovery should be had against the Federal Crop Insurance Corporation. See *Merrill v. Federal Crop Ins. Corp.*, 67 Idaho 196, 197, 174 P.2d 834, 835-836 (1946), *rev'd*, *Federal Crop Ins. Corp. v.*

Despite the language of *Merrill*, many courts have since used the proprietary/sovereign distinction to analyze whether equitable estoppel should lie against the government.<sup>98</sup> By using this distinction courts imply that the language in *Merrill*, rejecting the distinction, was merely dictum. Courts have noted that the holding of *Merrill* is limited to the proposition that the government may not be substantively estopped when it engages in an activity that is proprietary in form.<sup>99</sup> This interpretation of *Merrill* is consistent with the proposed framework. In *Merrill*, the government sold crop insurance without competition from the private sector<sup>100</sup> and the claimants were not substantively entitled to the insurance they claimed.<sup>101</sup> Therefore, under the proposed framework, *Merrill* was properly decided because proprietary in form activity is insufficiently proprietary to support substantive equitable estoppel.

Further, the force of *Merrill* as precedent has weakened in the forty years since the decision. Perhaps the most obvious indication of this is the Supreme Court's reliance on the *Merrill* dissent in *Community Health*.<sup>102</sup> Indeed, some courts applying the proprietary/sovereign distinction in government equitable estoppel cases fail even to mention *Merrill* as relevant precedent.<sup>103</sup> Moreover, lower courts have criticized the

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*Merrill*, 332 U.S. 380 (1947). The Supreme Court of the United States, however, rejected this analysis stating:

It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. *Merrill*, 332 U.S. at 383-84 (1947).

98. See, e.g., *Azar v. United States Postal Serv.*, 777 F.2d 1265, 1271 (7th Cir. 1985) (affirmative misconduct need not be shown to estop the government when it competes directly with a private delivery service); *Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984) (FDIC acted in a proprietary capacity and therefore is subject to equitable estoppel); *Portmann v. United States*, 674 F.2d 1155, 1161-62 (7th Cir. 1982) (while not determinative in all situations, proprietary nature of the Postal Service militates in favor of allowing estoppel); *Meister Bros. v. Macy*, 674 F.2d 1174, 1177 (7th Cir. 1982) (agency not acting in a sovereign capacity but was engaged in essentially a private business, therefore subject to estoppel); *United States v. Georgia-Pac. Co.*, 421 F.2d 92, 100-01 (9th Cir. 1970) (estoppel may be asserted against the government if acting in its proprietary capacity and its representative acts within the scope of his authority).

99. See, e.g., *Portmann v. United States*, 674 F.2d 1155, 1162-63 (7th Cir. 1982); (distinguishing *Merrill* from EXPRESS MAIL situation because with EXPRESS MAIL, Postal Service competes directly with private delivery services).

100. See *supra* note 86 and accompanying text.

101. See *supra* note 25 and accompanying text (insurance for crops which the FCIC was not statutorily entitled to provide).

102. See *Heckler v. Community Health Servs.*, 467 U.S. 51, 61 n.13 (1984). In a footnote the Court cited Justice Jackson's dissent in *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387-88 (1947), as support for the proposition that there might be cases "in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with the Government." *Community Health*, 467 U.S. at 60-61 (1984).

103. See, e.g., *Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 411-12 (11th Cir.

*Merrill* decision as leading to unduly harsh results.<sup>104</sup>

Critics of the proprietary/sovereign distinction have admitted that the distinction "has a common sense realism that helps explain its durability."<sup>105</sup> Certainly, the argument that the government should not be completely immune from equitable estoppel when it engages in a business of the kind that is simultaneously or ordinarily conducted by private entities appeals to a sense of fairness and justice.<sup>106</sup> The more the government functions as a private entity, the less the considerations of sovereign immunity that originally begot the "no-estoppel"<sup>107</sup> rule should insulate it from liability.

A second criticism of the proposed framework may be its use of the distinction between substantive and procedural equitable estoppel. It is argued that the Supreme Court in *Hansen* rejected the substantive/procedural distinction as a method of determining when equitable estoppel may lie against the government.<sup>108</sup> In *Hansen* the Court stated that the distinction between the claimant's substantive eligibility and her failure to satisfy a procedural requirement did not justify estopping the government.<sup>109</sup>

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1984) (ignoring *Merrill* in discussion of use of proprietary/sovereign distinction); *Meister Bros. v. Macy*, 674 F.2d 1174 (7th Cir. 1982).

104. See *Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 18-19 (1st Cir. 1986) (compelled by *Merrill* to hold that estoppel may not be applied against a government agency despite the hardship visited upon the insured); *Augusta Aviation, Inc. v. United States*, 671 F.2d 445, 450 (11th Cir. 1982) (the "result appears harsh" but the court dutifully followed *Merrill*).

105. *Equitable Estoppel*, *supra* note 22, at 556.

106. See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting) (urging Court to "hold these agencies to the same fundamental principles of fair dealing that have been found essential in progressive states to prevent insurance from being an investment in disappointment"); *Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 412 (11th Cir. 1984) ("As would any other receiver or liquidating agent, FDIC should be required to deal fairly with its debtors and should be held accountable for the representations of its agents."); *Meister Bros. v. Macy*, 674 F.2d 1174, 1177 (7th Cir. 1982) (government agency engaged in essentially private business not permitted belatedly to assert technical defense to law suit that would not have prevailed if it were a private insurance carrier); see also 4 K. Davis *Administrative Law Treatise* § 20:3, at 6 (1984) ("[T]he idea is an appealing one that estoppel law should apply to the government when it engages in a business of the kind that is ordinarily conducted by private corporations.").

107. See *supra* notes 12-14 and accompanying text.

108. See *Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13, 18 (1st Cir. 1986); *Restrictive Rule*, *supra* note 4, at 1033 n.35.

109. In *Hansen*, the court below discussed the different implications of a claimant being substantively or procedurally ineligible to recover a claim against the government. See *Hansen v. Harris*, 619 F.2d 942, 948 (2d Cir. 1980), *rev'd sub nom.* *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam). The Court of Appeals for the Second Circuit decided to allow estoppel in situations where (a) a procedural not a substantive requirement is involved and (b) an internal procedural manual or guide or some other source of objective standards of conduct exists and supports an inference of misconduct by a Government employee. See *Hansen v. Harris*, 619 F.2d 942, 949 (2d Cir. 1980), *rev'd sub nom.* *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam). The Supreme Court, however, rejected the Second Circuit's substantive/procedural test. See *Schweiker v. Hansen*,

Courts and scholars have noted, however, that the opinion in *Hansen* failed to establish any clear rules of when equitable estoppel may lie against the government.<sup>110</sup> One source of confusion is language in *Hansen* indicating that equitable estoppel may lie against the government where a party could not correct the mistake made in reliance on the government agent's conduct.<sup>111</sup> Thus, *Hansen* left open the issue of estopping the government when the misrepresentation causes a procedural error barring the claimant permanently from recovering a benefit.<sup>112</sup>

Finally, determining whether a claimant is substantively or procedurally barred from recovering a claim against the government goes to the heart of the policy considerations underlying the traditional no-estoppel rule. In a situation in which an individual is substantively entitled to a claim, but is procedurally led astray by the government agent, the two main concerns supporting the traditional rule—separation of powers and protection of the public fisc—are satisfied. The proposed framework enforces the legislative ends. Estoppel would result in claimants receiving a claim that Congress intended they receive.<sup>113</sup> Similarly, if a person

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450 U.S. 785, 790 (1981) (per curiam) (“distinction between respondents substantive eligibility and her failure to satisfy a procedural requirement does not justify estopping petitioner in this case”).

110. See *supra* note 47.

111. *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (per curiam) (“But at worst [agent’s] conduct did not cause respondent to take action . . . or fail to take action . . . that respondent could not correct at any time.”) (citations omitted).

112. For an example of the confusion surrounding this issue, see *Phelps v. Federal Emer. Mgmt. Agency*, 785 F.2d 13 (1st Cir. 1986); *Meister Bros. v. Macy*, 674 F.2d 1174 (7th Cir. 1982); *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp. 1334 (E.D. Ark. 1982). The facts of these three cases are virtually identical, see *supra* note 76 and accompanying text. The courts, however, each have a different opinion on the effect *Hansen* has on the issue of whether estoppel can be asserted against the government. See *Phelps*, 785 F.2d at 18 (interpreting *Hansen* as holding that individual’s failure to follow procedural requirements cannot be overlooked even when claimant is eligible for benefits and not allowing estoppel permanently bars claimant from collecting benefits); *Meister Bros.*, 674 F.2d at 1177 (*Hansen* left “the law far from clear” as to whether government may be estopped under these facts); *Dempsey*, 549 F. Supp. at 1338 (cited *Hansen* as favorable to allowing equitable estoppel, quoting language from *Hansen* indicating that estoppel against the government may be appropriate where the government agent’s misrepresentation causes the claimant to take action or fail to take action that the claimant could not correct at any time). The result in *Hansen* also falls squarely within the proposed framework; when the government activity in issue is purely sovereign, neither substantive nor procedural estoppel should lie against the government. In *Hansen*, the Court ruled that an individual cannot estop the government from asserting a procedural defense to a claim for social security benefits. The administration of social security benefits is an inherently sovereign function against which estoppel should never lie. Furthermore, the Court in *Hansen* rather than laying down a broad proscription against the substantive/procedural approach stated only that the distinction did not justify estoppel in “this case.” See *Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) (per curiam).

113. See, e.g., *Dempsey v. Director, Federal Emer. Mgmt. Agency*, 549 F. Supp. 1334, 1340 (E.D. Ark. 1982) (“if estoppel were not allowed . . . a victim of flood damage would be unjustly precluded from being compensated contrary to the objective of the legislation”). Admittedly, Congress does have an interest in people following the proper procedure to realize benefits from the government. However, in many cases, as one commentator noted, “it may be necessary and appropriate to permit a lesser breach of

is substantively entitled to a benefit, equitable estoppel will not result in an unauthorized raid on the public treasury.<sup>114</sup> On the contrary, Congress already has allocated the funds in question. The three scenarios under the proposed framework are analyzed individually in the following subsections.

### A. *Proprietary in Fact*

There are two reasons why substantive equitable estoppel should lie against the government when the government undertakes an activity that is proprietary in fact. First, even though the claimant is not substantively entitled to receive a benefit, he does suffer a detriment as a result of his reliance on the government agent's misrepresentation.<sup>115</sup> If an accurate representation were given by the government agent, the plaintiff could have chosen to do business with the government's private competitor. Thus, the existence of a private competitor transforms a mere accidental gratuity into actual detriment by adding an element of opportunity cost.<sup>116</sup> The notion that one could not suffer a detriment by failing to receive a benefit to which one was never entitled<sup>117</sup> breaks down in the case of government activity that is proprietary in fact.

The second reason to allow substantive equitable estoppel against a proprietary in fact government activity is that equitable estoppel would further the congressional intent that the activity function as a competitive business.<sup>118</sup> If the government were held immune from equitable

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congressional will in order to give effect to a larger congressional purpose" *Equitable Estoppel*, *supra* note 5, at 566.

114. *See, e.g.*, *Payne v. Block*, 714 F.2d 1510, 1518 (11th Cir. 1983) (estoppel "does not threaten the public fisc. . . . The remedy merely provides for reopening of the application period; farmers must still demonstrate eligibility for relief"); *Hansen v. Harris*, 619 F.2d 942, 962 (2d Cir. 1980) (Newman, J., concurring) ("this decision does not drain the public fisc of one dollar that is being spent either in excess of anticipated benefit levels or contrary to a substantive policy decision of the Congress"), *rev'd sub nom.* *Schweiker v. Hansen*, 450 U.S. 785 (1981).

115. It is speculated that the Court in *Community Health* might have made substantive entitlement a threshold element when a private party asserts estoppel against the government. *See Still Waiting for the Right Case*, *supra* note 4, at 203. In *Community Health*, the Court implicitly equated substantive entitlement with detrimental reliance.

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 respondent lost no rights but merely was induced to do something which could be corrected at a later time. . . . Respondent cannot raise an estoppel without proving that it will be significantly worse off than if it had never obtained the CETA funds in question.

*Heckler v. Community Health Servs.*, 467 U.S. 51, 62-63 (1984).

116. *See, e.g.*, *Portmann v. United States*, 674 F.2d 1155, 1165 (1982) ("Portmann was barred . . . from contracting with a private entity which would have reimbursed her for this loss."); *cf.* *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) (substantive estoppel not allowed where government was only entity providing service).

117. *See supra* note 115.

118. *See Azar v. United States Postal Serv.*, 777 F.2d 1265, 1271 (7th Cir. 1985) ("Congress's intent to create a competitive enterprise would be ill-served by a rule insulating the Postal Service from the same kind of liability shouldered by its competitors.");

estoppel, potential customers would choose to do business with a private competitor that can be estopped from denying the representations of their agents. The no-estoppel rule would thus place the government at a competitive disadvantage. In the case of the Postal Service, immunity from equitable estoppel would directly affect its ability to compete for customers with its private competitors.<sup>119</sup>

### B. *Proprietary in Form*

With a proprietary in form government activity, the government is providing goods or services that are not provided by the private sector.<sup>120</sup> Therefore, proprietary in form activity should not be subject to the doctrine of equitable estoppel on the same terms as a private litigant.<sup>121</sup> The concerns for the separation of powers and protecting the public fisc dictate that substantive equitable estoppel cannot lie against a proprietary in form government activity.<sup>122</sup> By allowing substantive equitable estoppel the judiciary would be holding the government liable on a claim for which Congress neither intended nor authorized funds.<sup>123</sup> That the government is functioning in a form analogous to a private entity does not override these considerations. Unlike a proprietary in fact situation, here the claimant suffers no detriment as a result of his reliance on the government agent's misrepresentation.<sup>124</sup> Because the goods or services the claimant is attempting to gain from the government are not available in the private sector, the claimant forgoes no alternatives.

Where a claimant is asserting procedural equitable estoppel against an agency that is proprietary in form, the concerns of separation of powers

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Portmann v. United States, 674 F.2d 1155, 1169 (7th Cir. 1982) (Postal Service would gain "no competitive favor by conferring it an absolute immunity from estoppel").

119. See *Azar v. United States Postal Serv.*, 777 F.2d 1265, 1271 (7th Cir. 1985) ("[C]onsumers knowing of the Service's effectively absolute immunity would prefer to deal with businesses governed by ordinary principles of commercial law."); *Portmann v. United States*, 674 F.2d 1155, 1169 (7th Cir. 1982) ("[T]he dubious privilege of not being bound by the representations of its employees in routine commercial transactions would seem to further reflect on the Service's already tarnished reputation as a provider of regular and EXPRESS MAIL service.").

120. See *supra* notes 85-86 and accompanying text.

121. See *Federal Deposit Ins. Corp. v. Harrison*, 735 F.2d 408, 411-12, 413 (11th Cir. 1984) (court allows estoppel to be asserted against a proprietary in form government activity but notes limit to allowing estoppel by citing *Merrill* as holding that estoppel is inappropriate when government agent acts beyond scope of his authority); cf. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (rejecting assertion that government should be treated differently when it acts like private insurance corporation if plaintiff is not substantively entitled to insurance).

122. For a discussion of these concerns see *supra* notes 17-20 and accompanying text.

123. See *Heckler v. Community Health Servs.*, 467 U.S. 51, 62-63 (1984) (refusing to estop the government from gaining repayment of funds that claimant was not substantively entitled to receive); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947) (estoppel would provide insurance for which Congress did not authorize funds).

124. Cf. *supra* notes 115-17 and accompanying text (detriment suffered by an individual who relies on a government agent's misrepresentation in a proprietary in fact situation is the opportunity cost of not contracting with government's private competitor).

and protection of the public fisc are not implicated.<sup>125</sup> Where neither the Constitution nor the treasury is threatened, there is no reason why the government should not be held to the same level of fairness in dealing with its customers as is the private sector.

An example of procedural estoppel against a proprietary in form government activity can be found in cases involving the government agency that provides subsidized flood insurance.<sup>126</sup> In these cases the government provided subsidized flood insurance through private insurance companies.<sup>127</sup> The number of possible claimants was limited to those who had purchased a policy and paid their premiums.<sup>128</sup> The laws of insurance provide that the insurer deal fairly and honestly with the insured.<sup>129</sup> In this situation, not allowing estoppel against the government would effectively bar insureds from recovering despite their reliance on an agent's representation that they need not file a written proof of loss form. This result frustrates the intent of Congress<sup>130</sup> and disregards the interest citizens have in dealing with a fair and honest government.<sup>131</sup>

### C. Sovereign

*Schweiker v. Hansen*<sup>132</sup> precludes the application of procedural equitable estoppel against the government when the government activity is inherently sovereign.<sup>133</sup> Indeed, prior to *Hansen*, the Court refused to

125. Procedural estoppel can enforce legislative ends. Claimants who are substantively entitled to receive benefits can realize their benefits by asserting equitable estoppel against the government. Furthermore, if a person is substantively entitled to a benefit, estoppel will not result in an unauthorized raid on the public treasury since Congress has authorized that the claimant receive the funds in question. See *supra* notes 74-78 and accompanying text.

126. See *supra* note 76-78 and accompanying text.

127. See *supra* note 85.

128. Compare 42 U.S.C. § 4053 (1982) (providing that only policy holders under National Flood Insurance Program may institute a federal action and that such action must be brought within one year after notice of disallowance or partial disallowance of claim by FEMA) with *Hansen v. Harris*, 619 F.2d 942, 956 (2d Cir. 1980) (Friendly, J., dissenting) (Social Security Administration handles more than "1,250,000 disability determinations alone a year, with 215,300 reconsiderations" (citing 1 Davis, *Administrative Law Treatise* § 1.3 (2d ed. 1978))), *rev'd sub nom.* *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam).

129. A general principle of insurance law is that a contract of insurance is to be construed liberally in favor of the insured and strictly as against the insurer. See *A.W.G. Farms, Inc. v. Federal Crop Ins. Corp.*, 757 F.2d 720, 726 (8th Cir. 1985); *First Nat'l Bank v. Fidelity Nat'l Title Ins.*, 572 F.2d 155, 161 (8th Cir. 1978); *Howard v. Federal Crop Ins. Corp.*, 540 F.2d 695, 697 (4th Cir. 1976).

130. See *Dempsey v. Director, Fed. Emer. Mgmt. Agency*, 549 F. Supp 1334, 1340 (E.D. Ark. 1982); *supra* notes 76-79 and accompanying text.

131. See *Heckler v. Community Health Servs.*, 467 U.S. 51, 60-61 (1984); *supra* notes 32-34 and accompanying text.

132. 450 U.S. 785 (1981) (per curiam).

133. Whether the government may be estopped when it acts in its sovereign capacity if it is proven that the government agent's misrepresentation constituted "affirmative misconduct" is an open question. See *supra* note 4. The search for its answer is beyond the scope of this Note.

estop the government from enforcing procedural requirements when the government was undertaking sovereign functions such as granting citizenship<sup>134</sup> and collecting taxes.<sup>135</sup>

When the government functions in an inherently sovereign capacity, the application of immunity from equitable estoppel is most appropriate. Here the law is guided by the considerations of sovereign immunity that originally gave rise to the no-equitable estoppel rule.<sup>136</sup> The Supreme Court has recognized the procedural requirements as set forth by Congress must be strictly enforced to insure the honest and effective administration of sovereign functions.<sup>137</sup> The possibility of creating a floodgate of claims and the burden on the public fisc are too great for the courts to allow government agents' misconduct to result in circumventing a procedural requirement.<sup>138</sup> Further, unlike proprietary in form government activity, there is usually no analogous law that courts can use to determine when equitable estoppel may properly lie against a government agency performing a sovereign function.<sup>139</sup>

Thus, when the government provides a service that is unique, for which there is no analogy or competitor in the private sector, the government should be immune from equitable estoppel.<sup>140</sup> The courts should allow the government to enforce the law "to the last detail" free from equitable estoppel.<sup>141</sup>

#### CONCLUSION

Strict application of the rule that the government cannot be estopped results in harsh and unfair results. The rule, however, is based on important considerations. Estopping the government can interfere with the separation of powers and endanger the public fisc. Estoppel, however, can lie against the government in limited circumstances without greatly implicating these considerations. One approach to determine whether

134. See *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam).

135. See *Automobile Club v. Commissioner*, 353 U.S. 180, 183 (1957).

136. See *supra* notes 12-14 and accompanying text.

137. See *Schweiker v. Hansen* 450 U.S. 785, 790 (1981) (per curiam) (experience has taught written application requirement to be essential to honest and effective administration of Social Security laws).

138. See *supra* notes 44-46 and accompanying text.

139. For example, the laws concerning citizenship and immigration are unique and not paralleled any where in the private sector. See, e.g., *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (number of applicants received by INS and unique need to investigate their validity make it necessary that the agency operate immune from estoppel claims); *INS v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam) (INS by enforcing procedural requirement is enforcing public policy established by Congress, not just arbitrary cutoff date). Cf. *supra* note 125 (applying laws that apply to insurance to proprietary in form government activity).

140. Even in its sovereign capacity the question remains open whether the government may be equitably estopped by the "affirmative misconduct" of its agents. See *supra* note 4.

141. See *Hansen v. Harris*, 619 F.2d 942, 956-57 (2d Cir. 1980) (Friendly, J., dissenting), *rev'd sub nom.* *Schweiker v. Hansen*, 450 U.S. 785 (1981) (per curiam).

equitable estoppel can lie against the government is to consider two factors: the extent to which the government activity in issue is proprietary in nature and whether the government is estopped on substantive or procedural grounds. Proper use of these factors promotes fair results without disregarding the considerations that support the traditional rule.

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