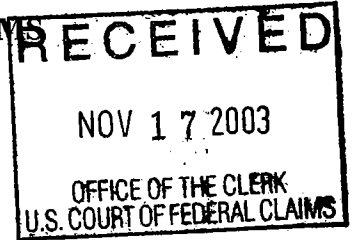


IN THE UNITED STATES COURT OF FEDERAL CLAIMS



FRANK P. SLATTERY, JR., *et al.*,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Civil Action No. 93-280 C
(Senior Judge Smith)

**PLAINTIFFS' POST-TRIAL MEMORANDUM
IN SUPPORT OF THEIR CLAIMS FOR DAMAGES**

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**PLAINTIFFS' POST-TRIAL MEMORANDUM
IN SUPPORT OF THEIR CLAIMS FOR DAMAGES**

Pursuant to this Court's Order of October 17, 2003, Plaintiffs submit this Post-Trial Memorandum in Support of Their Claims for Damages. Plaintiffs respectfully request restitution damages of \$3.013 billion, cost of performance damages of \$650,173,000, expectancy damages of \$276 million and "wounded bank" reliance damages of \$28,394,999.

I. PLAINTIFFS NEED ONLY PROVE THAT THE AMOUNT OF DAMAGES IS BASED ON A "REASONED CALCULATION" RATHER THAN "MERE SPECULATION"

"When the fact of damage is reasonably certain, it is enough that there is a basis for reasoned inference as to the extent of the damage chargeable to the defendant." *Locke v. United States*, 283 F.2d 521, 524 (Ct. Cl. 1960) (citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931)). As the Supreme Court has held: "Certainty as to the amount goes no further than to require a basis for a reasoned conclusion." *Palmer v. Connecticut R. & Lighting Co.*, 311 U.S. 544, 561 (1941) (emphasis added); *see also J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 567, n.5 (1981) (quoting *Story Parchment*, 282 U.S. at 566 (1931) ("If the [existence of] damage is certain, the fact that its extent is uncertain does not prevent recovery."))

The Supreme Court's repeated "willingness to accept a degree of uncertainty" in the determination of damages rests, in part, "on the principle . . . that it does not come with very good grace for the `wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *J. Truett Payne*, 451 U.S. at 566-67 (quoting *Hetzel v. Baltimore & Ohio R. Co.*, 169 U.S. 26, 39 (1898)). "Any other rule would . . . be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain." *Id.* at 566 (citations omitted); *see also Fifth Third Bank of W. Ohio v. United States*, 55 Fed. Cl. 223, 242 (2003) (citing *Locke*), 283 F.2d at 524 (wrongdoer "should not be permitted to reap advantage from his own wrong by insisting on proof which by reason of his breach is unobtainable"); *Wells Fargo Bank, N.A. v. United States*, 33 Fed. Cl. 233, 243 (1995), *rev'd on other grounds*, 88 F.3d 1012 (Fed. Cir. 1996) (citing McCormick, *Handbook on the Law of Damages* § 7 (1935)) (same).

In *Azure v. United States*, 129 F.3d 1361997, U.S. App. LEXIS 29365 (Fed. Cir. 1997) (unpublished), the Court reversed a decision denying contract damages because there was "no method by which to award plaintiff the damages to which he may be entitled." *Id.* at *6. The Court explained:

Although Azure failed to establish an exact measure of its damages, the government's liability is clearly established. . . As our predecessor court has held: "When confronted with the clear liability of defendant and plaintiff's efforts to present all available evidence on damages, the [court] was under a heavy obligation to provide compensation. While there was 'uncertainty' as to the extent of damage,... there was none as to the fact of damage." *S.W. Electronics & Mfg. Corp. v. United States*, 228 Ct. Cl. 333, 655 F.2d 1078, 1088 (Ct. Cl. 1981) (quoting *Joseph Pickard's Sons Co. v. United States*, 209 Ct. Cl. 643, 532 F.2d 739 (Ct. Cl. 197)).

Id. at *14-*15 (alteration in original) (emphasis added). The Court described the trial court's duty "to arrive at a reasonable equitable adjustment after receiving evidence from the parties":

In the cases in which jury verdict damages have been awarded, the fact of damage was established as well as the defendant's responsibility for it. The remaining question, therefore, was how to compute reasonable damages from the evidence at hand. Under this approach, “the claimant bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation.” See *American Line Builders, Inc. v. United States*, 26 Cl. Ct. 1155, 1182 (1992) (quoting *Willems Indus., Inc. v. United States*, 155 Ct. Cl. 360, 295 F.2d 822, 831 (Ct. Cl. 1961)).

Id. at *16-*17 (emphasis added).

The government's strategy in the *Winstar*-related cases has been to concede nothing and appeal everything. According to the government, a \$20 billion bank has been destroyed, but nobody got hurt.

- **Restitution:** Ignoring its pre-trial binding admission that Western Savings Fund Society ("Western") would have been seized and liquidated absent a merger, the government contends that FDIC had a *variety* of options at its disposal. According to the government, FDIC could have provided open bank assistance to Western – even though the evidence proves that FDIC had *rejected* that option as illegal. Or, the government asserts, Dollar Savings Bank would have been happy to acquire Western. But FDIC specifically *rejected* Dollar's bid because it failed the least cost test—and because it was too small to assume Western's \$800 million deficit. The government suggests that perhaps an out-of-state bank would have merged with Western. But Pennsylvania law prohibited interstate bank acquisitions and there is no evidence that anyone in Pennsylvania was interested in having that law changed. The record establishes that every alternative other than liquidation was foreclosed.

- **Cost of Performance:** The government acknowledges that PSFS assumed in 1982, as part of the underlying contract, an obligation to pay approximately \$2 billion in deposit liabilities, while simultaneously acquiring only about \$1.5 billion in assets to support those liabilities, yet it insists that Meritor incurred no cost in performing the contract. But there is no dispute that the total liabilities assumed in 1982 were discharged. The facts of this case permit an accurate accounting of Meritor's actual cost of performance, complying fully with the directives of the Court of Appeals.
- **Expectancy:** The government argues that plaintiffs are not even entitled to the value of the bank in 1988, at the time of the first breach and before the massive branch sale, because Meritor conceivably could have downsized even absent the breach. But this Court has already held that the 1988 breach "doomed" the bank, and that is the law of the case. Moreover, the record show that the bank's plan *before the breach* was to downsize the bank by only \$1 billion. In contrast, in an effort to satisfy the 1988 MOU and the 1991 Written Agreement, Meritor self-liquidated from \$19 billion to less than \$4 billion in just four years—and sacrificed its best branches and assets in the process—*because of the 1988 breach*.
- **Wounded Bank Damages:** Finally, the government argues that plaintiffs are not entitled to wounded bank damages, apparently suggesting that this Court's finding in the liability decision that the government's breaches caused Meritor to incur these costs is not good enough. The

doctrine of law of the case—and the record evidence—is all to the contrary.

There can be no serious question but that plaintiffs suffered injury – profound injury. Because FDIC was more interested in protecting the BIF than in honoring its promises, the oldest thrift in the country is gone.

II. PLAINTIFFS HAVE SATISFIED THEIR BURDEN IN PROVING RESTITUTION DAMAGES.

In denying the government's motion for summary judgment, this Court orally advised the parties that the Federal Circuit's three decisions denying restitution damages were predicated on factual findings. The Court of Appeals has never barred restitution as a matter of law. *Glendale Fed. Bank, FSB v. United States*, 239 F.3d 1374, 1380-81 (Fed. Cir. 2001); *Cal. Fed. Bank, F.S.B. v. United States* ("*CalFed*"), 245 F.3d 1342 (Fed. Cir. 2001); *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363 (Fed. Cir. 2003) *reh'g denied*, March 13, 2003. Lest the government be confused: This case is not *Glendale*; it is not *CalFed*; and it is not *LaSalle Talman*.

Plaintiffs have alleged, and proven, that Western would have been seized and liquidated absent the PSFS merger. The government's avoided cost of liquidation is a benefit that the Government must disgorge as restitution damages.

The likelihood of liquidation need only be shown by a preponderance of the evidence. *LaSalle Talman Bank, FSB v. United States*, 45 Fed. Cl. 64, 118 n.87 (1999), *aff'd in part, vacated in part*, 317 F.3d 1363 (Fed. Cir. 2003) (plaintiff may recover the net liabilities of an acquired thrift by showing that, "absent the supervisory merger, FSLIC more probably than not would have liquidated the thrift (or thrifts) acquired"); *see also Glendale Fed. Bank, FSB v. United States*, 43 Fed. Cl. 390, 406 (1999), *aff'd in part, vacated in part*, 239 F.3d 1374 (Fed.

Cir. 2001) (awarding restitution because "defendant provided no evidence that it would not have liquidated"); *Westfed Holdings, Inc. v. United States*, 55 Fed. Cl. 544, 561 (2003) (rejecting the plaintiff's proof that liquidation would have occurred); *Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 164 (2002) (allowing plaintiff opportunity at trial to prove that liquidation would have occurred).

Plaintiffs have more than met their burden. Unlike any *Winstar* case, the government here has admitted that the FDIC, had it been unable to find a merger partner for Western in or about the spring of 1982, "would have terminated Western's deposit insurance and that the State of Pennsylvania would have appointed a receiver to liquidate the institution." PX 861 at Admission 6 (emphasis added). See Answer to Question 105 (the matter admitted is "conclusively established," see RCFC 36(b)).¹ The government is therefore foreclosed from arguing that, absent the PSFS merger, the FDIC would have: (1) allowed Western to continue operations; (2) allowed open bank assistance; (3) installed new management at Western; (4) offered a rebid; or (5) pursued a purchase and assumption agreement, rather than liquidate, after Western's closure. Indeed, in light of the government's admission, the only alternative available to the government other than liquidation would have been a merger with another financial institution. After ten years of litigation, the government has offered no evidence to support that this was possible.

The only other bid received by FDIC was Dollar Savings Bank. But acceptance of the Dollar bid would be inconsistent with the government's admission that Western would have been

¹ The party making the admission is not permitted to rebut the admission with contradictory evidence at trial. *Am. Auto. Ass'n (Inc.) v. AAA Legal Clinic of Jefferson Crooke, P.C.*, 930 F.2d 1117, 1120 (5th Cir. 1991); see also *999 v. C.I.T. Corp.*, 776 F.2d 866, 869-70 (9th Cir. 1985) *McNeil v. AT&T Universal Card*, 192 F.R.D. 492, 494 n.4 (E.D. Pa. 2000); *T. Rowe Price Small-Cap. Fund, Inc. v. Oppenheimer and Co., Inc.*, 174 F.R.D. 38, 44 (S.D.N.Y. 1997). In addition, court cannot ignore the admission, even if "it finds the evidence presented by the party against whom the admission operates more credible." *Am. Auto. Association (Inc.)*, 930 F.2d at 1120. See Answer to Court's Question 105.

"seized" and "liquidated" in the absence of a "merger." PX 861 at Admission No. 6; *see also* Answer to Question 105. Dollar's operative bid did not seek a merger, but, instead, sought to purchase Western after the latter's closure.² In any event, FDIC itself found that Dollar was too small to acquire Western. *See* PX 615 (emphasis added) ("Philadelphia's Saving Fund Society is the only mutual savings bank in the state large enough to acquire Western."); PX 634; PX 910; Dmgs. Tr. 112:22 – 113:18 (Brumbaugh); Dmgs. Tr. 1676:11 – 1677:9 (Gough); *see also* PX 911; Dmgs. Tr. 113:19 – 114:15 (Brumbaugh); Dmgs. Tr. 110:11 -- 111:3 (Brumbaugh). FDIC also rejected Western for the independent reason that it did not satisfy FDIC's "least cost test." Paul Fritts, FDIC's Regional Director, testified -- and was contradicted by no fact witness -- that FDIC "had a bid or two" for Western, but that "they wouldn't meet minimum cost standards that the FDIC had to meet in order to accept it. [PSFS's bid] was the only one that met the cost test," and the only viable alternative to seizure. Liab. Tr. 2940:22 -- 2941:7 (Fritts) (emphasis added); *see also* Liab. Tr. 2940:11-21 (Fritts); Dmgs. Tr. 132:16 -- 133:10 (Brumbaugh).³ The record reflects no other financial institution that was interested in acquiring Western. *See also* Liab. Tr. 2760:3-7 (Gough) (assistance package provided to PSFS to avoid liquidation "costs of almost \$700 million").

While Plaintiffs need not prove the accuracy of the government's admission, the record evidence establishes that FDIC had no viable option but to liquidate:

² Compare PX 658 with PX 662; *see also* Dmgs. Tr. 108:6-13 (Brumbaugh) (Dollar bid inconsistent with Admission); PX 856 (FDIC Resolutions Handbook for agency definition of "purchase and assumption agreement") at 19; Dmgs. Tr. 104:16 -- 105:16 (Brumbaugh); Dmgs. Tr. 106:9 -- 107:2 (Brumbaugh); Dmgs. Tr. 119:1-13 (Brumbaugh); Dmgs. Tr. 99:10-15 (Brumbaugh); Dmgs. Tr. 1604:16 -- 1605:3 (Gough); Dmgs. Tr. 1608:11-20 (Gough); Dmgs. Tr. 1674:24 -- 1675:3 (Gough); Dmgs. Tr. 1840:21 -- 1841:4 (Lutz).

³ Dr. Brumbaugh likewise found that Dollar's asset liquidation and credit risk protection provisions "imposed on the FDIC a lengthy and ongoing substantial potential cost that, in my opinion, would have exceeded the liquidation cost estimate." Dmgs. Tr. 117:7-14 (Brumbaugh); *see generally* Dmgs. Tr. 117:17 – 118:17 (Brumbaugh) (for explanation of Dollar's bid provisions); Dmgs. Tr. 3074:24 -- 3075:11 (Hamm); Dmgs. Tr. 3082:9-12 (Hamm); PX 913A; Answer1 to Questions 101-103.

- Pennsylvania law prohibited out-of-state mergers,⁴ and no out-of-state banks were interested. *See* Answers to Questions 99 and 100.
- FDIC rejected open bank assistance for Western, because it would have been exceedingly expensive, it held no prospect for Western's survival, and would have been illegal under Section 13(c) of the FDIC Act. *See* 12 U.S.C. § 1823(c) (1950) (open bank assistance not allowed absent a finding that the bank was "essential to provide adequate banking service in the community").⁵
- Nor was a re-bid of Western viable because it: (1) would have taken too long under the emergency timeline certified by the FDIC under the Bank Merger Act, *see* Answer to Question 106; and (2) would have exceeded the time permitted under Admission 6 ("In or about the Spring of 1982").⁶

⁴ Pennsylvania law prohibited interstate bank acquisitions. *See* Dmgs. Tr. 126:21 -- 128:22 (Brumbaugh); Dmgs. Tr. 1592:17-21 (Gough); Dmgs. Tr. 1614:23 -- 1615:3 (Gough); Dmgs. Tr. 3097:17 -- 3098:3 (Hamm). There is no evidence that the Pennsylvania legislature was inclined to change the law; the evidence is all to the contrary. *See* PX 644 ("the statutes prohibiting interstate mergers are just as much law as the essentiality provisions in Section 13(c) of the Federal Deposit Insurance Corporation Act."); PX 648 ("Pennsylvania Department of Banking will no doubt object to any bidders outside of the State"); Dmgs. Tr. 276:10-20 (Brumbaugh).

⁵ Mr. Gough testified that Western "did not meet the essentiality" requirement," *see* Dmgs. Tr. 1572:2-13 (Gough), and that FDIC instead made a determination not to provide assistance to Western. Dmgs. Tr. 1569:5-9 (Gough). Contemporaneous documents support this conclusion. *See* PX 623 at 2 (lack of Western "presence in the local mortgage market, particularly the inner city area" cited as one of several reasons against finding of essentiality); PX 626 at 3, 4 (essentiality not established); *see also* Dmgs. Tr. 100:24 -- 101:9 (Brumbaugh); Dmgs. Tr. 102:10 -- 103:1 (Brumbaugh); Dmgs. Tr. 103:9 -- 104:4 (Brumbaugh); Dmgs. Tr. 3086:2-11 (Hamm); Dmgs. Tr. 3086:20-23 (Hamm); Dmgs. Tr. 3089:9-18 (Hamm). FDIC also determined that even an infusion of \$500 million would not be sufficient to save Western. *See* PX 607 at 3 (Western "not viable and would not be viable after any reasonable period of assistance"; "not a bank deserving of assistance"; & "classic example of sending 'good money after bad'"); PX 623 at 2 ("Staff analysis . . . indicates that it will not avert insolvency under any reasonable loan amounts"); PX 610 at Item 9 ("no reasonable amount of assistance will make the bank viable"); PX 621 at 2; Dmgs. Tr. 1577:15 -- 1578:5 (Gough); PX 626 at 3, 4; PX 905; Dmgs. Tr. 1573:8 -- 1574:19 (Gough); Dmgs. Tr. 2704:3-12 (Gough); Dmgs. Tr. 3092:1-6 (Hamm); Dmgs. Tr. 101:20 -- 102:9 (Brumbaugh).

⁶ FDIC made the requisite finding that "it must act immediately in order to prevent the probable failure of one of the banks involved." *See* PX 17; *see also* PX 18.

