

No. 90-773C
(Filed Apr. 30, 1998)

STATESMAN SAVINGS HOLDING CORPORATION, et al.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

* Contracts; breach of contract;
* summary judgment; intervention
* of FDIC in **Winstar** cases (**United States v. Winstar Corp.**, 578 U.S. 839, 116 S. Ct. 2432 (1996));
* whether Termination Agreement operates as accord and satisfaction of all claims relating to Breach of Assistance Agreement; whether "as is" clause in Purchase and Assumption Agreement forecloses suit for breach by FDIC; whether FDIC is successor in interest to failed thrift; whether private plaintiffs can recover breach damages directly from the Government or whether the failed thrift's receiver is the proper party.

Charles J. Cooper, Washington, DC, for plaintiff. **Michael A. Carvin, Robert J. Cynkar, Vincent J. Colatrisano, and David H. Thompson**, Cooper, Carvin & Rosenthal, of counsel.

John V. Thomas, Washington, DC, for plaintiff Federal Deposit Insurance Corporation. **James J. Igo, Robert J. Soffer, Richard S. Gill, and Bruce C. Taylor**, of counsel.

Jeanne E. Davidson, Washington, DC, with whom was **Assistant Attorney General Frank W. Hunger**, for defendant. **William P. Donovan, Jr., Linda Halpern, Katherine Kelly, Scott J. Pivnick, Tarek Sawi, Ho Sik Shin, and John P. Sholar**, of counsel.

Melvin C. Garbow, Arnold & Porter and **Jerry Stouck**, Spriggs & Hollingsworth, Washington, DC, for *Amicus Curie* Select Committee of Certain Open Thrift Plaintiffs. **Rosemary Stewart**, Spriggs & Hollingsworth, for *Amicus Curiae* C. Hunt Trust Estate and **Dennis A. Winston**, Brestoff & Winston, for *Amicus Curiae* WestFed Holdings, Inc. **Kathleen M. McGeehin**, Spriggs & Hollingsworth, Washington, DC, and **Beverly Ray Burlingame**, Thompson & Knight, Dallas, TX, of counsel.

Gaston H. Gage, Charlotte, NC, for *Amici Curiae* O. Bruton and Bill Smith. Parker, Poe, Adams and Bernstein, of counsel.

ORDER ON MOTION FOR RECONSIDERATION

MILLER, Judge.

On April 27, 1998, private plaintiffs filed Plaintiffs' Motion for Reconsideration or, in the Alternative, Clarification, of the Court's Decision on Plaintiffs' Motion for Direct Recovery, and Emergency Request for Continuance, which was received in chambers on April 28. On April 29, 1998, the court's chambers notified counsel for defendant and plaintiff FDIC that no response was required at this late date and that the court was not inclined to grant either the motion or a continuance. However, plaintiff FDIC apparently had responded earlier on April 29, 1998.

Private plaintiffs seek to have the court reconsider its decision, see Statesman Savings Holding Corp. v. United States, No. 90-773C, slip op. at 23-28 (Fed. Cl. Apr. 22, 1998), limiting private plaintiffs' direct recovery to restitution. Moreover, in light of what private plaintiffs' characterize as a decision "on the eve of trial," they have requested a continuance of one month.

Although the court finds private plaintiffs' motion for reconsideration to be without merit, it will endeavor to alleviate certain of the purported ambiguities raised by private plaintiffs. Specifically, private plaintiffs are correct insofar as the court's April 22 opinion did not define the nature of the expectancy damages that might be awarded. The parties' replies to the outstanding motions *in limine* reveal that, since a date prior to transfer of this case for trial, plaintiffs -- both private and the FDIC -- have been operating under a division of labor to which the court was not privy. See Plaintiff Federal Deposit Insurance Corporation's Reply to Defendant's Motion in Limine Concerning Plaintiffs' Claim for Restitution, filed Apr. 21, 1998, at 2-3 & n.2. ⁽¹⁾ The court has also been assisted by plaintiff FDIC's reply to its motion *in limine* concerning the testimony of Dr. John Bovenzi. This filing, responding to the court's tentative ruling on the outstanding motions *in limine* filed concurrently with the April 22 opinion, demonstrates the continued relevance of Dr. Bovenzi's testimony.

As a consequence of these filings, the court understands that plaintiffs are dividing the responsibilities of proving expectancy damages. Therefore, the scope of the evidence pertaining to expectancy damages admissible at trial will include Dr. Bovenzi's testimony on the lost value of Statesman Bank's assets. Any damages awarded by the court will be based on both private plaintiffs' model regarding lost profits, as well as plaintiff FDIC's evidence addressing the losses suffered by Statesman Bank because of its closure. Plaintiff FDIC states:

In pursuing this whole claim, the FDIC is not suing as a creditor of the failed thrift, but as the successor to, and in the right of, Statesman Bank. In sum, implicit in the lost profits model is the fact that if Statesman Bank were open and operating today, it would be paying all of its creditors on a[n] ongoing basis.

Plf FDIC's Br. filed Apr. 28, 1998, at 4. This clarification is not inconsistent with the court's decision to foreclose an independent claim by plaintiff FDIC as a creditor of Statesman Bank. Both the evidence of private plaintiffs and of plaintiff FDIC are elements of the total expectancy damages suffered by Statesman Bank. Any damages related to this claim to which Statesman Bank may be entitled will flow through the receivership. ⁽²⁾

Private plaintiffs' request for a continuance at this late date is not a legitimate response to any unforeseeable development. Private plaintiffs made a tactical decision to file their motion for direct recovery; they were not required to do so. It should be apparent to private plaintiffs that by filing a motion one runs the risk of receiving an adverse ruling. By filing a memorandum in support of their motion without one case citation for the proposition that the law recognizes a right to direct recovery in these or similar circumstances, one also runs the risk that oral argument will not be scheduled. The court

stated during the March 6, 1998 status conference that it would make every effort to rule on the outstanding motions prior to trial. See Transcript of Proceedings, **Statesman Savings Holding Corp v. United States**, No. 90-773C, at 34 (Fed. Cl. Mar. 6, 1998). Private plaintiffs' failure to consider the ramifications of an adverse ruling is not a sufficient reason to delay a trial that they have been pursuing aggressively for several years, the scheduling of which also affects many of the other **Winstar**-related cases pending before the Court of Federal Claims. ⁽³⁾ Accordingly,

IT IS ORDERED, as follows:

1. Private plaintiffs' motion for reconsideration is denied.
2. Private plaintiffs' request for a clarification is granted insofar as plaintiff FDIC will be permitted to call Dr. John Bovenzi to testify on one component of the expectancy damages claim that is owned in its entirety by plaintiff FDIC as receiver.
3. As further clarification the court strikes footnote 23 of the April 22 opinion. Because of the division of labor between private plaintiffs and plaintiff FDIC, no need arises for plaintiff FDIC to compensate private plaintiffs for carrying the burden on the lost profits aspect of expectancy damages.
4. Private plaintiffs' emergency request for a continuance is denied.
5. The Clerk of the Court shall serve a copy of this order on counsel by facsimile transmission at 202/822-8966, 942-3656, and 307-0972.

Christine Odell Cook Miller

Judge

1. Although this reply was filed on April 21, 1998, it was received by the court subsequent to the issuance of the April 22 decision.
2. The court reiterates the statement made in the April 22 opinion that it has not foreclosed private plaintiffs from pursuing any reliance damages to which they might be entitled as an alternative to restitution. This ruling is not inconsistent with the law that breach damages are an alternative to restitution or reliance damages. The breach damages suffered by private plaintiffs are different than those incurred by Statesman Bank. The court has not ruled on whether private plaintiffs as investors in Statesman Bank may recover restitution or reliance damages and also expectancy damages, *i.e.*, participate as shareholders of Statesman Bank in any surplus recovered by the receiver as expectancy damages.
3. Insofar as private plaintiffs consider it necessary to investigate further the applicability of equitable subordination, they are free to do so and may bring their findings to the court's attention via a post-trial brief, if their investigation so warrants.