

**ORIGINAL**

2007-5063, -5064, -5089

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**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

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**FRANK P. SLATTERY, JR., on behalf of himself and on behalf of  
all other similarly situated shareholders of Meritor Savings Bank,**

**Plaintiff-Cross Appellant,  
and**

**STEVEN ROTH,  
and INTERSTATE PROPERTIES,**

**Plaintiffs-Cross Appellants,**

**v.**

**UNITED STATES,**

**Defendant-Appellant.**

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**Appeal from the United States Court of Federal Claims in 93-CV-280,  
Senior Judge Loren A. Smith.**

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**REPLY BRIEF FOR DEFENDANT-APPELLANT, THE UNITED STATES**

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**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

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**FRANK P. SLATTERY, JR., on behalf of himself and on behalf of all other  
similarly situated shareholders of Meritor Savings Bank,**

**Plaintiff-Cross Appellant,**

**and**

**STEVEN ROTH,  
and INTERSTATE PROPERTIES,**

**Plaintiffs-Cross Appellants,**

**v.**

**UNITED STATES,**

**Defendant-Appellant.**

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**Appeal from the United States Court of Federal Claims in 93-CV-280,  
Senior Judge Loren A. Smith.**

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Defendant, the United States, respectfully submits this reply brief in response to the opening briefs filed by plaintiffs-cross appellants Frank P. Slattery, Jr. (“Slattery”), Steven Roth and Interstate Properties (“Roth”), and the amicus brief filed by the Federal Deposit Insurance Corporation (“FDIC”) on behalf of the receiver.

## INTRODUCTION

In 1982, Meritor Savings Bank's predecessor ("Meritor") merged with Western Savings Fund Society ("Western") in a FDIC-sponsored transaction. FDIC and Meritor entered into several agreements, including a Memorandum of Understanding ("1982 MOU"). In the 1982 MOU, the FDIC promised not to "object" to "certain accounting methods," including that the net Western liabilities assumed by Meritor on a mark-to-market basis "may be treated as goodwill and amortized on a straight-line basis up to fifteen (15) years."

There is no dispute that the Western goodwill was counted as an asset in Meritor's regulatory capital accounting from 1982 to 1992. In 1988, however, Meritor suffered from severe financial problems and, in the absence of raising new capital, it was obvious to all that the bank would be forced to downsize massively to match its rapidly diminishing regulatory capital. Plaintiffs presented expert testimony that, in a no-breach world, Meritor could have downsized from \$19 billion to \$7.8 billion in assets from 1987 to 1990, losing over \$650 million during 1988-91 alone, before potentially returning to profitability.

Regulators, however, were unable to predict the future of this enormous downsizing for one of the country's largest savings banks. The FDIC required Meritor to sign another MOU in 1988. This MOU provided, in part, that Meritor

raise its capital above the minimum level set for healthy banks. The FDIC acted on the basis of safety and soundness policies that pre-dated the 1982 MOU. These policies required that high-risk banks have higher minimum capital levels than healthy banks.

Eight years later, plaintiffs alleged that this regulatory intervention had breached the 1982 MOU. The trial court agreed and awarded the bank's 1988 stock market valuation, as well as a 50-percent "control premium," plus net cash payments made under the 1982 MOU, and so-called "wounded bank" damages.

The trial court erred in that (1) the court lacked jurisdiction over the FDIC insurance fund, which is a non-appropriated fund instrumentality ("NAFI") supported only by member premiums; (2) the court interpreted the contract to require FDIC performance beyond the contract's plain meaning, which was fully satisfied; (3) the court's award was duplicative and unsupported by this Court's precedent and the record; and (4) the court's judgment improperly interfered with receiver operations. Alternatively, the trial court's decision should be affirmed with respect to Roth's and Slattery's cross-appeals, both of which are unavailing.

**I. The Trial Court Lacked Jurisdiction To Consider Claims Asserted Against A Non-Appropriated Fund Instrumentality**

The trial court erred in determining that it possessed jurisdiction to entertain Slattery's breach of contract claims, as the contract at issue was with a NAFI.

Slattery asserts several arguments against the applicability of the NAFI doctrine, but none is supported by this Court's precedent. Slattery does not dispute our description of the enactments by which Congress structured the funding of the relevant FDIC insurance fund, now the Deposit Insurance Fund ("DIF"), and its predecessors. Congress explicitly separated these funds from appropriated funds and from the FDIC's other insurance funds. As we previously demonstrated, the DIF, its predecessor, the Bank Insurance Fund ("BIF"), and the BIF's predecessor, the Permanent Insurance Fund ("PIF"), have been funded solely by member assessments since the PIF's creation in the 1930's.<sup>1</sup> Govt. Br. at 26-33; 12 U.S.C. § 1817(b). Moreover, although Congress created a potential borrowing capability for the FDIC, that borrowing capability is limited to avoid any expense to the Treasury. Govt. Br. at 31-32.

The FDIC activity at issue here -- the regulation and insurance of state-chartered savings banks -- is, and was at all relevant times, a NAFI activity that

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<sup>1</sup> Unless otherwise noted, further reference to the DIF includes its predecessors.

Congress clearly intended to separate from appropriated funds. That same NAFI provided the funding for the contract upon which Slattery bases its breach of contract claims, and FDIC personnel, acting on behalf of, and funded by the PIF or BIF, took all of the actions the trial court held to be breaches.

This Court should reject Slattery's attempt to avoid this congressional prohibition against suits based upon NAFI contracts. It makes no difference that Slattery has named the United States as nominal defendant here and sued in the Court of Federal Claims. It is established beyond cavil that the Court of Federal Claims lacks jurisdiction to entertain claims based upon NAFI contracts and activities. And, as the Court explained in Lee by Lee v. United States, 129 F.3d 1482, 1484 (Fed. Cir. 1997), "the judgment fund cannot be used to satisfy the obligations of non-appropriated fund instrumentalities."

**A. The Four Requirements For NAFI Status Are Clearly Satisfied**

Slattery questions the applicability of the NAFI doctrine here by emphasizing one of the four requirements for application of the doctrine set forth in Ains, Inc. v. United States, 365 F.3d 1333, 1342 (Fed. Cir. 2004), effectively conceding satisfaction of the other three NAFI tests. Slattery Br. at 17-18. To achieve NAFI status, this Court's precedent requires a conclusion that Congress

clearly expressed its intention to separate the FDIC's DIF from general Federal revenues. Ains, 365 F.3d at 1342. Slattery focuses its arguments upon this prong of the NAFI test.

**1. Congress Intended To Separate This FDIC Activity From Appropriated Fund Activities**

Slattery cites L'Enfant Plaza Props., Inc. v. United States, 668 F.2d 1211, 1212 (Ct. Cl. 1982), and El-Sheikh v. United States, 39 Fed. Cl. 1, 5 n.2 (1997), rev'd on other grounds, 177 F.3d 1321 (Fed. Cir. 1999), for the proposition that the Court of Federal Claims possesses jurisdiction to entertain claims against an agency, absent a statutory prohibition against funds being appropriated to the purported NAFI activity. Slattery Br. at 20. This Court in Ains, however, explained that Congress's intention to separate a NAFI from general Federal revenues may be demonstrated in at least four ways:

In the past, we have found several different statutory ways for Congress to express its intent to separate an agency from the general fund. See, e.g., L'Enfant Plaza, 668 F.2d at 1212 (explicit prohibition from receiving appropriated funds); Denkler [v. United States], 782 F.2d 1003, 1004-05 (Fed. Cir. 1986) (absence of language authorizing appropriations); id. at 1005 (explicit statement that agency's funds shall not be construed to be [G]overnment funds or appropriated moneys); Core Concepts [of Florida, Inc. v. United States], 327 F.3d