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Lessons from the Damages Decisions Following *United States v. Winstar Corp.*

RODGER D. CITRON

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Rodger D. Citron, an attorney in Washington, D.C., was a member of the U.S. Department of Justice's trial team in Glendale Fed. Bank, FSB v. United States, *43 Fed. Cl. 390 (1999),* rev'd in part, *239 F.3d 1378 (2001), after remand,* Glendale Fed. Bank, FSB v. United States, *No. 90–772C, 2002 WL 31004679 (Fed. Cl. Aug. 2, 2002), and* LaSalle Talman Bank v. United States, *45 Fed. Cl. 64 (1999), appeal pending. The views expressed are those of the author and do not reflect the views of the Department of Justice.* *The author wishes to thank the following individuals for their time and thoughts: Brandt Goldstein, William Rubenstein, and Steve Schooner. Needless to say, they are not responsible for any errors.*

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I. Introduction

The literature on damages for breach of contract traditionally makes the following assumptions about the parties to, and the subject of, the agreement: the contracting parties are private individuals or entities; the subject of the contract is a service or good that is purchased for a sum; and there is a market where a substitute for the subject of the contract can be bought. Quite naturally, then, in evaluating various remedies for breach of contract, the literature focuses on the economic question of which remedy best promotes efficiency between the parties and for society.[1] Lately, however, literature on a different type of contract, known as the regulatory contract, has emerged.[2] This recent interest can be traced to the Supreme Court's decision in *United States v. Winstar Corp.*,[3] in which acquirers of troubled savings and loan institutions sought favorable regulatory accounting treatment.

Regulatory contracts have been defined as "contracts between government entities and private actors subject to, or potentially subject to, regulation in which the Government promises to maintain . . . a specified regulatory regime in exchange for either money or performance by the private party."[4] In these cases, the Government—typically a federal agency—is a party to the agreement and may have dealt with more than a single party. The subject of the contract is the Government's promise of regulatory treatment or to refrain from regulatory action. As only the Government is able to "supply" regulatory treatment, there may be no readily available market substitute to replace what was bargained for in the event of government breach.

Breach-of-regulatory-contract claims present an exquisite dilemma: on the one hand, given its many roles and responsibilities, and the fact that it is a representative body, the Government reasonably requires flexibility in deciding whether to change its laws and policies. On the other hand, depending upon the nature of the dealings between the Government and the claimant(s), the latter may reasonably have relied upon a government promise in conducting business operations, thereby incurring expenditures and expecting to profit because of its dealings with the Government. In this clash

1. The literature is extensive. A starting point is THE ECONOMICS OF CONTRACT LAW (Anthony Kronman & Richard Posner eds., 1979).

2. *See* Jonathan R. Macey, *Winstar, Bureaucracy and Public Choice*, 6 SUP. CT. ECON. REV. 173 (1998); David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. PA. L. REV. 473 (1999); Daniel R. Fischel & Alan O. Sykes, *Governmental Liability for Breach of Contract*, 1 AM. L. & ECON. REV. 313 (1999); Gillian Hadfield, *Of Sovereignty and Contract: Damages for Breach of Contract by Government*, 8 S. CAL. INTERDISC. L.J. 467 (1999); Abraham L. Wickelgren, *Damages for Breach of Contract: Should the Government Get Special Treatment?* 17 J.L. ECON. & ORG. 121 (2000); Richard E. Speidel, *Contract Excuse Doctrine and Retrospective Legislation: The Winstar Case*, 2001 WIS. L. REV. 795 (2001).

3. 518 U.S. 839 (1996).

4. Dana & Koniak, *supra* note 2, at 480. This definition of regulatory contract applies to *Winstar* and the related cases discussed *infra*.

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between the discretion permitted to the Government by public law and the protection of individual commitments allowed under private law, when should the Government prevail? And when it does not, how much should it pay?[5] These questions have arisen in a number of regulated industries, including the nuclear power industry[6] and the low-income housing industry.[7] In *Winstar*, these questions were raised in the context of the savings and loan industry.

Winstar involved claims by three thrifts that had been parties to acquisitions approved or induced by regulators. The thrifts prevailed at every step of the liability phase, and ultimately before the Supreme Court in *Winstar*. The Court concluded in a seven-to-two decision without a majority opinion that Congress's enactment of the Financial Institutions Reform Recovery and Enforcement Act (FIRREA), Pub. L. No. 101-731, 103 Stat. 183, breached agreements between the acquiring entities and the federal banking regulators with whom they dealt. Although the Supreme Court's decision allowed for substantial claims on the public fisc, it nevertheless was endorsed as the correct result: a deal is a deal, and the United States should keep its promises.[8] Having decided that the sovereign defenses asserted by the United States

5. *See, e.g.*, Lois R. Lupica, *Transition Losses in the Electric Power Market: A Challenge to the Premises Underlying the Arguments for Compensation*, 52 RUTGERS L. REV. 649 (2000). In addition to the growing literature on regulatory contracts as defined by Professors Dana and Koniak, there is a body of literature addressing claims by former state-sanctioned monopolists that the Government's shift from monopoly regulation to a regulatory regime designed to promote competition entails the Government's breach of a broad regulatory contract between the Government and the former monopolists. *See, e.g.*, J. Gregory Sidak & Daniel Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851 (1996). This article does not address regulatory contract claims in that context.

6. *See, e.g.*, Maine Yankee Atomic Power Co. v. United States, 225 F.3d 1336 (Fed. Cir. 2000) (finding government's failure to comply with contractual schedule for disposal of spent nuclear fuel constituted breach of contract); Yankee Atomic Elec. Co. v. United States, 112 F.3d 1569 (1997) (reversing trial court, entering summary judgment for Government based upon sovereign acts defense and unmistakability doctrine on claim that special assessment imposed upon utilities by Energy Policy Act constituted unlawful exaction), *cert. denied*, 524 U.S. 951 (1998). *See also* Marcia Coyle, *Broken Promises May Bust Budget*, NAT'L L.J., Apr. 27, 1998, at A1 (noting that plaintiffs suing Federal Government for breach of contract "include companies involved in spent nuclear fuel disposal, uranium enrichment services, subsidized housing, and other forms of federal procurement").

7. *See, e.g.*, Cienega Gardens v. United States, 162 F.3d 1123 (1998), 194 F.3d 1231 (1998) (reversing judgment entered in favor of developers and against HUD on the grounds that there was no privity of contract), *cert. denied*, Sherman Park Apartments, v. United States, 528 U.S. 820 (1999).

8. *See, e.g.*, Marianne Lavelle, *Federal Contractors Hail High Court's Ruling*, NAT'L L.J., July 15, 1996, at A1 ("From regulators and aerospace giants down to the firms that dish out meals to the infantry, government contractors cheered the Supreme Court victory won on the last day of the term . . ."); Mark T. Cramer, Note, *Contracts Written in Stone: An Examination of* United States v. Winstar Corp., 25 PEPP. L. REV. 567, 567 (1997) ("The United States Supreme Court's decision in . . . *Winstar* . . . sent a resounding message to Washington: The government has to make good on its contracts.").

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were unavailing, the Court remanded the cases to the Court of Federal Claims for damages trials.

In 1999, the Court of Federal Claims entered a $909 million judgment in *Glendale*,[9] the first supervisory goodwill damages case to be decided after remand. Suddenly *Winstar* did not seem so wise: it now appeared that the Supreme Court had opened the floodgates to litigation that would bankrupt the Treasury.[10] Indeed, the Court's expansive language in the *Winstar* plurality opinion indicated that in cases involving breach of contract, courts should view the Government's sovereign defenses with skepticism, and the size of the judgment in the first goodwill case—one of the largest ever entered against the United States—suggested that the Court of Federal Claims would be receptive to claims for compensation.

Subsequently, in 2001, an appeals court vacated the judgment in *Glendale*.[11] And, although there have been a number of damages decisions in goodwill cases since 1999, in most of them the award has not been more than $35 million despite claims for much larger amounts.[12] What happened?

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9. Glendale Fed. Bank, FSB v. United States, 43 Fed. Cl. 390 (1999), *rev'd in part*, 239 F.3d 1374 (Fed. Cir. 2001).

10. *See, e.g.*, Stephen Labaton, *West Coast S. & L. Wins $909 Million from Government*, N.Y. TIMES, Apr. 10, 1999, at A1 ("If the reasoning of [*Glendale*] is upheld on appeal, experts say it could, in effect, reopen the huge bailout of the savings and loan industry, adding $30 billion to $50 billion to the costs of the most expensive financial debacle in American history."); *see also* Coyle, *supra* note 6, at A1 (noting that "as with the eye-popping verdicts the thrifts have demanded, these new claimants, if victorious, could further threaten the government's projected multibillion dollar budget surpluses").

11. Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374 (Fed. Cir. 2001).

12. *See Glendale*, 43 Fed. Cl. 390 (1999) (awarding $909 million in restitution and nonoverlapping reliance damages), *aff'd in part, rev'd in part*, 239 F.3d 1374 (Fed. Cir. 2001) (vacating judgment), *on remand*, 2002 WL 31004679 (Fed. Cl. Aug. 2, 2002) (reinstating $381 million in "wounded bank" and other incidental reliance damages); Suess v. United States, 52 Fed. Cl. 221 (2002) (awarding $35 million after rejecting lost profits and restitution claims for larger amounts); California Fed. Bank v. United States, 43 Fed. Cl. 445 (1999) (awarding $23 million in replacement costs, rejecting claims for lost profits and restitution), *aff'd in part, rev'd in part*, 245 F.3d 1342 (Fed. Cir. 2001) (affirming cost of replacement award, remanding case for trial on lost profits damages); LaSalle Talman Bank, F.S.B. v. United States, 45 Fed. Cl. 64 (1999) (rejecting claims for lost profits and restitution, awarding $5 million for mitigation costs), *appeal pending*; Landmark Land Co. v. United States, 46 Fed. Cl. 261 (2000) (awarding acquirer $20 million, value of land contributed pursuant to contract), *aff'd in part, rev'd in part*, 256 F.3d 1365 (Fed. Cir. 2001) (affirming award to acquirer, vacating award to FDIC); Glass v. United States, 47 Fed. Cl. 316 (2000), *rev'd*, 258 F.3d 1349 (Fed. Cir. 2001) (vacating award to FDIC and shareholders of failed thrift); Bluebonnet Savings Bank, F.S.B. v. United States, 47 Fed. Cl. 156 (2000) (rejecting plaintiffs' claims for damages), *rev'd*, 266 F.3d 1348 (Fed. Cir. 2001), *after remand*, 52 Fed. Cl. 75 (2002) (awarding $132 million pursuant to remand order); Castle v. United States, 48 Fed. Cl. 187 (2000) (awarding plaintiff shareholders $15.1 million, amount of contribution in restitution), *rev'd in part*, 301 F.3d 1328 (Fed. Cir. 2002) (vacating award to shareholders); Bank United of Texas FSB v. United States, 50 Fed. Cl. 645 (2001) (awarding $8.8 million in mitigation costs, rejecting lost-profits

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In the damages trials, the courts developed a more complete understanding of the economics of the savings and loan industry, and of the accounting techniques used by the regulators during the 1980s. As a result, the courts generally have rejected claims for lost profits, limited restitution awards to the funds contributed by acquiring entities, and awarded transactions costs to plaintiffs that were able to replace the phased-out supervisory goodwill.[13] By now, the thrift claimants and the Federal Government have spent hundreds of millions of dollars litigating goodwill damages claims.[14] Even if we can't all get along, it is important to ask what lessons can be learned from the goodwill damages cases in evaluating claims for breach of regulatory contract.

This subject is especially worthy of consideration because the damages decisions indicate that, on the limited record before it, the Supreme Court erred in *Winstar*. Some of the academic literature on *Winstar* argues that the Supreme Court erroneously, even dangerously, expanded the Government's liability for breach of contract.[15] However, if, as appears to be the case so far, the courts generally have limited recovery to a reimbursement measure of reliance damages, then *Winstar*'s bark may be worse than its bite as far as government liability is concerned. Moreover, the damages decisions—and the way they have fleshed out the economic issues at stake in claims for breach of regulatory contract—provide important guidance with respect to the best approach to awarding damages in cases presenting such claims.

The Supreme Court decision in *Winstar* and the subsequent damages cases in the Federal Circuit and the Court of Federal Claims are challenging to write about in a comprehensive fashion. The issues are complicated. The Supreme Court decision establishing liability in the first three cases fills nearly one hundred pages in the U.S. Reports, and includes opinions by four different justices.[16] And the damages decisions involve complicated questions of accounting and economics, in particular, valuation. Furthermore, the case law continues to evolve. Even with more than a dozen damages decisions

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claims), *appeal pending*. The citations in this footnote are limited to the damages decisions and do not include separately reported decisions on liability.

13. There are exceptions, of course, and there are appeals pending in a number of cases.

14. *See* Marcia Coyle, *U.S. Digs in Against S&Ls*, NAT'L L.J., May 28, 2001, at A1 (according to a Department of Justice official, "the government has spent 'several hundreds of millions of dollars' on *Winstar* litigation"); *see also Glendale*, 43 Fed. Cl. at 410 ("It has cost each side tens of millions of dollars to litigate this case. The court imagines that the total cost at this point well exceeds $100 million.").

15. *See, e.g.*, Dana & Koniak, *supra* note 2, at 476–79, 516, 558–59.

16. One scholar has written two excellent lengthy articles on the liability issues in *Winstar*: Joshua Schwartz, *Liability for Sovereign Acts: Congruence and Exceptionalism in Government Contracts Law*, 64 GEO. WASH. L. REV. 633, 640–50 (1996) [hereinafter Schwartz, *Liability for Sovereign Acts*], and Joshua Schwartz, *Assembling* Winstar: *Triumph of the Ideal of Congruence in Government Contracts Law*, 26 PUB. CONT. L.J. 481 (1997) [hereinafter Schwartz, *Assembling* Winstar].

reported, new decisions are reported on an almost weekly basis, and there are still nearly one hundred goodwill damages cases still pending in the Court of Federal Claims.[17] At the time this article was in page proofs, at least one Court of Federal Claims decision had been argued and was pending in the Federal Circuit, and several others almost certainly will not be resolved before an appeal to that court.[18]

Nonetheless, there are enough reported damages decisions to identify certain patterns in those decisions, and to explain how they illustrate the economic errors made by the Supreme Court in *Winstar*. Part II of this article provides a brief history of the savings and loan industry. Part III describes the *Winstar* litigation, in particular the Supreme Court decision. Part IV explains that in the ensuing damages decisions, the courts have been able to correct two economic errors in the Supreme Court's decision—one relating to the economic condition of the parties when they entered into the agreements; the other relating to the effect of FIRREA's phase-out of supervisory goodwill as regulatory capital on acquirers of troubled thrifts.

Winstar involved more than the application of economics to the acquisitions of troubled savings and loan institutions, and to the impact of FIRREA on acquiring entities. It also presented the legal question of the extent to which the United States should be treated like a private party in its dealings with private parties. The *Winstar* plurality opinion examined this question in great detail, and it has been discussed in the damages decisions as well. Historically, the United States, as the sovereign, has not been liable for lost profits. The goodwill damages decisions suggest that the Court of Federal Claims now may be receptive to entertaining claims for lost profits, subject to the requirements for recovery of those damages in cases between private parties. Part V examines this question greater detail. This article offers some concluding thoughts in Part VI.

II. The Savings and Loan Industry in the 1980s

A. *The First and Second Thrift Crises*

Since the Great Depression of the 1930s, the savings and loan industry has been extensively regulated by the Federal Government. Three acts of Congress established the structure of the savings and loan industry from the 1930s through the enactment of FIRREA in 1989. In 1932, the Federal Home Loan Bank Act created the Federal Home Loan Bank Board (FHLBB).[19] The

17. The trial court decisions are available on the Court of Federal Claims website *at* http://www.uscfc.uscourts.gov/winstar.htm.

18. *LaSalle* was argued before the Federal Circuit in 2002 and is still pending. The other decisions likely to be subject of proceedings in the Federal Circuit are *Bluebonnet*, *Suess*, and *Glendale*.

19. Ch. 522, 47 Stat. 725 (1932), codified as amended, 12 U.S.C. §§ 1421–1449 (1988 ed.); *see* United States v. Winstar Corp., 518 U.S. 839, 844 (1996).

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Home Owners' Loan Act of 1933 authorized the Bank Board to regulate federal savings and loan institutions.[20] And in 1934, the National Housing Act created the Federal Savings and Loan Insurance Corporation (FSLIC), which was responsible for insuring thrift deposits.[21] Under this structure, the Federal Government had a dual role in the savings and loan industry. It wanted the industry to grow and prosper, and could make funds available to thrifts for that purpose. At the same time, the Federal Government also was responsible for regulating thrifts to ensure their safety and soundness and for insuring deposits in savings and loan institutions.

From the 1930s through the early 1980s, a typical thrift's business consisted of taking in short-term deposits in order to make long-term, fixed-rate mortgage loans.[22] By and large, this arrangement worked for most savings and loan institutions, especially in the era of prosperity that followed World War II. As an insurer, the Federal Government rarely needed to intervene and take over or liquidate a savings and loan institution.

In the late 1970s, soaring interest rates shattered the stable environment in which savings and loan institutions operated. The market value of a thrift's long-term, fixed-rate mortgages fell as "short-term interest rates rose above long-term interest rates."[23] Concurrently, a thrift's short-term deposit liabilities increased as they repriced constantly. Thus, as the interest costs of a thrift's liabilities increased, the market value of its assets (the fixed-rate loans) declined. A typical thrift became insolvent on an economic basis; the market value of its liabilities exceeded the market value of its assets. Over time, the economic condition of many thrifts was reflected on their books, so that they became insolvent on a book (or accounting) basis. In the early 1980s, the savings and loan industry had a massive negative market value and nearly all thrifts were insolvent on a market basis.[24]

As thrifts became insolvent on a book basis, FSLIC was obligated to respond. The agency was overwhelmed by the situation and lacked the funds

20. Ch. 64, 48 Stat. 128 (1933), codified as amended, 12 U.S.C. §§ 1461–68 (1988 ed.); *see Winstar*, 518 U.S. at 844.

21. Ch. 847, 48 Stat. 1246 (1934), codified as amended, 12 U.S.C. §§ 1701–1750g (1988 ed.); *see Winstar*, 518 U.S. at 844.

22. *See, e.g.*, James R. Barth, *The S&L Crisis, 10 Years Later: Government Errors Caused the Problems and They Still Do*, NAT'L POST (Sept. 20, 1999), 1999 WL 27065879 ("Since the 1930s, S&Ls had been required by law to make long-term, fixed-rate home mortgages funded by short-term deposits").

23. *See id.*

24. *See* Sridhar Sundaram et al., *The Market Valuation Effects of the Financial Institutions Reform, Recovery and Enforcement Act of 1989*, 16 J. BANKING & FIN. 1097, 1097–98 (1992) ("The financial condition of the thrift industry had significantly deteriorated in the years 1979–82 during which the industry's net income fell from $2.05 billion to a net loss of $3.2 billion"); *see also* LAWRENCE J. WHITE, THE S&L DEBACLE: PUBLIC POLICY LESSONS FOR BANK AND THRIFT REGULATION 70–72 (1991); JAMES R. BARTH, THE GREAT SAVINGS AND LOAN DEBACLE 38 (1991) ("On a market-value basis, the entire industry was deeply insolvent in 1981 and even in 1980 before any of the accounting measures of capital revealed the seriousness of the problem.").

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to immediately pay off depositors at book-insolvent institutions.[25] Nonetheless, FSLIC did not have to make a massive, immediate payment to depositors at troubled institutions. As long as a thrift did not have to pay off all of its depositors at one time, it could continue to operate and hope that interest rates would fall. Lacking the funds to resolve all of the troubled institutions, federal regulators sought to promote the appearance of health in the savings and loan industry while waiting for interest rates to decline.[26] Thrifts shared this goal for a number of reasons, including the loss of depositors to other investment opportunities, such as mutual funds.

Savings and loan regulators employed a number of strategies to allow even the most financially distressed thrifts to continue to operate. Capital requirements were lowered from 5 percent to 3 percent. Even thrifts that could not satisfy these requirements were allowed to continue to operate, frequently through the use of accounting "gimmicks" to give the appearance of solvency and regulatory compliance.[27] Along with "net worth certificates," income capital certificates, and other regulatory accounting devices, supervisory goodwill became a favored tool of the regulators.[28]

From 1981 through 1989, federal banking regulators were parties to transactions involving hundreds of savings and loan institutions and investment groups. Sometimes the regulators merely approved proposed mergers; other times they played a more active role in encouraging the acquisition of a troubled savings and loan institution.[29] As Robert A. Eisenbeis and Paul M.

25. United States v. Winstar Corp., 518 U.S. 839, 846–47 (1996).

26. *See* California Fed. Bank v. United States, 43 Fed. Cl. 455, 461–62 (1999), *aff'd in part, rev'd in part*, 245 F.3d 1342 (Fed. Cir. 2001).

27. *Winstar*, 518 U.S. at 846 n.2; *see also* Robert A. Eisenbeis & Paul M. Horvitz, *The Role of Forebearance and Its Costs in Handling Troubled and Failed Depository Institutions*, *in* REFORMING FINANCIAL INSTITUTIONS AND MARKETS IN THE UNITED STATES 59 (George Kaufman ed., 1993) ("[T]he FSLIC, both because of financial constraints and political considerations, engaged in a series of accounting and related gimmicks to give the illusion that these GAAP insolvent institutions were in fact solvent.").

28. *Winstar*, 518 U.S. at 846 n.2. Supervisory goodwill was created when the parties to an acquisition employed the purchase method of accounting to account for the transaction. This, in turn, gave rise to an accounting entry known as supervisory goodwill, which allowed acquiring entities to comply with regulatory capital requirements they otherwise would not have been able to meet. For a detailed discussion of the accounting techniques and regulatory practices giving rise to supervisory goodwill, see Richard C. Breeden, *Thumbs on the Scale: The Role That Accounting Practices Played in the Savings and Loan Crisis*, 59 FORDHAM L. REV. S71 (1991).

29. While the United States has insisted that, in many of the savings and loan transactions, it was acting as a regulator in reviewing and approving mergers or acquisitions and that these regulatory actions should not be interpreted as a binding contract, the lower courts generally have not been receptive to such arguments since the Supreme Court's decision in *Winstar*. *Compare, e.g.*, California Fed. Bank v. United States, 245 F.3d 1342 (Fed. Cir. 2001), with First Commerce Corp. v. United States, 53 Fed. Cl. 38 (2002). *See also* Joshua Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of* Winstar: *An Interim Report*, 51 ALA. L. REV. 1177, 1223–24 (2000) (noting that, with respect to liability issues, in the "savings and loan context, the United

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Horvitz summarized, "[o]n an industry-wide basis, the situation of the thrift industry in the high-rate period of 1981–82 is an example of widespread agency-sanctioned forbearance. The systematic policy of the Federal Home Loan Bank Board was to avoid closing institutions that were market-value insolvent during this period."[30]

Congress responded to the thrift crisis by enacting the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA) and the Depository Institution Act of 1982 (DIA, or Garn–St Germain Act).[31] Together these Acts "phased out interest rate ceilings," attempted to address the interest rate mismatch between short-term deposits and long-term mortgage loans by allowing thrifts to diversify their investments, and, as a means of attracting or retaining depositors, increased the deposit insurance guarantee.[32] The combination of diversified investment opportunities and the increased deposit insurance guarantee made more insured funds available for more risky lending projects. As one commentator observed, "[i]n 1980 and 1982, the S & Ls were set free to become more like commercial banks, which had remained largely immune to risks inherent in borrowing at short-term interest rates while lending at long-term rates. The S & Ls mostly rushed into commercial real estate."[33]

The Government's forbearance policy, coupled with its allowance of diversification by thrifts in their investments, encouraged even "greater leverage in real estate investments."[34] As the decade progressed, it turned out that many thrifts lacked the ability or experience to compete effectively in the real estate business, especially when the market experienced a downturn in the Southwest following the fall in oil prices in the mid-1980s "and the general decline in commercial real estate prices following passage of the Tax Reform Act of 1986."[35] Yet as losses continued to grow at many thrifts, the Government maintained a "policy of capital forbearance [that] delayed the closing of insolvent thrifts and overstated the institutions' net worth positions."[36]

These economic and regulatory developments—along with the general decline in commercial real estate prices, and the mid-1980s' collapse of oil prices in the Southwest—culminated in the thrift crisis of the late 1980s.[37] As in the crisis of the early 1980s, the FSLIC lacked adequate funds to meet

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States Court of Federal Claims has been reluctant to distinguish any of the other claims from those in *Winstar* itself").

30. *See* Eisenbeis & Horvitz, *supra* note 27.

31. *See* Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96–221, 94 Stat. 132; Garn–St Germain Depository Institutions Act of 1982, Pub. L. No. 97–320, 96 Stat. 1469.

32. *See* Sundaram et al., *supra* note 24, at 1098.

33. *See* Barth, *supra* note 22.

34. *See id.*

35. *See* Sundaram et al., *supra* note 24, at 1098.

36. *Id.*

37. *See id. See also* WHITE, *supra* note 24; BARTH, *supra* note 24.

the deposit guarantees of hundreds of failing savings and loan institutions.[38] The politics of the crisis, which resulted not only from the magnitude of the investment losses but also from thrifts' losses due to widely publicized fraudulent conduct by owners and managers, prompted escalating calls to overhaul the industry.[39] Ultimately, in 1989, Congress and President Bush prepared comprehensive legislation, FIRREA, to bail out and reform the savings and loan industry.[40]

B. *FIRREA*

In 1989, as the decade came to a close and the costs of the second thrift crisis mounted, Congress enacted FIRREA to reform the savings and loan industry. FIRREA addressed the thrift crisis in a number of ways. It provided funds to close and merge insolvent savings and loan institutions. FIRREA restructured the agencies responsible for regulating thrifts, abolishing the FHLBB and assigning its regulatory responsibilities to the Office of Thrift Supervision (OTS), a new agency under the Department of Treasury. It also eliminated the FSLIC, transferring its insurance responsibilities to the Federal Deposit Insurance Corporation (FDIC), and created the Resolution Trust Corporation (RTC), which was responsible for liquidating or arranging the sale of troubled thrifts from 1989 through 1995.[41]

FIRREA adopted tighter capital requirements, including a provision accelerating the phase-out of supervisory goodwill as an asset to be counted in determining regulatory capital.[42] Although the statute did not require the immediate deduction of supervisory goodwill from capital, it limited the amount of supervisory goodwill that could be counted as capital to 1.5 per-

38. *See* Sundaram et al., *supra* note 24, at 1098.

39. *See* Stanley I. Langbein, *The Thrift Crisis and the Constitution*, 53 WASH. & LEE L. REV. 159, 201–03 (1996).

40. Pub. L. No. 101–73, 103 Stat. 183.

41. United States v. Winstar Corp., 518 U.S. 839, 856 (1996).

42. The regulatory capital provisions, including the "transition rule" for the phase-out of "qualifying supervisory goodwill," are located at 12 U.S.C. § 1464(t). The Supreme Court summarized:

> FIRREA also obligated OTS to "prescribe and maintain uniformly applicable capital standards for savings associations" in accord with strict statutory requirements. § 1464(t)(1)(A). In particular, the statute required thrifts to "maintain core capital in an amount not less than 3 percent of the savings association's total assets," § 1464(t)(2)(A), and defined "core capital" to exclude "unidentifiable intangible assets," § 1464(t)(9)(A), such as goodwill. Although the reform provided a "transition rule" permitting thrifts to count "qualifying supervisory goodwill" toward half the core capital requirement, this allowance was phased out by 1995.

Winstar, 518 U.S. at 856–57. Then, "[o]n November 8, 1989, OTS published interim final rules, effective December 7, 1989, implementing FIRREA's capital requirements. See Regulatory Capital, 54 Fed. Reg. 46,845 (1989) (codified as amended in various sections of 12 C.F.R.)." Ariadne Financial Servs. Pty. Ltd. v. United States, 133 F.3d 874, 877 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 823 (1998).

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cent of a thrift's assets initially. Moreover, this "qualifying supervisory goodwill" had to be phased out as regulatory capital over a shorter time interval—a period of about five years.[43] FIRREA's capital requirements required, for the first time, a thrift to maintain a minimum amount of tangible capital.

The Government, as insurer, would pay off the thrift's depositors in the event of failure.[44] Therefore, as Professor Macey has explained, "[t]he requirement that a federally insured depository institution retain adequate capital is one of the few and perhaps 'the most powerful source of (market) discipline for financial institutions.'"[45] With their emphasis on tangible or "real" capital—as opposed to capital created by regulatory accounting techniques—FIRREA's capital requirements imposed market discipline by requiring a firm's owners to bear the firm's risk of failure as well as the benefits of its success. Before FIRREA, the owners enjoyed the latter without having to put their own money at risk. Not surprisingly, as the Supreme Court noted in *Winstar*, the capital requirements were described as "the 'heart' of FIRREA's legislative reform."[46]

FIRREA also restricted the diversification in a thrift's portfolio of assets. For example, thrifts were no longer allowed to invest in noninvestment-grade (or "junk") bonds, were restricted in their ability to invest in real estate, and were required to hold more housing-related assets (which were less risky than investments—such as commercial real estate—permitted by earlier laws). In addition, FIRREA required banks and savings and loan institutions to pay higher deposit insurance premiums. The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA),[47] required the FDIC to base deposit insurance premiums on the thrift's relative riskiness.

III. The Short Path to the Supreme Court's Decision in *United States v. Winstar Corp.*

A. *The Savings and Loan Litigation in the Lower Courts*

After the enactment of FIRREA, many savings and loan institutions sued over the statute's more stringent capital requirements. Some sued in United States District Court, seeking injunctive relief to prevent application of the new capital rules. These suits were unsuccessful.[48] The courts essentially con-

43. 12 U.S.C. § 1464(t)(3).

44. *See* Macey, *supra* note 2, at 185.

45. *Id.* (quoting Breeden, *supra* note 28, at S75).

46. United States v. Winstar Corp., 518 U.S. 839, 857 n.11 (1996) (quoting Sen. Riegle).

47. Pub. L. No. 102-242, 105 Stat. 2236 (1991) (to be codified in scattered sections of 12 U.S.C.).

48. *See* Langbein, *supra* note 39, at 218-27 (summarizing district court litigation). For a discussion of the unavailability of specific relief as a remedy against the United States for breach of contract, see Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*,

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cluded that, even assuming there were enforceable contracts between the thrifts and the Federal Government, the contracts could not be construed to prevent the application of the new law.

Other thrifts sued for damages, alleging breach of contract and takings claims in the Court of Federal Claims. These claims were more favorably received than those for injunctive relief. The three cases that were consolidated for appellate review and ultimately decided by the Supreme Court involved acquisitions by different entities at different times: Glendale, a large California savings and loan institution, acquired Broward, a Florida institution, in 1981; Winstar Corp., an investment holding company, was formed to acquire a troubled institution in 1984; and Statesman Savings Holding Corp. invested $21 million and received $60 million to acquire four troubled institutions in 1988.[49]

In each of these three cases, the acquirers moved for summary judgment in the Court of Federal Claims. Despite the factual differences in the underlying acquisitions, the story told by acquiring entities was essentially the same. All three entities argued that they were healthy prior to relieving the United States of an obligation to deal with, and most likely liquidate, troubled savings and loan institutions; that the acquisition would have been detrimental for the acquiring entity absent a promise from government regulators guaranteeing the treatment of supervisory goodwill as regulatory capital; and that the enactment of FIRREA—with its stringent capital requirements, including the phase-out of supervisory goodwill as regulatory capital—caused the thrift either to go out of business (as was the case with Winstar and Statesman) or experience severe disruption of its business operations (as was the case with Glendale).[50]

In response to the motions for summary judgment, the United States did not challenge the particulars of the stories told by the acquiring entities. Instead, the Government asserted a number of global defenses—discussed in more detail below—based upon its status as the sovereign. The Court of Federal Claims rejected the Government's "special" defenses.[51] It held that FIRREA's capital requirements breached agreements to allow the institutions to include supervisory goodwill as an asset for regulatory capital calculations and to amortize that supervisory goodwill over long periods of time. The court entered summary judgment on the contract claims of the acquirers of

43 VILL. L. REV. 155 (1998). *See also, e.g.*, Frazer v. United States, 288 F.3d 1347 (Fed. Cir. 2002) (describing procedural history of claim brought by shareholders of failed thrift, including unsuccessful suit by thrift to enjoin enforcement of FIRREA's capital requirements).

49. *See Winstar*, 518 U.S. at 861–68.

50. *Id.*

51. All of the cases were before former Chief Judge Loren Smith, who is now a senior judge on the Court of Federal Claims.

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three savings and loan institutions.[52] The Federal Circuit initially agreed with the United States' arguments on appeal, then vacated its decision and ultimately affirmed the decisions below in an en banc decision.[53]

It is worth noting that no discovery had occurred in the lower court proceedings when the United States petitioned the Supreme Court. Nor had the United States developed a detailed counter-story about the parties' costs of and incentives for entering into the acquisitions or the consequences of Congress's breach through the enactment of FIRREA. And, perhaps most significantly, given the resulting splintered decision by the Supreme Court, there had been little, if any, percolation of the legal issues in the lower courts before the Court was asked to resolve the dispute since contract claims against the United States are required to be brought in the Court of Federal Claims and are appealed only to the Federal Circuit.

B. United States v. Winstar Corp. *in the Supreme Court*

Before the Supreme Court, the United States asserted that there were literally billions of dollars at stake in the goodwill cases.[54] If the Government prevailed on one of its global defenses, it would avoid liability in the three cases before the Supreme Court as well as in more than one hundred goodwill cases pending in the Court of Federal Claims. The Supreme Court affirmed the Federal Circuit by a seven-to-two vote. The decision produced four opinions, none of which commanded a majority.[55]

In a lengthy plurality opinion, Justice Souter emphasized that, in the goodwill cases, the United States had acted like a private party, and therefore should be subject to ordinary contract law principles. His opinion was joined in full by Justices Stevens and Breyer and in part by Justice O'Connor. Justice Scalia's concurring opinion—joined by Justices Thomas and Kennedy—was

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52. *See* Winstar Corp. v. United States, 21 Cl. Ct. 112 (1990); 25 Cl. Ct. 541 (1992) (entering summary judgment on liability); Statesman Sav. Holding Corp. v. United States, 26 Cl. Ct. 904 (1992) (entering summary judgment on liability to Statesman and Glendale).

53. Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995). The principal defenses raised by the United States were based upon the "unmistakability" doctrine and sovereign acts doctrine, each of which is discussed *infra*. Essentially, the court of appeals held that (1) the United States had the power to enact FIRREA so long as it was willing to pay damages for any breach of contract brought about by FIRREA and (2) FIRREA's phase-out of supervisory goodwill was not a public and general act because it affected only thrifts that had been involved in acquisitions in which supervisory goodwill was used to account for the transaction. *Id.* at 1547–49; *see also* United States v. Winstar Corp., 518 U.S. 839, 859–60 (1996) (summarizing court of appeals decision).

54. Schwartz, *Assembling* Winstar, *supra* note 16, at 486–87 (citing United States' Petition for a Writ of Certiorari at 24).

55. For a detailed summary of the procedural history of the case as well as each opinion in the Supreme Court's decision, see Schwartz, *Liability for Sovereign Acts*, *supra* note 16, at 640–50, and Schwartz, *Assembling* Winstar, *supra* note 16.

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less sweeping in its reconsideration of the Government's defenses but nevertheless concluded that the defenses did not apply in these cases. Chief Justice Rehnquist and Justice Ginsburg dissented.

1. The Unmistakability Doctrine

In its primary special defense, the Government argued that the goodwill agreements were not "unmistakably clear" restrictions on future regulatory authority. This defense—known as the unmistakability doctrine—holds that contracts limiting the Government's future exercises of regulatory authority are strongly disfavored, and therefore will be recognized only when the limitation on future regulatory authority is set out in clear terms. The United States relied upon *Bowen v. Public Agencies Opposed to Social Security Entrapment*, in which the Court stated that "[s]overeign power . . . governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."[56]

According to the plurality, the unmistakability doctrine did not apply because the agreements concerning goodwill did not constrain the Federal Government from regulating the thrifts (as Congress did when it enacted FIRREA). Instead, the plurality found, the agreements obligated the Government to pay damages in the event it changed regulatory policy, stating "the Government agreed to do something that did not implicate its sovereign powers at all, that is, to indemnify its contracting partners against financial losses from regulatory change."[57]

Justice Souter's decision was based, in part, upon his view of the economics of the acquisitions. He described acquirers of troubled savings and loan institutions as "healthy."[58] He reasoned that a healthy entity would not "assume[] the obligations of thrifts that far outstripped their assets" unless it received an unmistakably clear promise from the Federal Government that it would not modify its regulatory accounting rules in a way that would jeopardize the acquisition.[59] Therefore, even though the pertinent documents contained a less than clear promise relating to the treatment of supervisory goodwill as regulatory capital, Justice Souter nevertheless concluded that, under the circumstances, the Government's promise need not have been more explicit.[60] He acknowledged that the Court's decision could indirectly increase the cost of regulation but concluded that this was simply part of

56. 477 U.S. 41, 52 (1986) (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982)).

57. *Winstar*, 518 U.S. at 887.

58. *Id.* at 848.

59. *Id.* at 848, 880–82; *see also id.* at 863 (asserting that it would have been "irrational" for Glendale to proceed with acquisition without contract); *id.* at 864 (asserting it would have been "madness" for Glendale to proceed without contract).

60. *Id.* at 868–70 n.15.

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the price the United States had to pay for pursuing its goals through regulatory contract.[61]

Justice Breyer offered his own interpretation of the unmistakability doctrine. He essentially concluded that although the three cases presented the type of question to which the unmistakability doctrine would apply, he was persuaded by the contracts at issue that the parties agreed that the Government would be liable for breach in the event that Congress abrogated its earlier promise of favorable regulatory treatment.[62]

In his concurring opinion, Justice Scalia offered a different view of the unmistakability doctrine. He disagreed with the plurality's emphasis on the contracts at issue as "risk-shifting" agreements to avoid application of the Government's special defenses.[63] Instead, Justice Scalia acknowledged application of the unmistakability doctrine but asserted that "the doctrine has little if any independent legal force beyond what would be dictated by normal principles of contract interpretation."[64] He then concluded that, under the facts and circumstances, and given the agreements between the parties, the promises made by the Government to the savings and loan institutions were sufficiently unmistakable.[65]

In dissent, Chief Justice Rehnquist made two points. First, he noted that *ex ante*, it is almost impossible to determine whether an award of damages would amount to an exemption from the statute or regulation responsible for the change in regulatory treatment. He therefore dismissed the test proposed by Justice Souter as unworkable.[66] Second, Chief Justice Rehnquist criticized the majority opinions for not distinguishing between the short-term and long-term risks and benefits available to an acquiring entity. In his view, the short-term benefits available could have been adequate consideration for an acquiring entity even if there was long-term uncertainty about whether the Government would maintain the promised regulatory treatment.[67]

2. The Sovereign Acts Doctrine

The Court also rejected the Government's argument that the breach was excused by the sovereign acts doctrine.[68] Under *Horowitz v. United States*,[69] government actions—legislative or executive—that are "public and general"

61. *Id.* at 883.
62. *Id.* at 918.
63. *Id.* at 919.
64. *Id.* at 920.
65. *Id.* at 920–21.
66. *Id.* at 927.
67. *Id.* at 935–36.
68. Justice O'Connor did not join this part of the plurality opinion.
69. 267 U.S. 458, 461 (1925) ("Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.").

do not violate contracts entered into by the Government with private persons. The plurality rejected the sovereign acts defense for "two reasons." First, the plurality held, "the facts of this case do not warrant application of the doctrine."[70] *Horowitz* and its Civil War predecessors articulated—and rested upon—the notion that the Government had "dual and distinguishable capacities": one as sovereign lawmaker, or regulator; the other as ordinary contractor, or nonregulator.[71] In the "modern administrative state," however, "the Government's 'regulatory' and 'nonregulatory' capacities were fused in the instances under consideration."[72]

Given this fusion of governmental capacities, the question for the Court became how to "identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties."[73] The plurality set out the following criteria for making that determination:

> [G]overnmental action will not be held against the Government for purposes of the impossibility defense so long as the action's impact upon public contracts is, as in *Horowitz*, merely incidental to the accomplishment of a broader governmental objective. The greater the Government's self-interest, however, the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence, and where a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations, the defense will be unavailable.[74]

The plurality concluded that FIRREA was not sufficiently "public and general" because the statute was intended to eliminate the "very accounting gimmicks the acquiring thrifts had been promised," and that a finding that the statute was public and general would insulate the Government from liability under those agreements.[75] In reaching this conclusion, the plurality cited the legislative history of the statute.[76]

The second reason the sovereign acts doctrine did not apply, the plurality held, is because "the doctrine would not suffice to excuse liability under this governmental contract allocating risks of regulatory change in a highly regulated industry."[77] According to the plurality, even if FIRREA was a "public and general" act, the sovereign acts doctrine still would not apply because the Government could not show that the "nonoccurrence of a change in the regulatory capital rules was a basic assumption" of the thrifts' agreements with the Bank Board and FSLIC.[78]

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70. United States v. Winstar Corp., 518 U.S. 839, 891 (1996).

71. *Id.* at 892–93. The Civil War cases are Deming v. United States, 1 Ct. Cl. 190 (1865), and Jones v. United States, 1 Ct. Cl. 383 (1865).

72. *Winstar*, 518 U.S. at 894.

73. *Id.* at 896.

74. *Id.* at 898 (citations omitted).

75. *Id.* at 900.

76. *Id.* at 902 n.48.

77. *Id.* at 892.

78. *Id.* at 907. The court cites RESTATEMENT (SECOND) OF CONTRACTS § 261, which provides that [w]here, after a contract is made, a party's performance is made impracticable

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Justice Scalia wrote separately on the sovereign acts doctrine, dispensing with this argument in a single paragraph. The sovereign acts doctrine, in his view, was based upon a single, abbreviated opinion, *Horowitz*, and did not add anything to the Government's defense beyond the protection afforded by the unmistakability doctrine.[79] Accordingly, he concluded that the doctrine did not permit the Government to "repudiate its contractual obligations" in these cases.[80]

In dissent, Chief Justice Rehnquist again made two points. First, he argued that it was problematic for the Court to rely upon legislative history to divine Congress's intent in passing this legislation.[81] Second, Chief Justice Rehnquist criticized the majority's reliance on the idea that the Government sought to avoid its own financial obligations in passing FIRREA. With such a comprehensive statute, he believed there was confusion over who in the Government would save money, and how. Therefore, in his view, judicial focus on the avoidance of financial obligations would not produce a clear result.[82]

IV. The Supreme Court's (Mis)Understanding of the Economics of the Transactions and FIRREA

The Supreme Court remanded the *Winstar* cases to the Court of Federal Claims for damages proceedings. The decision also released more than one hundred cases pending in the Court of Federal Claims from a stay entered pending resolution of the appeals in *Winstar*. Since 1996, the Court of Federal Claims and the Federal Circuit have issued a number of published decisions on liability and damages in the goodwill cases. This section explains how the damages decisions have corrected the incomplete understanding of the Supreme Court with respect to the economics of the acquisitions giving rise to

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without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Id. at 904. (quoting RESTATEMENT (SECOND) OF CONTRACTS § 261). After quoting this section, Justice Souter stated that

> since the object of the sovereign acts defense is to place the Government as contractor on par with a private contractor . . . the Government, like any other defending party in a contract action, must show that the passage of the statute rendering its performance impossible was an event contrary to the basic assumptions on which the parties agreed, and must ultimately show that the language or circumstances do not indicate that the Government should be liable in any case. . . . [W]e find that the Government as such a contractor has not satisfied the conditions for discharge in the present case.

Id. at 904–05 (1996) (citation omitted).

79. *Id.* at 923–24.
80. *Id.* at 924.
81. *Id.* at 933.
82. *Id.*

Winstar. It begins with a brief overview on the different theories of recovery available to a claimant in a common-law breach-of-contract case.

A. *Theories of Recovery for Breach of Contract*

The *Restatement (Second) of Contracts* provides that remedies for breach of contract are intended to "protect one or more of the following interests" in compensating the nonbreaching party for breach of contract, and the corresponding loss of—as in the *Winstar* decisions—a promised performance: (a) the "expectation interest," which is the "interest in having the benefit of [the] bargain by being put in as good a position as [the party] would have been in had the contract been performed";[83] (b) the "reliance interest," which is the "interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as [the party] would have been in had the contract not been made"; or (c) the "restitution interest," which is the in-

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83. In breach-of-contract suits between private parties, the general measure of damages is expectancy. This is consistent with and supported by the economics of efficient breach. Hadfield, *supra* note 2, at 510. According to David Friedman,

> [a]n individual will breach a contract if his private benefits from breach are greater than his private costs. He ought to breach (from the standpoint of economic efficiency) if social benefits—total benefits to everyone affected, himself included—are greater than social costs. The seller's lost profit . . . is one of the costs of breach.

Id. (quoting David Friedman, *An Economic Analysis of Alternative Damage Rules for Breach of Contract*, 32 J.L. & ECON. 281, 283–84 (1989)). When the Government is the breaching party, however, this reasoning may not apply. Unlike a private corporation, the Government does not act to maximize its own wealth. Rather, as Professor Hadfield states, "the government acts directly on the basis of social incentives, that is, in pursuit of some conception of social welfare. Government is the visible hand." *Id.* at 513. To put it another way, the efficiency rationale does not apply to Government because it is not an individual entity with the single goal of maximizing self-interest. As Professors Fischel and Sykes explain in connection with FIRREA:

> [t]he government is not a person with an identifiable self-interest. Voters, taxpayers, government officials, industry participants and others all have a self-interest, but the government does not. The phase-out of supervisory goodwill, like the regulatory policies creating supervisory goodwill, may have affected these groups in various ways, but no separate "government self-interest" was affected.

Fischel & Sykes, *supra* note 2, at 372. Accordingly, the Government's incentives to breach a contract are different from a private party's. As Professor Hadfield explains, "when the contracting partner is the government . . . breach decisions are not made in the same way, that is relative to the type of profit function facing a private actor. Breach decisions are political and/or administrative decisions." Hadfield, *supra* note 2, at 514. One question raised by the goodwill damages decisions, therefore, is whether the reasoning in support of efficient breach applies when the Government is the breaching party. If it does not, then some measure of damages other than expectancy, such as reliance, may be the more appropriate measure of damages. So far, only Professor Hadfield has addressed this question, and she concluded that reliance damages are a more appropriate measure. *Id.* at 469. Her article was published before many—if not all—of the damages decisions were issued, and does not discuss them.

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terest in restoring to the nonbreaching party any benefit that the party conferred upon the breaching party.[84]

According to the *Restatement*, "[c]ontract damages are ordinarily based on the injured party's expectation interest and are intended to give [that party] the benefit of" its bargain.[85] Expectancy damages are available subject to the limits of avoidability—that is, they are not recoverable if the claimant could have mitigated its damages "without undue risk, burden or humiliation"[86]—and foreseeability and certainty.[87] One form of expectancy damages—for damages "other than loss in value"—is consequential damages.[88] Lost profits damages have been defined as "the quintessential example of 'consequential damages.'"[89]

B. *The Goodwill Damages Decisions*

The first damages trial involved Glendale Federal Savings Bank, a large California thrift that acquired a Florida thrift, First Federal Savings and Loan Association of Broward County (Broward), in 1981.[90] The damages trial began in 1997, concluded in 1998, and resulted in a $909 million judgment in favor of plaintiff Glendale in 1999. The trial court rejected Glendale's claim of lost profits damages, and instead combined an award of restitution with what it described as "non-overlapping reliance damages."[91] Subsequently, the United States appealed, and the Federal Circuit vacated the judgment, reversing the trial court's decision on restitution and remanding the case for further proceedings on reliance damages. In August 2002, the Court of Federal Claims issued a decision awarding Glendale $380 million in reliance damages.[92]

In addition to Glendale, there have been at least five other damages decisions so far in the Federal Circuit.[93] And, besides Glendale, there have been at least eight other damages decisions in the Court of Federal Claims.[94] In

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84. Restatement (Second) of Contracts § 344. *See also* Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1380–81, 1382–83 (Fed. Cir. 2001) (discussing restitution and reliance); California Fed. Bank v. United States, 245 F.3d 1342, 1349–50 (Fed. Cir. 2001) (discussing expectancy damages).

85. Restatement (Second) of Contracts § 347, cmt. a.

86. *Id.* § 350.

87. *Id* §§ 351, 352.

88. E. Allan Farnsworth, Farnsworth on Contracts § 12.9 at 198 (2d ed. 1998).

89. *Id.* § 12.14 at 242 n.5 (citing Nyquist v. Randall, 819 F.2d 1014 (11th Cir. 1987)).

90. After the merger, Glendale grew quickly, and in fact was in capital compliance after the enactment of FIRREA in 1989. However, it fell out of capital compliance in 1992. It recapitalized by issuing $451 million in stock in 1993. Glendale Fed. Bank, FSB v. United States, 43 Fed. Cl. 390, 393–94, 401 (1999).

91. *Id.* at 409.

92. Glendale Fed. Bank, FSB v. United States, No. 90-772C, 2002 WL 31004679 (Fed. Cl. Aug. 2, 2002).

93. *See supra* note 12.

94. *See supra* note 12.

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the trials, the Court of Federal Claims judges have been required to conduct a careful examination of the financial condition of the acquiring entity, both at the time it acquired the troubled savings and loan institution and after the enactment of FIRREA, when the acquiring entity was required to respond to the Government's breach of contact.

The former inquiry—along with an examination of the options available to federal regulators for dealing with troubled thrifts—is relevant to restitution claims, in which the court focuses on what would be necessary to return to the acquiring entity any benefits it conferred upon the United States as part of the contract. The latter inquiry is relevant to claims for expectancy damages, in which the court evaluates the acquiring entity's claim of what position it would have been in—specifically what profits it would have made—had the Government not breached the contract. By engaging in such a thorough inquiry, the court also is able to adjudicate a claim for reliance damages. Reliance damages, which seek to put the nonbreaching party "in as good as a position as he would have been in had the contract not been made," include expenditures made in the course of preparing for and performing the contract.[95]

As described above, the Supreme Court believed that "healthy" thrifts like Glendale acquired "unhealthy" thrifts, thereby solving a problem for the Government. In exchange, the Court believed; the Government provided favorable regulatory treatment (the goodwill promise) that could make the thrift more profitable. However, the Court's assumptions about these complicated transactions were incorrect. With the benefit of the record that emerged in the damages cases, it is possible to correct the erroneous assumptions made by the Supreme Court in *Winstar*.

C. *The Health of the Acquiring Entities*

First, and most importantly, "healthy" thrifts did not acquire "weak" thrifts. In the early 1980s, there were few economically "healthy" thrifts. As described above, the interest rate spike devastated the entire industry, so that on an economic basis nearly all thrifts in the industry were insolvent.[96] Of the three cases before the Supreme Court, only *Glendale* involved the acquisition of a troubled savings and loan institution, Broward, by another savings and loan institution in the early 1980s.[97]

Broward was hit especially hard by the interest rate spike of the early

95. RESTATEMENT (SECOND) OF CONTRACTS §§ 344(b), 349. The classic articles on reliance damages are Lon Fuller & William Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52 (1936), and Lon Fuller & William Perdue, *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373 (1937). For additional discussion of those articles, see http://www.bepress.com/ils/iss1/.

96. *See supra* note 24.

97. The acquiring entity in *Statesman* was a holding company formed by an insurance company, while in *Winstar*, it was a holding company formed by private investors. *See* United States v. Winstar, 518 U.S. 839, 864, 866 (1996).

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1980s. In 1981, the FHLBB "found that Broward's financial condition was deteriorating and projected that Broward's regulatory capital would fall to zero by June 1982."[98] Glendale was interested in acquiring Broward for a number of reasons, and in November 1981, "the FHLBB approved Glendale's acquisition of Broward in a voluntary merger, and the Government and Glendale entered into a contract memorializing the arrangement."[99] That contract, according to the Supreme Court (as described earlier), included an agreement by the Government to allow the parties to use the purchase method of accounting, thereby permitting Glendale to book the market value of Broward's excess liabilities at the time of the merger as supervisory goodwill, and to assume the risk of a change in the regulatory accounting requirements.

On paper, Glendale was relatively healthier than Broward and was even described by the regulators who approved the acquisition as "profitable and well-capitalized."[100] It had, however, been losing money before it acquired Broward.[101] The regulators' description of Glendale was based upon its condition on an accounting basis, and was widely publicized to demonstrate the regulators' swift and certain response to the "Broward problem." In fact, only a decline in interest rates would have enabled Broward (and Glendale) to survive.

This conflict between economics and accounting was addressed—but not correctly resolved—by the trial court in its damages decision. In awarding Glendale about half a billion dollars in restitution, the court relied upon the regulators' description of Glendale as "profitable and well-capitalized," which had been quoted by the Supreme Court in *Winstar*.[102]

In calculating restitution, the trial court acknowledged that Glendale did not pay off Broward's excess liabilities, and that it was not established that, absent Glendale's acquisition, federal regulators would have liquidated Broward.[103] Nevertheless, the trial court was convinced that Glendale had conferred a massive benefit upon the United States and should be compensated accordingly. The trial court reasoned that, because it would have cost FSLIC nearly $800 million to liquidate Broward when the acquisition occurred, and

98. Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1377 (Fed. Cir. 2001).

99. *Id.*

100. Glendale Fed. Bank, FSB v. United States, 43 Fed. Cl. 390, 393 (1999) (quoting *Winstar*, 518 U.S. at 861).

101. *Glendale*, 239 F.3d at 1377. Glendale almost certainly was insolvent on an economic basis before the acquisition. Although the Government offered evidence of Glendale's economic condition at the time of the acquisition of Broward, the court explicitly refused to rule on the credibility of the calculation (which showed that Glendale, as the larger institution, was even more economically insolvent than Broward at the time of acquisition). The trial court stated that Glendale's economic condition at the time of the merger was "irrelevant" because it was not a factor considered by the regulators when they approved the transaction. *Glendale*, 43 Fed. Cl. at 405.

102. *Id.* at 393 (quoting *Winstar*, 518 U.S. at 861).

103. *Id.* at 406–07.

Broward was not a problem for federal regulators after the acquisition, then the value of the benefit Glendale conferred upon the Government by acquiring Broward was about $800 million. After subtracting from this figure the value of the benefits Glendale received from the Government, the court arrived at a restitution amount of $509 million, to which it added $400 million in "non-overlapping reliance damages."[104]

On appeal, the Federal Circuit reversed the trial court's decision with respect to restitution, drawing upon the extensive record below to provide a more complete description of the acquisition. First, the appeals court recognized that soaring interest rates devastated the entire savings and loan industry, including Glendale. It also noted that Glendale was losing money, and that the recovery of Glendale and its newly acquired Florida division depended upon a decline in interest rates.[105] Although Glendale may have appeared to be healthier than Broward when the acquisition occurred, it certainly was not healthy in the manner suggested by Justice Souter.

This is related to a second point made by the Federal Circuit, which concerns Glendale's incentives for acquiring Broward. The Supreme Court plurality in *Winstar* insisted that it would have been "madness" for Glendale, a "healthy" thrift, to acquire Broward, a troubled thrift, absent a supervisory goodwill promise.[106] But that assumption ignores some of the benefits Glendale received from the acquisition.

As the appeals court explained, the acquisition offered Glendale the opportunity "to acquire previously prohibited interstate branches" in Florida and "to acquire [Broward's] high-quality assets that suffered only from the current interest rate squeeze."[107] For a savings and loan institution in Glendale's situation—in which it was losing money and would be able to reverse its position only if interest rates declined—the opportunity to acquire additional potentially profitable branches and assets in Florida without having to make any cash payment could be quite advantageous.

Moreover, if interest rates declined, the imbalance between Broward's liabilities and assets would be reversed, and Glendale would not have to expend any of its own funds to pay off Broward's excess liabilities. Indeed, both the trial court and the appeals court concluded that this is exactly what occurred. Both courts noted that Glendale and its Florida division returned to profitability after interest rates declined, and that Glendale never had to pay off the $734 million in net liabilities that existed at the time of the acquisition.[108]

The goodwill damages trials illustrate a third point relating to the economics of the acquisitions. Although the *Winstar* decision accurately de-

104. *Id.* at 406–09.

105. Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1382 (Fed. Cir. 2001).

106. United States v. Winstar, 518 U.S. 839, 910 (1996).

107. *Glendale*, 239 F.3d at 1377.

108. Glendale Fed. Bank, FSB v. United States, 43 Fed. Cl. 390, 407–08 (1999); *Glendale*, 239 F.3d at 1382.

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scribes the crisis created for the regulators by the troubled condition of the savings and loan industry—noting, for example, "the multitude of already-failed savings and loans confront[ing] FSLIC"[109]—it does not fully appreciate the many options available to regulators for dealing with the crisis. The *Winstar* plurality suggests that the regulators needed Glendale to acquire Broward to solve an imminent problem for the regulators.

In fact, as the Federal Circuit explained, "it is not at all clear that but for Glendale's purchase of Broward, the Government would have been called upon to make up that deficit then and there."[110] Regulators could have located another acquirer, or could have hired new managers to operate Broward.[111] Or they could have allowed Broward to continue to operate on its own, and, if necessary, to provide it with interim financial assistance, until interest rates came down.[112] Supervisory goodwill, then, was just one of many tools available to federal regulators as they followed a general policy of forbearance.

Moreover, Glendale did not have any economic capital to provide the Government in the event that interest rates did not decline and FSLIC had to liquidate Broward because Glendale was insolvent on an economic basis when it acquired Broward. Indeed, FSLIC had a contingent obligation with respect to the insured deposits of both Broward and Glendale, and that obligation would become due if interest rates did not decline.[113]

In summary, according to the *Winstar* plurality, it would have been "irrational" for Glendale to proceed without the promise that supervisory goodwill would count as regulatory capital for the length of its 40-year amortization period.[114] The plurality's assertion rests upon the premise that Glendale had much to give Broward by acquiring it, and possibly risked losing much without the regulators' promise.

A more accurate view of the economics of the acquisition and of the role of the supervisory goodwill promise is now possible with the benefit of the record developed in the Court of Federal Claims. Glendale in fact had much to gain—a thrift in a valuable state that could more than pay for itself, and little to lose when it acquired Broward—because Glendale's viability (regardless of whether it acquired Broward) depended upon the decline in interest rates necessary to preserve the entire savings and loan industry. The Federal Circuit correctly vacated the restitution award in *Glendale*.

Subsequently, both the Federal Circuit and the Court of Federal Claims have followed the reasoning of *Glendale* and arrived at results consistent with this reasoning. In other goodwill cases, restitution awards have been denied except when the claimant seeks the return of its cash investment in the

109. *Winstar*, 518 U.S. at 839.
110. *Glendale*, 239 F.3d at 1382.
111. *Id.*
112. LaSalle Talman Bank, F.S.B. v. United States, 45 Fed. Cl. 64, 70 (1999).
113. Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1382 (Fed. Cir. 2001).
114. United States v. Winstar, 518 U.S. 839, 863 (1996).

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acquired institution.[115] Essentially claimants have been reimbursed for their investment in the thrift.[116]

The plurality's incomplete understanding of the economic condition of the thrifts involved in the acquisitions—in particular that of acquiring thrifts in the early 1980s—appears to have been the result of a too-summary process before the Supreme Court decision. The record developed by the parties was limited as the trial court had issued its decisions based upon cross-motions for summary judgment and no trial had been conducted before review by appellate courts. There was no infirmity in the procedures followed by the parties in filing cross-motions for summary judgment, by the trial court in deciding the motions before it, or by the Supreme Court in granting a petition for certiorari by the United States stating that literally billions of dollars were at issue. But the cumulative effect of this summary process contributed to the fractured Supreme Court opinion and the erroneous plurality opinion.[117]

The plurality's incorrect understanding of the economics of the acquisitions and the effect of the phase-out was reinforced by the lack of opportunity for percolation of the issues in the appellate courts before Supreme Court review. Because breach-of-contract claims against the Government are generally brought in the Court of Federal Claims, only one court of appeals, the Federal Circuit, analyzed the issues in *Winstar* and its companion cases *Statesman* and *Glendale* before the Supreme Court addressed the issues. There was no opportunity for the issues in *Winstar* to germinate in the federal courts of appeals before Supreme Court review.

115. *See* California Fed. Bank v. United States, 245 F.3d 1342, 1350–52 (Fed. Cir. 2001); LaSalle Talman Bank, F.S.B. v. United States, 45 Fed. Cl. 64, 119–20 (1999); Suess v. United States, 52 Fed. Cl. 221, 228–30 (2002); Landmark Land Co. v. United States, 256 F.3d 1365, 1372 (Fed. Cir. 2001); Castle v. United States, 48 Fed. Cl. 187, 216, 220 (2000) *rev'd in part*, 301 F.3d 1328 (Fed. Cir. 2002). *See also* Andrew Kull, *Disgorgement for Breach, the "Restitution Interest," and the Restatement of Contracts*, 79 Tex. L. Rev. 2021 (2001) (discussing approach to restitution in *Glendale* and other *Winstar* cases).

116. *See, e.g.*, *Landmark*, 256 F.3d at 1372; *Castle*, 48 Fed. Cl. at 220.

117. This criticism based upon the limited record before the Supreme Court—in particular, one in which the Court credited the private parties' accounts of the underlying transactions and subsequent developments—points to a deeper criticism of regulatory contracts. Professors Dana and Koniak, for example, have criticized the Supreme Court's *Winstar* decision for, among other things, sanctioning private dealings between the Government and private parties that may result in the protection of narrow private interests at the expense of a more general and diffuse public interest. Dana & Koniak, *supra* note 2, at 517–525. According to Dana and Koniak, the private interests benefit from, among other things, the lack of transparency that accompanies contract formation; that is, the only entities aware of the regulatory contract are the parties to it even though the contract may implicate broader concerns. One beneficial aspect of the goodwill litigation is that it has provided an opportunity for the Government to scrutinize the particulars of the thrifts' claims in a public forum.

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D. *The Benefits of Supervisory Goodwill*

Perhaps because the *Winstar* plurality viewed the acquired savings and loan institutions as "ailing," it described supervisory goodwill as "attractive" to acquiring institutions.[118] According to the Court, supervisory goodwill had value to acquirers for three reasons.

First, the regulators' recognition of supervisory goodwill as regulatory capital enabled the acquiring institution to remain in capital compliance after the acquisition. Justice Souter explained that this regulatory accounting treatment was "critical to make the transaction possible in the first place, because in most cases the institution resulting from the transaction would immediately have been insolvent under federal standards if goodwill had not counted toward regulatory net worth."[119] The value of this benefit was minimal, however, in a regulatory regime that practiced industrywide forbearance. As noted above, FSLIC, lacking the resources and the incentive to shut down insolvent savings and loan institutions, adopted a number of measures to give economically insolvent thrifts the appearance of solvency.

Second, the accounting treatment of supervisory goodwill after an acquisition enabled an acquiring thrift to generate income on paper through what the Supreme Court described as "accretion of the discount." This accounting treatment worked as follows: under the purchase method of accounting, the discount on an acquired thrift's loans (the amount by which those loans are marked down to reflect their actual value) is "accreted," or taken into income, over the estimated life of the loans (typically, about seven years). Conversely, the goodwill created by marking the acquired thrift's assets and liabilities to market—that is, measuring the economic value of the assets and liabilities at a particular point in time under then-existing market conditions[120]—is amortized, or expensed, over a longer period.

A simple example demonstrates how the amortization/accretion mismatch results in paper profits.

Consider a loan with a face value of $100 that was marked down to $60. The resulting discount is $40. If the estimated life of the loan were ten years, an acquiring thrift would accrete (take into income) $4 over each of the ensuing ten years. If the amortization rate for the corresponding $40 of goodwill were 40 years, the acquiring thrift would have a $1 amortization expense for each of the ensuing 40 years. The net effect of those accounting

118. *Winstar*, 518 U.S. at 847, 850–51.

119. *Id.* at 850. *See also* California Fed. Bank v. United States, 43 Fed. Cl. 455, 461 (1999) ("[A]ll that we could determine from witnesses on both sides concerning the value of this contract was 'it would help keep the regulators off our backs.'"); *LaSalle*, 45 Fed. Cl. at 78 (analogizing supervisory goodwill to green stamps "recognized at the company store").

120. *See LaSalle*, 45 Fed. Cl. at 71 n.3 ("A mark-to-market valuation evaluates the net worth of a company under the prevailing market conditions; assets are valued according to market price rather than at book value.").

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adjustments would be a $3 increase in income for each of the first ten years following the merger ($4 in accretion income minus $1 in amortization expense).[121]

After the tenth year, the thrift would have a $1 accounting loss each year with no offsetting accounting income from accretion.

Although an acquiring thrift did not receive an economic benefit from the income added to its balance sheet through accretion of the discount, it nevertheless received the benefit of appearing to be more healthy in the short-term—an appearance that could provide it with a competitive advantage. For example, during the early 1980s, the appearance of a healthy balance sheets could reduce the likelihood of regulatory concern about the thrift.

The third reason that the Court believed that supervisory goodwill had value to acquirers is that, as Justice Souter stated, "[f]rom the acquiring thrift's perspective, . . . the treatment of supervisory goodwill as regulatory capital was attractive because it inflated the institution's reserves, thereby allowing the thrift to leverage more loans (and, it hoped, to make more profits)."[122] With his qualifying language, Justice Souter recognized that an increase in the number of loans made by a thrift did not guarantee it greater profits. Nevertheless, his observation about the relationship between supervisory goodwill and a thrift's ability to make more loans, and the ability of a thrift to make more loans and earn more profits, captured what has become the most contested issue between the United States and the plaintiff thrifts in the damages trials: whether the claimed breach of contract caused a thrift to lose profits on its business operations.

E. *Did the Phase-Out of Supervisory Goodwill as Regulatory Capital Cause an Acquirer to Lose Profits?*

Although the plurality opinion did not equate supervisory goodwill with profitability, at least two trial courts have asserted that there was a direct relationship between the additional investments permitted by the recognition of supervisory goodwill as regulatory capital and greater profits. In *Glendale*, the court stated that "the supervisory goodwill and the long amortization was [sic] designed to fill the capital hole, permit Glendale to maintain its ability to leverage its existing capital, give the thrift the ability to generate income to replace the amortizing goodwill and, ultimately, make the whole enterprise profitable."[123] In *LaSalle*, the court stated that the goodwill "agreements enabled the thrifts to keep their doors open and—equally importantly—gave them the additional opportunity to generate operating profits

121. This example is drawn from the Reply Brief of the United States at 12, LaSalle Talman Bank, F.S.B. v. United States, Nos. 00–5005, –5027 (July 30, 2001), submitted to the Federal Circuit. *See also* United States v. Winstar, 518 U.S. 839, 851–53 (1996).

122. *Winstar*, 518 U.S. at 850–51.

123. Glendale Fed. Bank, FSB v. United States, 43 Fed. Cl. 390, 394 (1999).

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to the extent they could leverage net positive capital resulting from the addition of supervisory goodwill to their books."[124]

Yet the trial court did not award the plaintiff lost profits in either *Glendale* or *LaSalle*. Rather, in each case, the court concluded that the evidence demonstrated that the thrift's claim for lost profits was speculative.[125] This failure of proof in those cases, and subsequent cases as well,[126] illustrates anecdotally a fundamental point: The Government did not really make an acquiring thrift any more profitable by allowing it to count supervisory goodwill as regulatory capital. That is because, quite simply, the ability to make more loans does not always mean more profits for a savings and loan institution. Indeed, as the thrift industry learned during the interest rate spike of the early 1980s and the recession of the early 1990s, more loans can lead to more losses if borrowers default.

A fundamental principle of corporate finance is that additional borrowing capacity in and of itself does not make a firm more profitable. In the goodwill damages cases, the United States presented this argument through the expert testimony of corporate finance professors. One of the experts was Dr. Merton Miller, recipient of the 1990 Nobel Prize in Economics.[127] Dr. Miller expressed the view that leverage has "no market value." As Dr. Miller and David Ross have explained:

> The phrase "leverage has no market value" should not be taken as suggesting, however, that the degree of leverage being assumed is of no concern to investors generally or to investors in the S&L mergers in particular. The S&L investors presumably bargained with the regulators for the capital ratio concessions in those mergers—concessions whose removal, after all, gave rise to the *Winstar* cases. Nor were the S&L investors necessarily being irrational in doing so. These concessions made it possible for the investors to defer or avoid the transactions costs associated with raising an equivalent amount of real capital. The M[iller] & M[odigliani] propositions, moreover, do not deny that a leveraged portfolio, whether on personal account or by investing in an S&L does indeed magnify both the gains and risks of that portfolio; and that on net, that the *expected* rate of return on a leveraged investment is positive, the more so the greater the risk. But, and this is the key, all points on the risk-return spectrum are equivalent. No particular value of leverage carries a premium in an M&M, efficient markets world. It makes no more sense to say that a highly leveraged investment is *always* better than a lower leveraged investment than to say that growth stocks are

124. LaSalle Talman Bank, F.S.B. v. United States, 45 Fed. Cl. 64, 78 (1999).

125. *Glendale*, 239 F.3d at 1380; *LaSalle*, 45 Fed. Cl. at 89–97.

126. *See also* Castle v. United States, 48 Fed. Cl. 187, 200 (2000); Bank United of Texas FSB v. United States, 50 Fed. Cl. 645 (2001); Suess v. United States, 52 Fed. Cl. 221, 226 (2002). *But see* Bluebonnet Sav. Bank, F.S.B. v. United States, 266 F.3d 1348 (Fed. Cir. 2001) (reversing trial court decision declining to award expectancy damages), *after remand*, 52 Fed. Cl. 75 (2002) (awarding expectancy damages).

127. Dr. Miller has been described as "the father of modern corporate finance." *See* http://www.derivativesstrategy.com/magazine/archive/2000/0700play.asp. Dr. Miller died in 2001.

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always better than public utilities. And, by the same token, forcing a reduction in the degree of leverage, as in the *Winstar* cases, does not cause damages.[128]

Applying the principles of corporate finance in the goodwill damages cases would obviate the need to conduct a trial on lost profits damages. A thrift plaintiff satisfying the requirements for liability and damages would recover the costs or expenses associated with replacing the phased-out supervisory goodwill. Although this is the result generally arrived at by courts in the goodwill damages decisions, they have not done so until *after* conducting trials involving claims for lost profits and other damages as well.

The general reluctance of the Federal Circuit and the Court of Federal Claims to embrace principles of corporate finance—even while arriving at the results dictated by those principles—is exemplified by the history of *California Federal Bank.*[129] The trial court in *California Federal Bank*, later reversed by the Federal Circuit, declined to allow the thrift to present its lost profits claim because of its understanding of foreseeability with respect to how the phase-out would impact a thrift. The court's pretrial order stated that the Government "knew that breaching this agreement would cause plaintiff to adjust its capital ratio. That is, it knew that plaintiff would have to reduce its assets or increase its capital. But it could not foresee what effect this adjustment would have on plaintiff's profits."[130]

The trial court expressed the view that, although the recognition of supervisory goodwill as regulatory capital would allow the thrift to make additional investments, the uncertainty as to whether those additional investments would have been profitable entitled the United States to summary judgment on California Federal Bank's lost profits claim. Although the trial court did not cite Dr. Miller in its order, the language in the order is an articulation of Dr. Miller's views with respect to the value of leverage.

Reversing the trial court's grant of summary judgment against California Federal Bank on its lost profits claim, the Federal Circuit stated:

> The subject of the contract between Cal Fed and the Government was Cal Fed's assumption of the net liabilities of the acquired thrifts in exchange for the promised favorable regulatory treatment. The continued use of supervisory goodwill as regulatory capital for the entire 35–40 year amortization period initially promised was therefore a central focus of the contract and the subject of the Government's breach. Profits on the use of the subject of the contract itself, here supervisory goodwill as regulatory capital, are recoverable as damages.[131]

128. Merton Miller and David Ross, *The Economics of the* Winstar *Cases* (unpublished manuscript on file with author), March 23, 2000, draft, at 27. *See also* Merton H. Miller & Keith Sharfman, *The Economic Expert Witness*, 3 Green Bag 297, 298 (2000).

129. California Fed. Bank v. United States, 43 Fed. Cl. 445 (1999), *aff'd in part, rev'd in part*, 245 F.3d 1342 (Fed. Cir. 2001).

130. *California Fed. Bank*, 43 Fed. Cl. at 457.

131. *California Fed. Bank*, 245 F.3d at 1349.

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California Federal Bank is now entitled to a trial, where it will have the opportunity to substantiate its claim that FIRREA's phase-out of supervisory goodwill caused it to lose profits.[132]

In his discussion of supervisory goodwill and profitability, Justice Souter did no more than recognize that the ability to make more loans could enable the thrift to make more profits. However, his suggestion overlooks the risks associated with additional leverage—in particular, the risk of greater investment losses—and overvalues the treatment of supervisory goodwill as regulatory capital as an economic inducement for a thrift's acquisition. So far, no plaintiff has been able to substantiate a lost profits claim due to an inability to engage in the additional leverage permitted by the recognition of supervisory goodwill as regulatory capital.

There is no obvious inconsistency between the plurality's discussion of supervisory goodwill and leverage, and the trial courts' approach with respect to lost profits claims in the damages decisions. The plurality states that the additional investments permitted by the recognition of supervisory goodwill as regulatory capital could result in greater profits, and the trial courts have given the thrift claimants the opportunity to show that they would have such profitable investments.

Yet the uniform denial of lost profits damages in the cases involving claims for lost leverage demonstrates that the plurality's views of the economic value of supervisory goodwill were incomplete, if not incorrect. It may be that, as the Court of Federal Claims has found in each individual case, no thrift has been able to demonstrate that it would have made additional investments that would have been profitable due to the additional leverage permitted by the recognition of supervisory goodwill as regulatory capital. The better explanation is that, as Dr. Miller wrote and corporate finance has recognized, the mere ability to leverage is no guarantee of profitability. To put it another way, if a savings and loan institution with supervisory goodwill after the enactment of FIRREA had additional investments it wanted to make, it could have—and should have—been able to convince investors to provide capital for those investments.

132. The trial court in California Federal Bank credited Dr. Miller's trial testimony with respect to the costs the thrift incurred in replacing its phased-out supervisory goodwill. *California Fed. Bank*, 43 Fed. Cl. at 460–61. This calculation—which estimated the amount as approximately $23 million in transaction costs—was upheld by the Federal Circuit. *California Fed. Bank*, 245 F.3d at 1350.

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V. The Tension Between Congruence and Exceptionalism in the Goodwill Damages Decisions[133]

A. *Congruence and Exceptionalism in Government Contracts Law*

This article has described the Supreme Court's decision in *Winstar*, and argued that the Court erred in its analysis of the economics of the acquisitions, and in its suggestion that supervisory goodwill was valuable to an acquiring thrift because it enhanced the profitability of an acquirer. *Winstar* involved more than the application of economics to the acquisitions of troubled savings and loan institutions, and to the impact of the phase-out of supervisory goodwill as regulatory capital on acquiring institutions. It also presented the legal question of the extent to which the United States should be treated like a private party in its dealings with private parties.

This question accompanies most government contracts disputes and arises in an extremely varied set of circumstances. The United States not only engages in ordinary commercial transactions with private parties; it also may attempt to regulate or tax private parties through negotiation and contract.[134] In *Winstar*, Justice Souter described the "wide spectrum" of the "different kinds of obligations the Government may assume and the consequences of enforcing them."[135] At one end of the spectrum are "humdrum supply contracts," such as a contract "to buy food for the army."[136] The enforcement of these contracts ordinarily does not implicate the United States' sovereign authority, and the defenses available to the Government are no greater than the defenses available to a private party in the same situation.[137]

At the other end of the spectrum are "claims for enforcement of contractual obligations that could not be recognized without effectively limiting sovereign authority, such as a claim for rebate under an agreement for tax exemption . . . [which] would block the exercise of the taxing power."[138] *Winstar*, according to Justice Souter, involved agreements between the Federal Government and private parties "[b]etween these extremes" and raised the question of whether performance by the parties would "require exercise (or not) of power peculiar to the Government."[139]

In answering this question, the Supreme Court was required to decide between two competing principles central to government contract law: As the sovereign, the United States is entitled to special treatment in its contractual dealings; however, this principle is in tension with the notion that

133. The terms "congruence" and "exceptionalism" are from Schwartz, *Liability for Sovereign Acts*, *supra* note 16, at 637–38.

134. *See* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543 (2000); Jody Freeman, *The Contracting State*, 28 Fla. St. U. L. Rev. 155 (2000).

135. United States v. Winstar, 518 U.S. 839, 880 (1996).

136. *Id.*

137. *Id.*

138. *Id.* (citations omitted).

139. *Id.*

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in ordinary contract disputes, the United States should not be treated differently than a private party. Professor Schwartz refers to the former view as "exceptionalism."[140] He explains that the "tradition of 'exceptionalism' . . . emphasizes that, because of its sovereign status, unique functions, and special responsibilities, the Government as a contracting partner is not subject to all of the legal obligations and liabilities of private contracting parties."[141] The most basic—and most compelling—rationale for exceptionalism is protection of the fisc.[142]

Exceptionalism conflicts with the notion of treating the United States in the way that private parties are treated in ordinary commercial disputes. Professor Schwartz refers to this view as "congruence."[143] The Supreme Court in *Lynch v. United States* recognized this concept when it noted that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."[144] The plurality opinion in *Winstar* is a model of congruence. Repeatedly, Justice Souter emphasizes that, in its dealings with acquirers, the thrift agencies were no different from private parties in offering favorable regulatory treatment in exchange for assistance with taking troubled savings and loan institutions off of the Government's hands.[145] A recurring theme in Justice Souter's plurality opinion is that, because the thrifts sought only an award of damages (and therefore were not attempting to prevent the implementation of FIRREA), the United States should not prevail through the assertion of defenses based upon the Government's sovereign status.[146]

The tension between congruence and exceptionalism surfaces in the law governing the recovery of damages for breach of contract by the United States as well. The most straightforward example of exceptionalism in this area involves the recovery of prejudgment interest. In a breach of contract case between two private parties, the plaintiff ordinarily is entitled to prejudgment interest if she prevails on her claim. Prejudgment interest compensates the plaintiff for the delay "since the accrual of the [plaintiff's] claim."[147]

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140. Schwartz, *Liability for Sovereign Acts*, *supra* note 16; *see also* Schwartz, *Assembling* Winstar, *supra* note 16, at 490.

141. Schwartz, *Liability for Sovereign Acts*, *supra* note 16, at 637.

142. *See* John Cibinic Jr., *Retroactive Legislation and Regulations and Federal Government Contracts*, 51 ALA. L. REV. 963, 967 (2000) (quoting Winstar Corp. v. United States, 518 U.S. 839, 937 (1996) (Rehnquist, C.J., dissenting)).

143. Schwartz, *Liability for Sovereign Acts*, *supra* note 16, at 637.

144. *See id.* at 637–38 (quoting United States v. Lynch, 292 U.S. 571, 579 (1934)).

145. *See, e.g.*, *Winstar*, 518 U.S. at 909–10.

146. *See id.* at 911. *See also id.* at 922 (Scalia, J., concurring); *id.* at 937 (Rehnquist, C.J., dissenting).

147. CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 50, at 205 (1935). Although the rules governing the recovery of prejudgment interest vary somewhat by jurisdiction, one commentator noted in 1982 that "[a] growing number of states have adopted statutes or court rules which make the award of prejudgment interest mandatory in certain situations." Anthony E. Rothschild, *Prejudgment Interest: Survey and Suggestion*, 77 NW. U. L. REV. 192, 209 (1982).

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Prejudgment interest may be awarded by statute or contract, by discretion of the judge or jury, or as an element of damages to compensate the plaintiff on her underlying claim.[148]

However, when the United States is the defendant in an action asserting a common-law breach-of-contract claim, the common-law right to prejudgment interest is not recognized absent a specific statute or contract providing for recovery.[149] Under 28 U.S.C. § 2516, prejudgment interest is recoverable only when it is provided for by statute or expressly in a contract. The claims courts have repeatedly rejected policy arguments attempting to enlarge the waiver of sovereign immunity in cases involving common-law claims for breach of contract, even when the failure to award prejudgment interest permits a result that does not appear to be equitable.[150]

B. *Congruence and Exceptionalism in the Goodwill Damages Decisions*

In the goodwill damages decisions following *Winstar*, the availability of lost profits damages has highlighted the tension between congruence and exceptionalism.[151] The Court of Federal Claims and its predecessors historically have respected the United States' sovereign status and barred or limited recovery of lost profits as a form of consequential damages. In the goodwill damages decisions, the courts have allowed the thrifts to present claims for lost profits, signaling a possible shift from exceptionalism to congruence in their views with respect to claims for lost profits against the United States.

It is necessary to acknowledge that the recovery of lost profits damages in the Court of Federal Claims and its predecessors is a broad subject, and that the inquiry in this article is limited to a preliminary discussion based upon the goodwill damages cases decided thus far. Claims for lost profits damages have been made in other breach-of-regulatory-contract cases in the Court of Federal Claims, and this article does not examine those cases.[152] Furthermore, as dis-

148. Rothschild, *supra* note 147, at 194.

149. *See, e.g.*, Ramsey v. United States, 101 F. Supp. 353, 356 (Ct. Cl. 1951). It is worth noting, however, that many cases in the Court of Federal Claims are brought under the Contract Disputes Act, which expressly provides for the recovery of interest. *See* 41 U.S.C. § 601 *et seq*. In particular, section 611 authorizes the recovery of "[i]nterest on amounts found due contractors on claims" under the Contract Disputes Act.

150. *See, e.g.*, United States v. Louisiana, 446 U.S. 253, 264–65 (1980); United States v. N.Y. Rayon Importing Co., 329 U.S. 654 (1947); United States *ex rel.* Angarica v. Bayard, 127 U.S. 251, 260 (1888) ("with the government the rule is different"); Tilson v. United States, 100 U.S. 43, 47 (1879); Gordon v. United States, 74 U.S. 188 (1868). The unavailability of prejudgment interest has been noted in a number of goodwill damages decisions. *See, e.g.*, Glendale Fed. Bank, FSB v. United States, 43 Fed. Cl. 390, 410 (1999); Castle v. United States, 48 Fed. Cl. 187, 216–17 (2000).

151. On incidental and consequential damages, see Roy Ryden Anderson, *Incidental and Consequential Damages*, 7 J.L. & Com. 327 (1987); *see also* Melvin Aron Eisenberg, *The Principle of* Hadley v. Baxendale, 80 Cal. L. Rev. 563 (1992).

152. *See, e.g.*, Cienega Gardens v. United States, 38 Fed. Cl. 64 (1997), *rev'd on other grounds*, 194 F.3d 1231 (Fed. Cir. 1998), *cert. denied*, Sherman Park Apartments v. United States, 528 U.S. 120 (1999).

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cussed below, although the first three goodwill damages cases indicated that threshold question of whether lost profits could be recoverable against the United States could be the subject of controversy, the issue appears to have been resolved in the goodwill cases by the *California Federal Bank* decision.[153] Subsequent trial court decisions have not addressed this question and have simply analyzed the merits of the specific lost profits claims asserted.[154]

As noted, the Court of Federal Claims and its predecessor courts historically have rejected claims for lost profits on collateral transactions. The first such case against the United States, *Myerle v. United States*, involved a claim by a contractor who built a war vessel.[155] The Navy's actions delayed work on the vessel, and the Government failed to make payments due, forcing the contractor to borrow money. The Government rejected the contractor's claim for interest paid on his borrowings, prompting the contractor to sue. Citing the statutory prohibition against the recovery of interest, the United States Court of Claims denied the claim.[156]

The court also suggested that the claim for such interest was a type of consequential damage, that is, a claim for monies not directly related to the contract. In *dicta*, the court rejected that claim, explaining that "the [contractor] can only recover those items of damage which are the proximate result of the act of the Government."[157] It further explained that for damages to be direct, there "must not be two steps between cause and damage" and that "[t]he damage must be such as was to have been foreseen by the parties."[158]

The legal principle set out in *Myerle*—that damages for lost profits on collateral transactions may not be awarded in a breach-of-contract case against the United States—was applied in subsequent cases.[159] Even recent decisions from the Court of Federal Claims have noted that "remote and consequential damages are not recoverable in a common-law suit for breach of contract . . . especially . . . in suits against the United States for the recovery of common-law damages."[160]

153. *Compare Glendale*, 43 Fed. Cl. at 397–98, and LaSalle Talman Bank, F.S.B. v. United States, 45 Fed. Cl. 64, 87–88 (1999) (rejecting argument that lost profits damages are barred as a matter of law), with *California Fed. Bank* (discussed *supra*).

154. *See, e.g.*, Castle v. United States, 48 Fed. Cl. 187 (2000) (evaluating lost profits claim with no initial discussion of whether claim is barred as a matter of law), *rev'd in part*, 301 F.3d 1328 (Fed. Cir. 2002); Bluebonnet Savings Bank v. United States, 47 Fed. Cl. 156 (2000), *rev'd* 266 F.3d 1348 (Fed. Cir. 2001), *after remand*, 52 Fed. Cl. 75 (2002).

155. 33 Ct. Cl. 1 (1897).

156. *Id.* at 25.

157. *Id.* at 27.

158. *Id.*

159. *See* Roberts v. United States, 18 Cl. Ct. 351, 358 (1989) (collecting Court of Claims cases denying lost profits damages); Wells Fargo Bank N.A. v. United States, 88 F.3d 1012, 1022 (Fed. Cir. 1996) (collecting cases), *cert. denied*, 520 U.S. 1116 (1997).

160. *Wells Fargo*, 88 F.3d at 1021 (quoting N. Helex Co. v. United States, 524 F.2d

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Yet with the exception of the trial court's decision in *California Federal Bank*, which later was reversed, the Court of Federal Claims judges have held that lost profits are potentially recoverable as an element of expectancy damages, subject to the requirements of foreseeability, causation, and certainty.[161] The goodwill damages trials—in particular the lost profits claims—have turned upon the following questions: Whether the phased-out supervisory goodwill could have been or was replaced and, if so, at what cost (the mitigation question); whether the phase-out prevented the thrift from making profitable investments (the lost profits question); and whether the thrift has a claim for expenditures made in reliance upon the goodwill agreement with the United States (the reliance question).

In allowing lost profits claims, the Federal Circuit and the Court of Federal Claims have rejected the argument that there is a legal bar to their recovery against the United States. In so doing, they have relied upon two points. First, as the discussion of *California Federal Bank* demonstrates, the courts have concluded that the purpose of the supervisory goodwill contracts was to allow the thrifts to make additional investments and that it was foreseeable to the Government that a breach such as the enactment of FIRREA would deny the thrifts the opportunity to make profitable investments.[162] Given the specific circumstances under which supervisory goodwill was created and the particular regulatory purpose for which it was created, the availability of lost profits in the goodwill cases may be limited to those cases.

The second factor cited by courts in allowing thrifts to assert claims for lost profits has been the finding that a thrift was unable to mitigate its damages by replacing the phased-out supervisory goodwill. Under general

707, 720 (Ct. Cl. 1975)); *see also* John Cibinic Jr. & Ralph C. Nash Jr., Administration of Government Contracts 732 (3d ed. 1995) ("There has been almost no recovery against the Government for consequential damages. This may be because of a very difficult rule requiring a contractor to prove both foreseeability and direct causation of damages."). However, in at least two cases, the courts have awarded lost profits damages against the United States for breach of contract. In *Neely*, which involved government breach of an agreement to lease land for mining, the profits lost "were profits on the use of the subject of the contract itself." *Wells Fargo*, 88 F.3d at 1023 (referring to Neely v. United States, 152 Ct. Cl. 137 (1961)). Given the subject matter of the contract—the leased land—it was foreseeable that the Government's breach could cause the contractor to lose profits (the amount of which was proven in a subsequent trial). Neely v. United States, 167 Ct. Cl. 407 (1964). In the other case, the Government breached an agreement to make manufacturing space available to a contractor who was able to demonstrate that, with the additional space, it would have been able to manufacture more chain belts and earn more profits. Chain Belt Co. v. United States, 127 Ct. Cl. 38 (1953). Once again, the court agreed that it was foreseeable to the Government that breach of this contract could cause the manufacturer to lose profits. *Id.* Furthermore, in both cases, the subject of the contract—mining land to be leased, manufacturing space to be made available—could not be replaced; therefore, the contractor was unable to cover.

161. Restatement (Second) of Contracts §§ 347, 350–52.

162. California Fed. Bank v. United States, 245 F.3d 1342, 1349–50 (Fed. Cir. 2001).

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principles of contract law, a party must demonstrate an inability to mitigate—such as an inability to replace the good or service that was to be provided—before recovering lost profits damages.[163] Although supervisory goodwill was created by the regulators and its primary value was that it enabled a thrift to meet regulatory capital requirements, courts have recognized that cash—such as the proceeds received from an infusion by a holding company[164] or the funds raised through an issuance of preferred or common stock[165]—is a substitute for supervisory goodwill because, among other things, it satisfies all three regulatory capital requirements. Generally, the courts also have concluded that the capital markets were virtually closed to thrifts, thereby making it difficult for a savings and loan institution to raise funds through an external source, except from an acquirer.[166] So, in addition to the specific findings made by courts with respect to foreseeability and the purpose of the goodwill agreements, the courts also have concluded that a thrift's inability to mitigate permits that thrift to assert a claim for lost profits.

In allowing the recovery of lost profits, the goodwill damages decisions have highlighted a paradox in current government contracts law. In the typical procurement case, the remedy for the Government's termination of the contract is reliance damages, and lost profits are not available.[167] Moreover, even if the Government fails to include a "termination for convenience" clause in the contract, courts nevertheless have held that they are implied.[168] This rule of construction suggests deference to the Government's sovereign status.

By permitting a claimant to recover lost profits in the goodwill damages cases—which involve claims for breach of regulatory contract—the courts have created the possibility that such a claimant may recover more than one in a procurement case in which it generally is not disputed that the Government is acting in its private capacity. The decisions of the Federal Circuit and the Court of Federal Claims allowing recovery of lost profits—a form of expectancy damages—create the possibility that claimants in these breach-of-regulatory-contract cases may recover under a more generous theory of

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163. *See* RESTATEMENT (SECOND) OF CONTRACTS § 350.

164. *See, e.g.*, Bank United of Texas FSB v. United States, 50 Fed. Cl. 645 (2001); California Fed. Bank v. United States, 43 Fed. Cl. 445, 460 (1999) ("Cal Fed replaced goodwill by flowing money down from its holding company.").

165. *See, e.g.*, Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, 1378 (Fed. Cir. 2001) ("To return to compliance, in 1993 Glendale raised $451 million from new investors.").

166. *See, e.g.*, LaSalle Talman Bank, F.S.B. v. United States, 45 Fed. Cl. 64, 103 (1999).

167. *See* 48 C.F.R. § 52.249-2.

168. *See* Krygoski Constr. Co. v. United States, 94 F.3d 1537 (Fed. Cir. 1996); *see also* Joseph J. Petrillo and William E. Conner, *From Torncello to Krygoski: 25 Years of the Government's Termination for Convenience Power*, 7 FED. CIR. BAR J. 337 (1997); Stephen N. Young, Note, *Limiting the Government's Ability to Terminate for Its Convenience Following Torncello*, 52 GEO. WASH. L. REV. 892 (1984).

damages than what is available to private contractors in ordinary procurement disputes.

VI. Conclusion

Winstar and the subsequent damages decisions suggest the procedural equivalent of "Goldilocks and the Three Bears." On the one hand, the economic errors in *Winstar* appear to have been the result of a too-summary process before the Supreme Court decision. On the other hand, if the path to the Supreme Court in *Winstar* was too short, the ongoing trials, appeals, and remand proceedings in the damages cases following *Winstar* arguably have taken too long. More than a dozen goodwill damages decisions have been issued since *Winstar* was decided, and so far every trial court decision has been appealed. The forecast for the foreseeable future is more trials, as there are still nearly one hundred cases pending in the Court of Federal Claims.

In April 1999, the trial court in *Glendale* noted that "[i]t has cost each side tens of millions of dollars to litigate this case," and expressed the "profound hope that the 120-some *Winstar* cases still pending on the court's docket will take heed. Each side now has more information on the issues involved. The court strongly believes that settlements, where fair compromise occurs, are in everyone's interest."[169] A week later, however, the trial court in *California Federal Bank* arrived at a very different result in a factually similar case, awarding only $23 million on a claim for as much as $1.6 billion, contrasted with the $909 million awarded by the trial court in *Glendale*. Such divergent results, before appellate review, discouraged either side from settling.

Subsequently, the Federal Circuit issued decisions in both *Glendale* and *California Federal Bank*. Neither decision was conclusive, since the court of appeals remanded each case to the trial court for additional proceedings. Moreover, although the Federal Circuit provided guidance on one theory of recovery, restitution, holding that an acquirer could not recover the excess liabilities of the acquired thrift, the court of appeals did not propose in either case a theory for resolving the damages issues in the *Winstar* cases. Instead the Federal Circuit focused its discussion on the specific facts and claims made in each case.

Following the Federal Circuit's decisions in *Glendale* and *California Federal Bank*, the Court of Federal Claims issued decisions in a number of other cases. The awards were limited to $23 million or less. At that time, the

169. Glendale Fed. Bank, FSB v. United States, 43 Fed. Cl. 390, 410 (1999). The trial court in *LaSalle* expressed a similar hope in issuing a lengthy decision: "It is hoped that the decisions in these early cases will facilitate either settlement or early resolution on appeal of common damage questions." *LaSalle*, 45 Fed. Cl. at 66.

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damages decisions suggested the following pattern: in cases in which the acquiring entity remained in business after the enactment of FIRREA, that entity was awarded the cost of replacing its phased-out supervisory goodwill as regulatory capital.[170] In cases in which the acquiring entity went out of business due to the phase-out, that entity was returned any investment it made as part of the acquisition.[171]

More recently, however, three trial court decisions awarded thrift claimants a total of $547 million (*Glendale*, $380 million; *Bluebonnet*, $132 million, and *Suess*, $35 million; all of the decisions are subject to appeal).[172] Now, with nearly one hundred cases still pending, it seems reasonable to ask whether it will be necessary to conduct a trial in each remaining case in order to decide whether and to what extent damages should be awarded. Several cases settled early on, but now there appears to be little common ground for the plaintiffs and the Government so long as there is the possibility of a substantial recovery from a court. The judicial decisions thus far have permitted thrifts to present at trial claims for lost profits. None have yet awarded lost profits for the inability to leverage. Nevertheless, the most recent trial court decisions indicate the possibility of a substantial award for a thrift claimant.

The United States has vigorously and successfully persuaded courts to reject substantial damages claims by claimants in the goodwill cases. Given their success in litigating the claims on a case-by-case basis, there is no reason for the Government to seek peace through a substantial payment. On the

170. Replacement has occurred through the issuance of stock (Glendale Fed. Bank, FSB v. United States, 239 F.3d 1374, (Fed. Cir. 2001)), from the provision of cash by a holding company (*California Fed. Bank v. United States*, 245 F.3d 1342 (Fed. Cir. 2001); Bank United of Texas FSB v. United States, 50 Fed. Cl. 645 (2001)), and by the infusion of funds by an acquiring entity (LaSalle Talman Bank F.S.B. v. United States, 45 Fed. Cl. 64 (1999)).

171. *See* Landmark Land Co. v. United States, 256 F.3d 1365 (Fed. Cir. 2001); Castle v. United States, 48 Fed. Cl. 187 (2000), *rev'd in part*, 301 F.3d 1328 (Fed. Cir. 2002). *Bluebonnet* is something of an anomaly. The favorable regulatory treatment provided by the Government in that case did not include the recognition of supervisory goodwill as regulatory capital; instead it concerned favorable dividend treatment. It also is unclear whether and to what extent the United States will have to pay damages. The trial court stated that plaintiffs were damaged and incurred costs due to the enactment of FIRREA but concluded that the evidence presented in support of plaintiffs' expectancy claim was speculative. The Federal Circuit reversed. *See* Bluebonnet Sav. Bank v. United States, 266 F.3d 1348 (Fed. Cir. 2001). On remand, the trial court issued a short opinion awarding $132,398,200 pursuant to the court's understanding of the Federal Circuit's mandate. Another pair of recent decisions—*Glendale* and *Suess*—do not fall into this pattern, though neither is necessarily inconsistent with it. In *Glendale*, the trial court reinstated its award of reliance damages; in *Suess*, the trial court awarded the thrift's shareholders its estimation of the value of the thrift when it was seized shortly after the enactment of FIRREA. *Glendale* and *Suess* almost certainly will be the subject of further appeals.

172. *See* Glendale Fed. Bank, FSB v. United States, No. 90–772C, 2002 WL 31004679 (Fed. Cl. Aug. 2, 2002); Suess v. United States, 52 Fed. Cl. 221, 232 (2002); Bluebonnet Sav. Bank, F.S.B. v. United States, 52 Fed. Cl. 75, 77 (2002).

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other hand, the thrift claimants, having come this far, likely will remain in the damages lottery, especially when the recent trial court decisions suggest that their patience just may pay off. Ultimately, a familiar lesson appears to apply to the prospects for a comprehensive settlement of the *Winstar* damages cases: so long as there is uncertainty and the possibility of a substantial recovery, however remote, neither side is likely to compromise.

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