

2007-5063, -5064, -5089

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

Plaintiff-Cross Appellants,

and

STEVEN ROTH and INTERSTATE PROPERTIES,

Plaintiffs-Cross Appellants

v.

UNITED STATES,

Defendant-Appellant.

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

EN BANC BRIEF OF AMICUS CURIAE
THE FEDERAL DEPOSIT INSURANCE CORPORATION

Supporting Defendant The United States and
Supporting Reversal in Part and Affirmance in Part

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May 7, 2010

CERTIFICATE OF INTEREST

Counsel for the Federal Deposit Insurance Corporation certifies the following:

1. The full name of every party or amicus represented by me is:

Federal Deposit Insurance Corporation, as receiver for Meritor Savings Bank

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Federal Deposit Insurance Corporation, as receiver for Meritor Savings Bank

3. Any parent corporation or any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me:

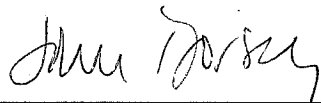
None

4. The names of all law firms and the partners and associates that appear for the party or amicus now represented by me in the trial court or are expected to appear in this court are:

John V. Thomas (FDIC Legal Division), Dorothy Ashley Doherty (FDIC Legal Division), John M. Dorsey III (FDIC Legal Division)

Dated: May 7, 2010

By:



John M. Dorsey III

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I. INTRODUCTION

The Federal Deposit Insurance Corporation (“FDIC”), acting in its capacity as receiver for Meritor Savings Bank, Philadelphia, Pa. (“Meritor”), respectfully submits this brief as *amicus curiae* in response to the Court’s Order of March 19, 2010.

II. QUESTIONS PRESENTED

1. Is the FDIC, in its capacity as receiver for Meritor, a non-appropriated funds instrumentality (“NAFI”)?
2. If FDIC as receiver is a NAFI, what is the effect upon the jurisdiction of the Court of Federal Claims over the claims asserted by the Roth intervenors?¹

III. SUMMARY OF POSITION

The brief of the United States focuses primarily on the NAFI issues raised directly by the derivative claims advanced by Plaintiff-Cross Appellant Slattery. FDIC as receiver concurs with the United States that FDIC in its corporate capacity is a non-appropriated funds instrumentality and that the Court of Federal Claims lacks jurisdiction to hear the claims asserted herein. The entire case should be dismissed on that basis. FDIC as receiver notes, however, that there is a second NAFI issue, one raised by the claims asserted by the intervening Roth

¹ FDIC as receiver adopts the arguments of the United States in response to the question, “What is the appropriate standard for determining whether an entity is a NAFI?” and therefore does not address that question herein.

shareholders (Plaintiff-Appellants). The Roth shareholders have asserted claims against the FDIC in its capacity as receiver of Meritor, and seek an order directing distribution of assets of the Meritor receivership to the Roth shareholders. The Court of Federal Claims dismissed the claim for lack of jurisdiction. The vacated panel decision of this Court would have reversed that dismissal and reinstated the Roth shareholder claims.

In this brief we explain how the nature and role of FDIC as receiver of failed financial institutions compel the conclusion that, in that capacity as well, FDIC is a NAFI and as such is not subject to the jurisdiction of the Court of Federal Claims.

IV. FACTUAL BACKGROUND

A. The Meritor receivership

The pre-failure history of the former Meritor is set forth in the En Banc Brief for Defendant-Appellant, The United States (April 30, 2010) at 2-3 (“US Br.”). The post-failure history of Meritor begins with the thrift’s closing by the Pennsylvania Secretary of Banking on December 11, 1992. *Slattery v. United States*, 35 Fed. Cl. 180, 182 (1996) (“Slattery I”).² That same day, the Pennsylvania Secretary of Banking appointed the Federal Deposit Insurance Corporation as receiver for Meritor. *Id.* The FDIC, acting in its receivership capacity,

² For ease of reference, FDIC as receiver adopts the short names used by the United States in its en banc brief to refer to the four published opinions of the Court of Federal Claims in *Slattery v. United States*, 93-CV-280.