United States Court of Appeals,
First Circuit.
Bruce A. HOWELL, et al., Plaintiffs, Appellants,
v.
FEDERAL DEPOSIT INSURANCE CORPORATION as receiver for Eliot Savings Bank, Defendant, Appellee.
No. 92-1542.

Heard Feb. 6, 1993.
Decided Feb. 17, 1993.

Officers for failed bank brought original action after Federal Deposit Insurance Corporation (FDIC) disavowed claims based on repudiated severance contracts. The United States District Court for the District of Massachusetts, William G. Young, J., ruled that there were no compensable damages and that promissory estoppel did not apply to claim against government. Officers appealed. The Court of Appeals, Boudin, Circuit Judge, held that: (1) FDIC's repudiation of severance agreements was valid; (2) repudiated severance contract was not allowed under Financial Institutions Reform, Recovery and Enforcement Act; and (3) promissory estoppel did not apply even if FDIC encouraged bank to enter severance contracts.

Affirmed.

West Headnotes

[1] Banks and Banking 52 505

52 Banks and Banking
52XI Federal Deposit Insurance Corporation
52k505 k. Powers, Functions and Dealings in General. Most Cited Cases
The Federal Deposit Insurance Corporation (FDIC), as receiver for failed bank, has right to disaffirm or repudiate any contract that bank may have made before receivership if FDIC decides in its discretion that performance would be burdensome and that disavowal would promote orderly administration of failed bank's affairs. Federal Deposit Insurance Act, § 2[11](e), as amended, 12 U.S.C.A. § 1821(e).

[2] Federal Courts 170B 611

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(D) Presentation and Reservation in Lower Court of Grounds of Review
170BVIII(D)1 Issues and Questions in Lower Court
170Bk611 k. Necessity of Presentation in General. Most Cited Cases
Claims which are not made in district court are waived.

[3] Banks and Banking 52 505

52 Banks and Banking
52XI Federal Deposit Insurance Corporation
52k505 k. Powers, Functions and Dealings in General. Most Cited Cases
Limitation on damages permitted for repudiated contracts under Financial Institutions Reform, Recovery, and Enforcement Act to “actual direct compensatory damages” precluded claims by former officers of failed bank for breach of repudiated severance contracts. Federal Deposit Insurance Act, § 2[11](e), (e)(3)(A)(i), (e)(3)(B), as amended, 12 U.S.C.A. § 1821(e), (e)(3)(A)(i), (e)(3)(B); Bankr.Code, 11 U.S.C.A. § 502(b)(7).

[4] Banks and Banking 52 505

52 Banks and Banking
52XI Federal Deposit Insurance Corporation
52k505 k. Powers, Functions and Dealings in General. Most Cited Cases

Estoppel 156 62.2(4)

156 Estoppel
156III Equitable Estoppel
156III(A) Nature and Essentials in General

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156k62 Estoppel Against Public, Government, or Public Officers
156k62.2 States and United States
156k62.2(4) k. Particular United States Officers, Agencies, or Proceedings. Most Cited Cases
The Federal Deposit Insurance Corporation (FDIC) as receiver for failed bank was not estopped from repudiating severance contracts which bank made with its officers, even if FDIC encouraged bank's promise of severance while acting as regulator; separate-capacities doctrine treats FDIC as two separate persons when acting in its regulator and receiver capacities and estoppel did not apply in claims against United States. Federal Deposit Insurance Act, § 2[11] (e)(1), as amended, 12 U.S.C.A. § 1821(e)(1).
***570** Edwin A. McCabe with whom Karen Chinn Lyons, Joseph P. Davis, III, The McCabe Group, and Lawrence Sager, Cambridge, MA, were on brief for plaintiffs, appellants.

Lawrence H. Richmond, Counsel, with whom Ann S. DuRoss, Asst. Gen. Counsel, Colleen B. Bombardier, Sr. Counsel, F.D.I.C., Washington, DC, John C. Foskett, Michael P. Ridulfo and Deutsch Williams Brooks DeRensis Holland & Drachman, P.C., Boston, MA, were on brief for defendant, appellee.

Before BREYER, Chief Judge, HIGGINBOTHAM, Senior Circuit Judge,[FN*] and BOUDIN, Circuit Judge.

FN* Of the Third Circuit, sitting by designation.

BOUDIN, Circuit Judge.

Appellants in this case are former officers of a failed bank. They sued the FDIC as the bank's receiver when the FDIC disallowed their claims for severance pay under their contracts with the bank. The district court sustained the FDIC, reasoning that Congress had restricted such claims. Although the statute in question is not easily construed and the result is a severe one, we believe that the officers' claims fail, and we sustain the district court.

The facts, shorn of flourishes added by the parties, are simple. In 1988 and 1989, the four appellants in this case were officers of Eliot Savings Bank (“Eliot”) in Massachusetts. In November 1988, when Eliot was undergoing financial strain, Eliot made an agreement with Charles Noble, its executive vice president, committing the bank to make severance payments (computed under a formula but apparently equivalent to three years' salary) if his employment were terminated. In August 1989, the bank entered into letter agreements with three other officers-appellants Bruce Howell, Patricia McSweeney, and Laurence Richard-promising them each a year's salary as severance in the event of termination. Finally, in December 1989 a further letter agreement was made with Noble, reaffirming the earlier agreement with him while modifying it in certain respects.

The agreements make clear that they were not intended to alter the “at will” employment relationship between Eliot and the officers. The bank remained free to terminate the officers, subject to severance payments, and (so far as appears) the officers were not bound to remain for any fixed term. The letter agreements with the three officers other than Noble state that the severance payments were promised in consideration of the officers' “willingness to remain” in the bank's employ; and the same intent can be gleaned from the two agreements with Noble. The weakened financial condition of the bank is adverted to in each of the four 1989 agreements.

At some point in 1989 the FDIC began to scrutinize closely Eliot's affairs. The officers allege, on information and belief, that the FDIC and the bank agreed that Eliot ***571** would take steps to retain its qualified management; and the complaint states that the FDIC “knew and approved” of the four letter agreements made in 1989. The officers also contend

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that they were advised by experienced counsel at a respected law firm that the severance agreements were valid and would withstand an FDIC receivership if one ensued. It is further alleged that, in December 1989, the FDIC and the bank entered into a consent order that provided that the bank would continue to retain qualified management.

Eliot failed and was closed on June 29, 1990. The FDIC was appointed its receiver. Within two months, the officers were terminated. The officers then made administrative claims for their severance benefits pursuant to applicable provisions of FIRREA, 12 U.S.C. §§ 1821(d)(3), (5), the statute enacted in 1989 to cope with the torrent of bank failures.[FN1] In October 1990, the FDIC disallowed the claims, stating that the claims violated public policy. Although the FDIC letter is not before us, it apparently is based upon the FDIC's general opposition to what are sometimes called "golden parachute payments," a subject to which we will return. Following the disallowance, the officers pursued their option, expressly provided by FIRREA, to bring an original action in federal district court. 12 U.S.C. § 1821(d)(6).

FN1. FIRREA is the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 183, codified in various sections of 12 and 18 U.S.C. Among other changes, FIRREA amended pre-existing provisions specifying the FDIC's powers as receiver and the claims provisions governing claims against failed banks.

In their district court complaint, the officers asserted claims against the FDIC for breach of contract, for breach of the contracts' implied covenant of fair dealing, and for detrimental reliance. The FDIC moved to dismiss or for summary judgment. Thereafter, the officers sought to amend their complaint by adding a promissory estoppel claim and by explicitly naming the FDIC in its "corporate capacity" as well as in its capacity as receiver. In a bench decision, the district judge ruled that the FDIC had lawfully repudiated the contracts between Eliot and the officers and that under FIRREA there were no compensable damages for the resulting breach. As for the promissory estoppel claim, the court deemed it "futile" and refused to allow the amendment; the court referred to the general principle that estoppel does not operate against the government and to the FDIC's broad grant of authority under FIRREA. The officers then sought review in this court.

[1] The first claim made on appeal, taken in order of logic, is that the FDIC's repudiation of the severance agreements was itself invalid. At this point we need to explain briefly the structure of the statute. Section 1821 governs, among other matters, the powers of the FDIC as receiver, 12 U.S.C. § 1821(d), the procedure for processing claims against the failed bank, 12 U.S.C. §§ 1821(d)(3), (5), and substantive rules for contracts entered into prior to the receivership. 12 U.S.C. § 1821(e). Section 1821(e)(1) gives the receiver the right to disaffirm or repudiate any contract that the bank may have made before receivership if the FDIC decides "in its discretion" that performance will be "burdensome" and that disavowal will "promote the orderly administration" of the failed bank's affairs. 12 U.S.C. § 1821(e)(1).

The power of a receiver to repudiate prior executory contracts made by the debtor, a familiar incident of bankruptcy law, see 11 U.S.C. § 365 (executory contracts and unexpired leases), means something less than might appear. By repudiating the contract the receiver is freed from having to comply with the contract, *e.g., Americare Medical Supply, Inc. v. RTC,* 1990 WL 58589, 1990 U.S.Dist. LEXIS 5355 (D.Kan.1990) (specific enforcement), but the repudiation is treated as a breach of contract that gives rise to an ordinary contract claim for damages, if any. Whether that claim is then "allowed" by the receiver and if so whether there are assets to satisfy it, are distinct questions; at this point we are concerned only with the receiver's authority to affirm or disaffirm. In this case the officers do not dispute that the ***572** FDIC did repudiate the severance agreements.

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Rather the officers argue that the repudiation is ineffective, and the agreements remain enforceable, because the FDIC did not make the statutory findings, or abused its discretion, or both.

[2] Interesting questions are posed by such a challenge, but the questions need not be resolved in this case. The claim was not made in the district court and, accordingly, it is waived. *Clauson v. Smith,* 823 F.2d 660, 666 (1st Cir.1987). The complaint makes only the barest reference to abuse of discretion by the FDIC, mentioning it not as a separate claim but in the prefatory description of facts; and there is no reference whatever to this line of argument, or to lack of required FDIC findings, in the opposition filed by the officers to the FDIC's motion to dismiss. A litigant would normally have an uphill battle in overturning an FDIC finding of "burden," if the FDIC made one, but in all events the issue has not been preserved in this case.

[3] The second ground of appeal raises the central question before us, namely, whether a damage claim based on a repudiated severance contract is allowed under FIRREA. A stranger to FIRREA might think it apparent that breach of a contract to make severance payments inflicts damages on a discharged employee in the amount of the promised payments. The hitch is that in FIRREA Congress adopted restrictive rules that limit the damages permitted for repudiated contracts. 12 U.S.C. § 1821(e). In a general provision subject to certain exceptions, 12 U.S.C. § 1821(e)(3)(A)(i) provides that the receiver's liability for a repudiated contract is "limited to actual direct compensatory damages...." Additionally, section 1821(e)(3)(B) provides:

For purposes of subparagraph (A), the term 'actual direct compensatory damages' does not include-

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunities; or

(iii) damages for pain and suffering.

The question thus framed is whether, or to what extent, the statute's limitation to "actual direct compensatory damages" bars the contractual severance claims made in this case.[FN2] The question is easy to state but less easy to answer. Although FIRREA's concept of limiting allowable claims for contract damages echoes the approach of the Bankruptcy Code, 11 U.S.C. 502, that statute is more specific and informative. In particular, section 502(b)(7) limits claims by a terminated employee for future compensation to one year's pay. So far as appears from the parties' briefs, FIRREA's broad exclusionary language ("actual direct compensatory damages") has been plucked out of the air by Congress, although the general purpose is obvious enough. If there is any illuminating legislative history or precedent, it has not been called to our attention by the parties and we have been unable to locate anything very helpful.

FN2. We do not reach the FDIC's alternative argument that the severance pay would be barred as representing "lost profits or opportunity."

It is fair to guess that Congress, faced with mountainous bank failures, determined to pare back damage claims founded on repudiated contracts. In all likelihood, the legislators knew that many uninsured depositors and other unsecured creditors would recover little from failed banks; and the government's own liability (to insured depositors) would be effectively increased to the extent that remaining assets went to contract-claim creditors of the bank rather than to the government (as the subrogee for the insured depositors whom the FDIC compensated directly). It is thus not surprising that Congress might wish to disallow certain damage claims deemed less worthy than other claims. This assessment casts some light on Congress' approach and provides a predicate for considering the severance contract claims posed in this case.

We conclude, not without some misgivings, that the officers' claims do not comprise allowable claims under FIRREA. ***573** The amounts stipulated by the

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Eliot contracts are easily determined-a formula payment for Noble and a year's pay for the others. But the statute calls upon the courts to determine the *nature* of the damages stipulated by the contract or sought by the claimant in order to rule out any but those permitted by Congress. In this case, analysis persuades us that the damages provided by Eliot's repudiated severance contracts with its officers, and sought by the appellants for their breach in this case, are not "actual direct compensatory damages" under 12 U.S.C. § 1821(e)(3)(A)(i).

Severance payments, stipulated in advance, are at best an estimate of likely harm made at a time when only prediction is possible. When discharge actually occurs, the employee may have no way to prove the loss from alternative employments foregone, not to mention possible disputes about the discharged employee's ability to mitigate damages by finding new employment. A severance agreement properly protects against these uncertainties by liquidating the liability. Such payments comprise or are analogous to "liquidated damages," at least when the amount is not so large as to constitute an unenforceable penalty. *See generally* E. Allan Farnsworth, *Contracts* § 12.18 (2d ed. 1990); Charles McCormick, *Damages* § 146 (1935).[FN3]

FN3. Of course, the other office of a severance agreement may be to provide a cause of action for an at will employee who otherwise has no contractual claim at all. *E.g., Pearson v. John Hancock Mutual Life Ins. Co.,* 979 F.2d 254, 258 (1st Cir.1992). In this case, the at will status of the appellants is not decisive; they did have contracts and our task is to see whether the promised payments fit into FIRREA's compensable-damage pigeonhole.

Unfortunately for the appellants, the statutory language-"actual direct compensatory damages"-does not quite embrace the payments promised by the officers' severance agreements. Eliot's officers may, or may not, have suffered injury by remaining at the bank, depending on what options they had in the past that are not available now. Conceivably, they suffered no damage at all; conceivably, their actual damages from staying at Eliot exceed the amounts stipulated in the agreements. The point is that severance payments of this class do not comprise actual damages. Thus, based on statutory language alone, the starting point for statutory construction, the FDIC appears to have the better case.

One might argue that, although the severance payments are not actual damages, they are often a good-faith effort to estimate such damages and should in such cases be permitted as consistent with the spirit of the statute, if not its language. But the spirit of the statute is quite otherwise. The statute actually excludes (see 12 U.S.C. § 1821(e)(3)(B)) two less-favored categories of what are indisputably actual damages (lost profits, pain and suffering), reinforcing the impression that Congress intended strictly to limit allowable claims for repudiated contracts. The treatment of leases in the next subsection is yet further evidence of Congress' temper. 12 U.S.C. § 1821(e)(4) provides that, if the receiver disaffirms a lease to which the bank was lessee, the lessor's damages are limited to past rent and loss of future rent is not compensable. Yet the lessor may have accepted a lower monthly rent in exchange for a long-term lease and protection against the risk of an empty building. As with severance pay, the lessor may have foregone other opportunities but the loss is not to be recompensed.

Each side has offered in its favor still broader policy arguments. The officers claim that the disallowance of promised severance pay will mean that a troubled bank cannot effectively contract to retain able officers who may rescue it. The FDIC, by contrast, implies that the present arrangements may be "golden parachutes" by which insiders take advantage of the crisis to assure themselves of a handsome farewell gift from a failing bank. The FDIC also points to regulations it has proposed, but not yet adopted, to curtail severely such arrangements; its new rules would disallow severance contracts for bank officials except in narrowly defined condi-

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tions, such as where an officer is induced to *leave* another post to help a troubled***574** thrift.FN4 The FDIC claims that the regulations and their authorizing statute reflect public policy.

FN4. The regulations were proposed on October 7, 1991, 56 Fed.Reg. 50529, pursuant to the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990, 104 Stat. 4859, adding 12 U.S.C. § 1828(k) (FDIC "may prohibit or limit, by regulation or order, any golden parachute payment....").

The policy arguments of the officers and the FDIC may each have some force, to some extent they offset each other, and neither set is decisive in this case. In answer to the officers, it may be said that their argument presents a fact and policy question best left to Congress and to expert bank regulators; those bodies in turn have ample incentives to make the right adjustment in delimiting severance agreements. As to the FDIC's argument, Congress has not declared severance payments unlawful but merely authorized the FDIC to do so, and the latter's proposed regulations are not yet in force. Further, this case arises on a motion to dismiss, so there is no basis whatever for considering any imputation of bad motive or misconduct on the part of Eliot's officers.

The officers' last argument in support of their contract claims is that the "actual damage" restriction, if read as the FDIC urges, is an unconstitutional taking. Alternatively, they say that the statute is so close to the line that it should be read favorably to them to avoid a constitutional question. These arguments were not made in the district court and we decline to consider them. Litigation is a winnowing process and, except in criminal cases where the stakes are different, only in extraordinary circumstances will we take up a contention that has not been made in the district court. We note that arguments that the FDIC might itself have made, but did not, have been similarly ignored, including a possible claim that its *order* disallowing the severance claims is a currently effective "order" under the golden parachute statute, 12 U.S.C. § 1828(k).

[4] What remains to be considered are the detrimental reliance claim in the original complaint and the related promissory estoppel claim advanced by the attempted amendment. In substance, the officers argue that the FDIC, acting in its supervisory or "corporate" capacity prior to Eliot's failure, was so closely associated with the bank's severance promises that their repudiation by the FDIC as receiver violates estoppel doctrine or gives rise to a new claim against the FDIC. That the FDIC was implicated in forming the severance contracts is a factual proposition, apparently denied by the FDIC, but we must accept the proposition as true for purposes of reviewing the motion to dismiss.

The FDIC seeks to answer the officers' estoppel and reliance argument by citing to cases that say that the FDIC is treated as two separate persons when acting in its "corporate" capacity as a regulator and when acting in its capacity as receiver. *E.g., FDIC v. Roldan Fonseca,* 795 F.2d 1102, 1109 (1st Cir.1986). On this theory, the FDIC is not liable in this case as regulator, even if it affiliated itself with the promise of severance pay, since "it" (the FDIC as regulator) did not break the promise; and as receiver, the FDIC was free to disavow the contracts because "it" (the FDIC as receiver) made no promises.

The officers argue that this "separate capacities" doctrine was designed for a different purpose and should not be applied in the present context to produce an unjust result. But the Eighth Circuit applied this doctrine without much hesitation to a case in which the FDIC as receiver sought to repudiate a lease it had previously accepted in its capacity as "conservator," conservator being yet another incarnation in which the FDIC sometimes appears. *RTC v. CedarMinn Building Limited Partnership,* 956 F.2d 1446 (8th Cir.), *cert. denied,* 506 U.S. 830, 113 S.Ct. 94, 121 L.Ed.2d 56 (1992). As for the claimed injustice, it is not clear that any apparent inequity worked in this case is greater than oc-

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curs in the usual case in which the separate-capacities doctrine is invoked. *FDIC v. Roldan Fonseca,* 795 F.2d at 1109.

***575** There is another answer to the officers' claim that rests more solidly on visible policy. Putting to one side the separate capacities defense, courts are for obvious reasons reluctant to permit estoppels against the United States, *e.g., Heckler v. Services of Crawford County,* 467 U.S. 51, 60, 104 S.Ct. 2218, 2224, 81 L.Ed.2d 42 (1984), although exceptions may be found. *United States v. Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 670-675, 93 S.Ct. 1804, 1814-1817, 36 L.Ed.2d 567 (1973). There are many reasons for the reluctance, including a concern for the public purse and a recognition that the government-unlike the normal actor-is an enterprise so vast and complex as to preclude perfect consistency. *See generally Hansen v. Harris,* 619 F.2d 942, 649-58 (2d Cir.1980) (Friendly, J., dissenting), *rev'd sub nom. Schweiker v. Hansen,* 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981). While leaving many questions unanswered, the Supreme Court has made clear that an estoppel against the United States is not measured by the rules used for ordinary litigants. *Heckler,* 467 U.S. at 62, 104 S.Ct. at 2225.

In the present case, even the most liberal reading of the reliance and estoppel counts leaves the FDIC in the position of one who encouraged or invited the bank's promise of severance pay. Yet (as we construe the actual damages clause), Congress has decided that, in parceling out fairly the limited assets of a failed bank, contract damages reflecting severance pay are not permitted. “[T]o permit [the claim] ... would be judicially to admit at the back door that which has been legislatively turned away at the front door.” *FDIC v. Cobblestone Corp.,* 1992 WL 333961, 1992 U.S.Dist. LEXIS 17024 (D.Mass.1992). It is hard to imagine a less attractive case for creating a new judicial exception to the general rule against estoppel of the government.

The judgment of the district court is *affirmed.*

C.A.1 (Mass.),1993.
Howell v. F.D.I.C.
986 F.2d 569, 61 USLW 2518

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