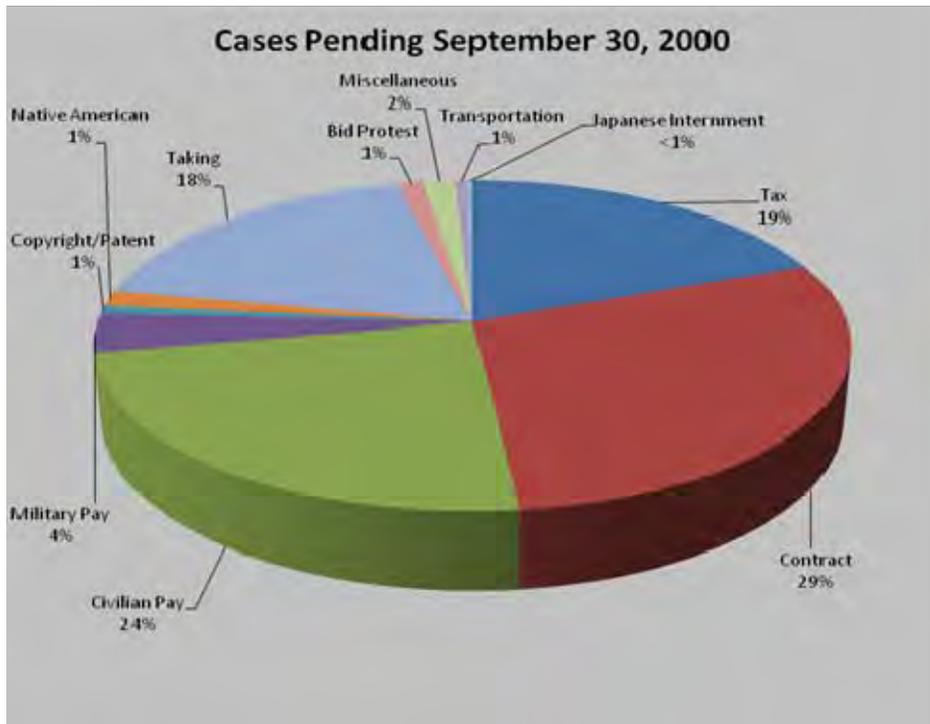


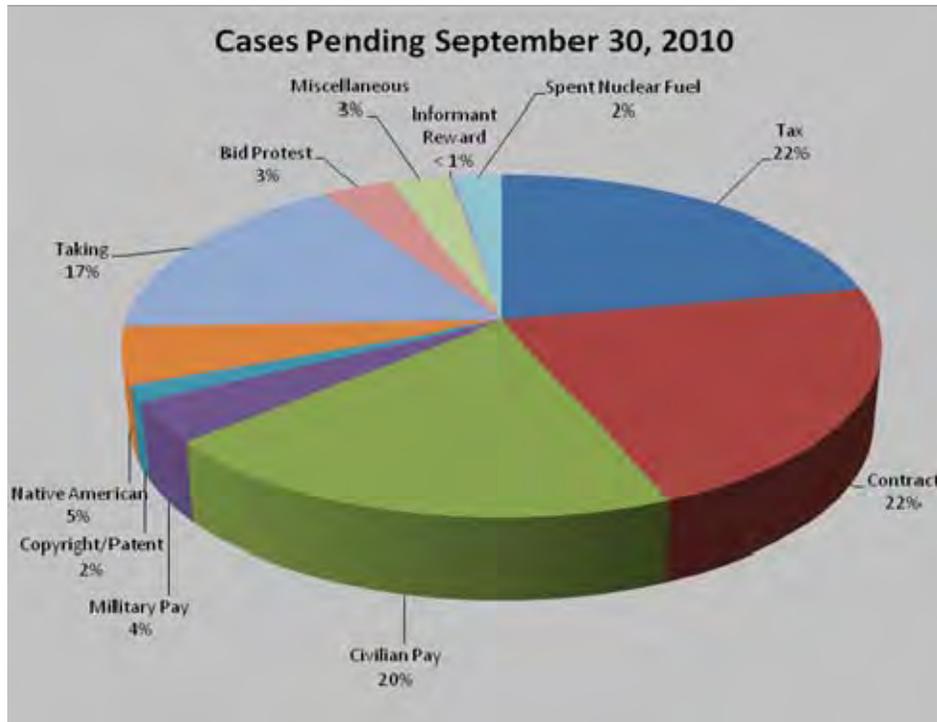
The United States Court of Federal Claims: Highlights for Participants in the 2012 Judicial Conference of the United States Court of Appeals for the Federal Circuit

The United States Court of Federal Claims welcomes the opportunity to provide participants in the 2012 Judicial Conference of the United States Court of Appeals for the Federal Circuit with information about the evolving composition of our docket, cases recently decided by or now pending in the Supreme Court of the United States that affect practice in our court, and an invitation to our 25th Annual Judicial Conference to be held at the National Courts Building in Washington on Thursday, November 25, 2012.

The Evolving Composition of the Docket of the U.S. Court of Federal Claims

In order to provide a glimpse of the evolving composition of our docket, we examine four pie charts. The two pie charts below show the composition of the docket of the U.S. Court of Federal Claims in 2000 and 2010.





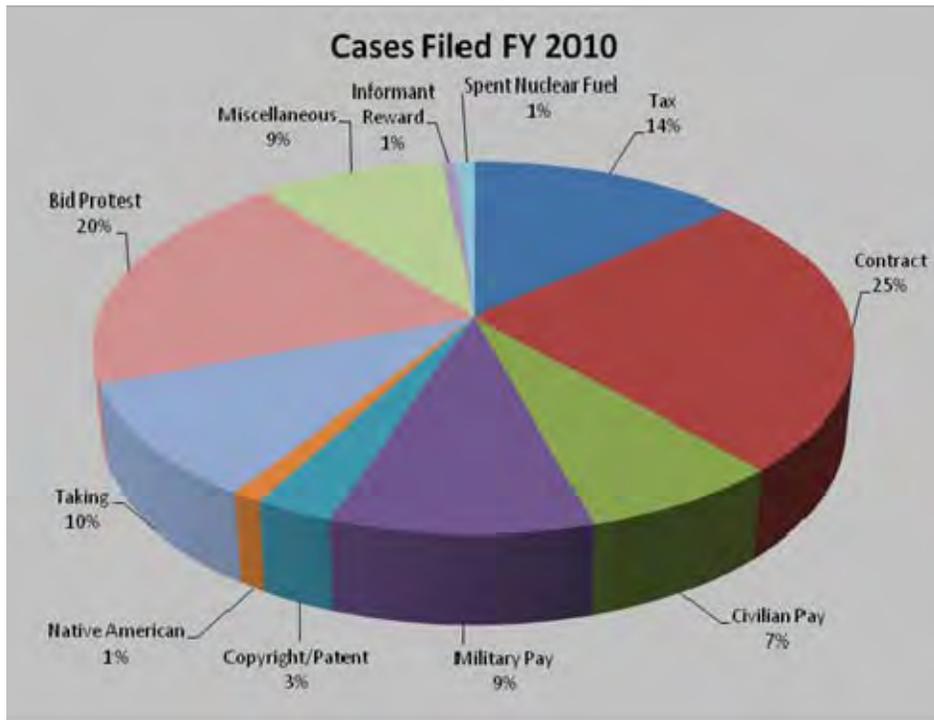
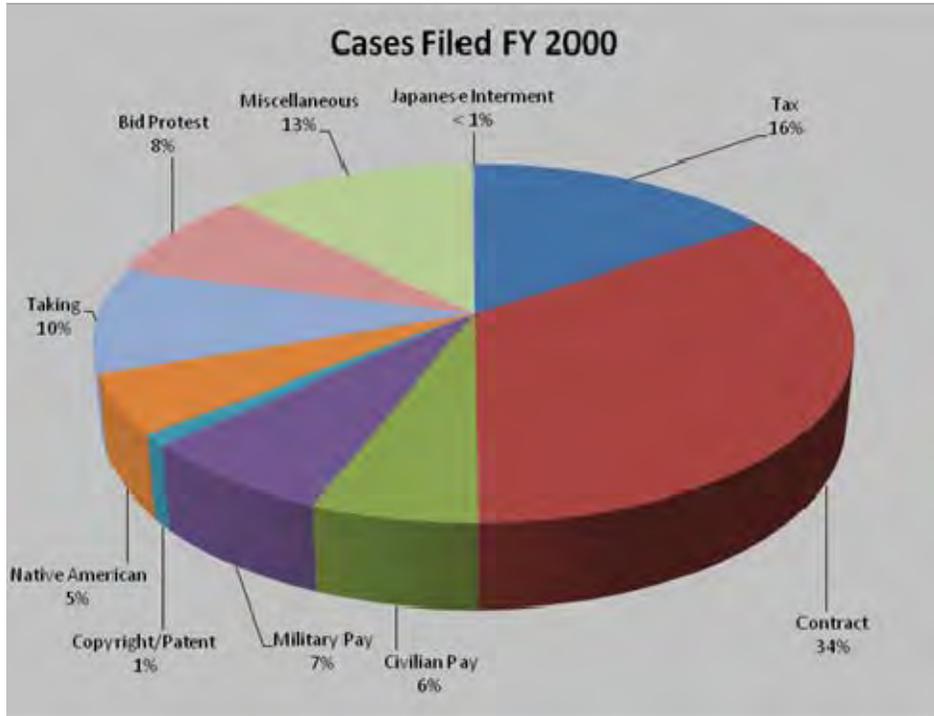
We look first at the cases pending at September 30, 2000. Cases pending includes all cases filed at any time on or before September 30, 2000 that then remained open. Four categories of cases--contract, civilian pay, tax and taking--made up 90% of the docket on September 30, 2000. One percent of the pending cases were bid protests.

You will notice that the lion's share, 89%, of the pending cases at September 30, 2010, as in 2000, are contract, civilian pay, tax and taking cases. The 9% decrease reflects reductions in contract and civilian pay cases. Increases appear in bid protest cases and Native American claims.

The cases pending pie chart reflects changes in categories of filings, but also reflects, indirectly, the time it takes to dispose of different types of cases.

For example, bid protests of procurements, 20% of the cases filed in FY 2010, were only 3% of the docket on the last day of FY 2010, reflecting a very rapid disposition. Taking cases, 10% of the cases filed in both FY 2000 and FY 2010, were 17% of the cases pending on the last day of FY 2010, reflecting what you know from the Court of Federal Claims Reports--that these cases are not usually disposed of without detailed briefing and opinions and may include extensive trials.

Changes in the docket of the court over the past decade appear in sharper relief in a comparison between cases filed in FY 2000 and cases filed in FY 2010 in the two pie charts below.



Notably, bid protest cases increased to 20% of new filings in FY 2010, compared with 8% of new filings in FY 2000, reflecting the fact that the U.S. Court of Federal Claims had become the only judicial forum in which to challenge procurements. At the same time, contract cases decreased to 25% of new filings in FY 2010, compared with 34% of new filings in FY 2000. Proportionate increases also appear in copyright and patent cases, military pay cases, and civilian pay cases.

The U.S. Court of Federal Claims at the U.S. Supreme Court

The United States Supreme Court issued three opinions in its 2010-2011 term addressing aspects of the jurisdiction of the Court of Federal Claims and will hear a case on the court's Fifth Amendment takings jurisdiction in the 2012-2013 term.

In Bruesewitz v. Wyeth, LLC, 131 S. Ct. 1068 (2011), the Court determined that the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to -34 (2006), preempts all design-defect claims against vaccine manufacturers brought by plaintiffs seeking compensation for injury or death caused by side effects of a vaccine covered by the Vaccine Act. The National Vaccine Injury Compensation Program, which is contained in Part 2 of the Vaccine Act, is located within the U.S. Court of Federal Claims and is administered by eight Vaccine Special Masters. The Bruesewitz decision is viewed as having protected the Vaccine Act as a sole remedy.

In United States v. Tohono O'Odham Nation (Tohono O'Odham), the Court considered the meaning of the words "for or in respect to the same claim" appearing in section 1500 of title 28 of the United States Code. Tohono O'Odham, 131 S. Ct. 1723, 1727-28 (2011). The Court determined that two suits are "for or in respect to the same claim," precluding the Court of Federal Claims' jurisdiction under section 1500, if they are based on substantially the same operative facts, regardless of the relief sought in each suit. Id. at 1731. Recent application by the Court of Federal Claims of the Tohono O'Odham case to pending cases includes United Keetoowah Band of Cherokee Indians in Oklahoma v. United States, No. 06-936L, 2012 WL 1005907 (Fed. Cl. Mar. 27, 2012) and Kaw Nation of Oklahoma v. United States, No. 06-934L, 2012 WL 639928 (Fed. Cl. Feb. 29, 2012).

In United States v. Jicarilla Apache Nation, the Court determined that the fiduciary exception to the attorney-client privilege does not apply to the general trust relationship

between the United States and Indian tribes. Jicarilla Apache Nation, 131 S. Ct. 2313, 2318 (2011). With respect to Indian breach of trust claims, the Court rejected the application of a common-law fiduciary exception to the attorney-client privilege to the trust relationship of the United States with Indian tribes and emphasized that the trust obligations of the United States are defined by statute rather than the common law. Id.

The Supreme Court recently agreed to hear a case involving the permanency of government action that is required to constitute a Fifth Amendment taking. In Arkansas Game and Fish Commission v. United States, 87 Fed. Cl. 594 (2009), rev'd, 637 F.3d 1366 (Fed. Cir. 2011), reh'g and reh'g en banc denied, 648 F.3d 1377 (Fed. Cir. 2011), cert. granted, No. 11-597, 2012 WL 1069212 (U.S. Apr. 2, 2012), the Court of Federal Claims found that deviations from a water management plan by the United States Army Corps of Engineers, deviations which caused increased flooding that damaged and destroyed acres of timber, was a compensable taking rather than a tort. Ark. Game & Fish Comm'n, 87 Fed. Cl. at 621-24. The Federal Circuit disagreed, holding that “because the deviations were by their very nature temporary,” they “cannot be ‘inevitably recurring,’” and therefore no taking occurred. Ark. Game & Fish Comm'n, 637 F.3d at 1376. The Supreme Court is now poised to decide “[w]hether government actions that impose recurring flood invasions must continue permanently to take property within the meaning of the Takings Clause.” Pet. for a Writ of Cert. at 1, Ark. Game & Fish Comm'n v. United States, No. 11-597, 2012 WL 1069212 (U.S. Apr. 2, 2012), 2011 WL 5593237, at *i.

The 25th Annual Judicial Conference of the U.S. Court of Federal Claims

Participants in the 2012 Judicial Conference of the United States Court of Appeals for the Federal Circuit are cordially invited to attend the 25th Annual U.S. Court of Federal Claims Judicial Conference on Thursday, November 15, 2012. The theme of this year's conference is “Growing Areas of Practice in the Court of Federal Claims.” The Conference and luncheon will be held in the National Courts Building, with a reception at the neighboring Decatur House to follow.

The Conference will kick off with a “Meet the Circuit Judges” panel with the Honorable S. Jay Plager as the moderator for a panel that will introduce the Circuit's newest judges--Judges O'Malley, Reyna, and Wallach--to the Court of Federal Claims bench and bar. The General Session will consist of panels focusing on the evolution of claims brought before the Court of Federal Claims in the jurisdictional areas of

government contracts, military pay, and tax, while also providing practice tips that will be useful to all practitioners. A bench and bar panel will consider the ethical concerns raised by class and collective actions brought before the court, for example, the rapidly increasing number of Rails-to-Trails cases. A concurrent Vaccine Session will focus on hot topics before the Office of Special Masters, including implementation of proposed Table amendments following last year's release of the Institute of Medicine Report on Vaccine Safety and proposed changes to the Vaccine Practice Guidelines.

For up-to-the-minute information regarding the 25th Annual U.S. Court of Federal Claims Judicial Conference, including information about registration and the availability of CLE credit, please visit <http://www.uscfc.uscourts.gov/conferences/2012>. We hope you will join us.

THE WINSTAR CASES – LESSONS LEARNED

by

Charles J. Cooper
Cooper & Kirk, PLLC

2012 Federal Circuit Judicial Conference
Court of Federal Claims and Board of Contract Appeals
Breakout Session

May 17, 2012

I. BACKGROUND

A. The *Winstar* Cases

1. The so-called *Winstar* cases arose out of the savings-and-loan crisis of the 1980s. The insolvency of a multitude of savings and loan institutions confronted FSLIC with deposit insurance liabilities that threatened to exhaust its insurance fund. Realizing that FSLIC lacked the funds to liquidate all of the failing thrifts, the FHLBB chose to avoid the insurance liability by encouraging healthy thrifts and outside investors to take over ailing institutions in a series of “supervisory mergers.” In order to induce financially healthy thrifts and other investors to acquire insolvent thrifts, federal regulators made certain contractual promises regarding the regulatory capital treatment of “goodwill” and other items booked in connection with the acquisition transactions. In the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), Congress disallowed the regulatory capital treatment of this “supervisory goodwill” and other items. FIRREA had the result of wiping billions of dollars of regulatory capital off of thrifts’ books overnight, thrusting many thrifts that had relied on the government’s promises into regulatory capital non-compliance. Many institutions failed as a result, and were seized by the regulators, while many of the thrifts that survived the Government’s breach were severely damaged.
2. Starting in 1989, a number of thrifts, thrift holding companies, shareholders, and investors brought suit against the United States for the abrogation of these regulatory capital promises. These suits proceeded on various theories, including breach of contract, due process, and takings.
3. In a trio of lead cases – *Winstar*, *Statesman*, and *Glendale* – both the Court of Federal Claims and the Court of Appeals for the Federal Circuit, sitting *en banc*,

held that the regulatory capital promises made by the regulators were contractual in nature and that the Government had breached those contracts in the wake of FIRREA; various defenses raised by the United States were rejected.

4. The Supreme Court then granted the Government's petition for *certiorari* in all three cases. On the last day of the Court's October 1995 term, the Court affirmed the Federal Circuit's liability ruling. Justice Souter's plurality opinion (for himself and Justices Stevens, Breyer, and O'Connor) framed the relevant issue and its resolution as follows:

The issue in this case is the enforceability of contracts between the Government and participants in a regulated industry, to accord them particular regulatory treatment in exchange for their assumption of liabilities that threatened to produce claims against the Government as insurer. Although Congress subsequently changed the relevant law, and thereby barred the Government from specifically honoring its agreements, we hold that the terms assigning the risk of regulatory change to the Government are enforceable, and that the Government is therefore liable in damages for breach.

United States v. Winstar Corp., 518 U.S. 839, 843 (1996). Justice Scalia, writing for himself and Justices Kennedy and Thomas, disagreed with aspects of the plurality's reasoning, but "agreed with the principal opinion that the contracts at issue in this case gave rise to an obligation on the part of the Government to afford respondents favorable accounting treatment, and that the contracts were broken by the Government's discontinuation of that favorable treatment, as required by FIRREA." *Id.* at 919 (Scalia, J., concurring in the judgment). Seven justices therefore agreed that the Government had entered into enforceable contracts, had breached those contracts, and was liable in damages for that breach.

B. The Case Management Challenge

1. Even before the Supreme Court ruled in *Winstar*, it was apparent that these cases presented "significant and unique case management problems." *California Federal Bank v. United States*, 39 Fed. Cl. 753, 755 (1997) ("*CalFed*").
 - a. Scores of cases had been filed in the Court of Federal Claims while *Winstar* worked its way through that Court, the Federal Circuit, and the Supreme Court. Most but not all of those cases had been assigned, under the CFC's related case rule, to Chief Judge Loren Smith (the author of *Winstar*), and had been stayed pending the resolution of *Winstar*. Many more cases were filed after the Supreme Court's decision affirming liability. Ultimately, more than 120 so-called "*Winstar*-related" cases were filed. *CalFed*, 39 Fed. Cl. at 755. These cases "involve[d] several hundred mergers and

hundreds of institutions.” *Id.*

- b. While the cases shared a similar core fact pattern, they did not present an opportunity for a “cookie cutter” solution. As Chief Judge Smith recognized, the cases “were not identical, and resolution of all of the cases would probably not turn on a single issue of law the determination of which would dispose of all the stayed cases. Rather, the cases involved individually negotiated contracts with unique fact patterns.” *Id.*
 - c. Coordinated treatment of the cases was also potentially problematic in light of the fact that the cases “were being handled by a large number of law firms and several hundred attorneys on the plaintiffs’ side.” *Id.*
 - d. In addition, the stakes were huge, as “[c]ollectively plaintiffs in these cases [were] seeking damages in the range of tens of billions of dollars.” *Id.*
 - e. The cases also presented some unique and complex issues, including the dual role of the FDIC. When thrifts failed due to capital non-compliance (including non-compliance that resulted from the Government’s breach of its regulatory capital promises), the Resolution Trust Corporation was appointed as receiver for the thrift. The FDIC later succeeded the RTC as receiver. Following the Supreme Court’s decision, the FDIC as receiver moved to intervene as a plaintiff in more than 40 cases involving failed thrifts. *Id.* at 755-56. Since the FDIC in its “corporate” capacity was also assisting the Department of Justice in its defense of the cases and, as manager of the FSLIC Resolution Fund created by FIRREA, was also potentially on the hook for any damages awarded, in those cases involving failed thrifts, the FDIC was effectively a party on both sides of the “v” in these “failed thrift” cases.
 - f. Finally, the Supreme Court in *Winstar* addressed only liability, not damages. Thus, even if its decision on liability could be easily applied to the remaining cases, “there would possibly need to be additional, and presumably fact intensive, litigation to resolve damages issues.” *Id.* at 755.
2. Chief Judge Smith recognized that these and other factors “argued for adopting some form of coordinated case management procedure to deal with these cases, at least initially, as a common group.” *Id.* at 756. There were two goals for such a case management procedure:
 - a. The first goal “was to insure that the *Winstar*-related cases could be managed as efficiently as possible with a fair opportunity for all plaintiffs to present their cases while minimizing the onerous litigation and discovery burdens facing the government.” *Id.*
 - b. The second goal “was to insure that the *Winstar*-related cases received an

appropriate share of the court's resources, but did not unduly burden the court's ability to manage the other cases on the docket." *Id.*

3. Prompted in part by a motion by the Government seeking the adoption of special case management procedures in these cases, Chief Judge Smith held a series of hearings in 1996 in an attempt to determine whether a coordinated approach to the cases could be developed.
 - a. An informal coordinating committee was set up by the plaintiffs, which then worked with DOJ and the Court to come up with a case management process that would establish common and streamlined procedures in the cases and establish a mechanism for common issues to be adjudicated.
 - b. After numerous hearings, negotiating sessions, and exchanges of draft orders, by September 1996 the parties had established a case management regime.

II. OVERVIEW OF WINSTAR CASE MANAGEMENT REGIME

I. Key Provisions of Important Case Management Orders

1. Omnibus Case Management Order ("OCMO") (Sept. 18, 1996) (Attachment 1)
 - a. Managing Judge: All *Winstar*-related cases were assigned to Chief Judge Smith for case management purposes
 - b. Roles of other judges: The OCMO authorized the Managing Judge to assign "common issues" to "Issue Judges" for resolution of those issues, and also authorized him to appoint a judge or a special master to serve as a "Discovery Judge" to handle discovery issues and resolve discovery disputes. Finally, the OCMO authorized the Managing Judge to assign individual cases to trial judges for trial. OCMO at 2.
 - c. Coordinating Committees:
 - i. The OCMO created a three-attorney (later expanded to four) Plaintiffs' Coordinating Committee ("PCC") to serve "as primary spokespersons for plaintiffs on matters relating to the administration of *Winstar* cases." OCMO at 3. The PCC was given authority to "bind all plaintiffs with respect to procedural matters," but had no authority to bind plaintiffs regarding substantive matters. *Id.* In addition, the OCMO made clear that plaintiffs who did not agree with a position taken by the PCC would have an opportunity to present their views. *Id.*

- ii. The OCMO also created a three-attorney Defendant’s Coordinating Committee with authority to bind the Government with respect to procedural matters. *Id.* at 4.
 - iii. The coordinating committees were given the charge of developing and implementing “a Master Litigation Plan, which will include a comprehensive discovery plan and will address such matters as the resolution of common issues, dispositive motions, and trials.” *Id.*
- d. Core Document exchange: The OCMO required the parties, without awaiting discovery requests from their opponents, to exchange certain categories of “core” documents that pertained to the acquisition/merger transactions at issue. *Id.* at 5-6.
- e. “Short Form” Summary Judgment process:
- i. The OCMO established a procedure and suggested format for the filing and briefing of so-called “short form” summary judgment motions following the exchange of core documents. This procedure was designed to allow the parties and the Court to quickly determine whether the alleged contracts in a case were akin to the contracts adjudicated in the *Winstar* trio of cases. As Chief Judge Smith observed, this procedure was “designed to streamline the process for identifying cases where liability was effectively determined by the Supreme Court’s decision in *Winstar*.” *CalFed*, 39 Fed. Cl. at 757.
 - ii. The procedure worked as follows:
 - 1) The plaintiff would file a short-form motion, following a suggested format provided in the OCMO, limited to two liability issues: (1) whether a contract existed; and (2) whether the Government had “acted inconsistently” with that contract.
 - 2) “In light of the additional burdens that defendant might face as a result of responding to a multitude of these summary judgment motions,” *CalFed*, 39 Fed. Cl. at 757, the Government was allowed additional time than what was provided in the Court’s rules to respond, and was allowed to split its response into two separate documents.
 - a) An initial “60-day response” was required to address the two liability issues addressed in the summary judgment motion.
 - b) A subsequent “120-day” response was required to identify any defenses the Government knew of or had reason to know of with respect to the two liability issues.

- iii. In *Cal Fed*, Chief Judge Smith outlined how he hoped this short form summary judgment process would work:

It was the court's hope that the process would work as follows: plaintiffs who believed that the *Winstar* decision controlled would file the short-form motions which provided the relevant documentation and cited the appropriate authority. Defendant would have ample time to review this documentation and the law to determine whether defendant was liable. If defendant determined that *Winstar* governed and that liability was established, then those cases could leave the liability track and move to the damages track and ultimate resolution. The court could then work with the parties to develop procedures to resolve other issues not resolved by the *Winstar* liability decisions.

CalFed, 39 Fed. Cl. at 757. This passage also accurately describes how the PCC and the plaintiffs' community envisioned the role of the short form summary judgment procedure.

- f. Common Issues

- i. The OCMO required the coordinating committees to meet periodically to identify common issues that arose in multiple cases and that could be resolved on a common basis, and authorized them to prepare suggested procedures to govern the resolution of such common issues.
- ii. The OCMO identified two such common issues at the outset: (1) the Government's effort to dismiss, on statute of limitations grounds, those cases filed after August 1995 (*i.e.*, the sixth anniversary of the enactment of FIRREA); (2) the FDIC-Receiver's motion, in 40-plus cases involving seized thrifts, to intervene as the successor-in-interest of the failed thrifts and to dismiss the private plaintiffs who had brought those cases. The OCMO set briefing schedules for these two issues.

- g. Master Litigation Plan and "Priority" Cases

- i. The OCMO directed the coordinating committees to attempt to reach agreement on a Master Litigation Plan that would "govern all further proceedings," including "procedures for resolving common issues ..., dispositive motions, trials, discovery schedules, protocols for depositions, document production, expert witnesses, document numbering systems, joint or uniform discovery requests from plain-

tiffs, master protective order, and other matters.” OCMO at 9.

- ii. The OCMO also identified 13 “priority” cases, in which the plaintiffs had agreed to forego extensive discovery against the Government in return for priority in the scheduling of cases for trial. The OCMO contemplated that the first “priority” case would go to trial within four months of the completion of the damages trials in the *Glendale* and *Statesman* cases. OCMO, Appendix D.

2. Procedural Order No. 1: Master Litigation Plan (“MLP”) (Aug. 11, 1997) (Attachment 2)

- a. The MLP applied to all *Winstar*-related cases except the original test cases – *Glendale* and *Statesman* (the *Winstar* case itself was eventually settled) – and the “priority” cases.

b. “Common” Discovery

- i. The MLP provided for initial exchanges of certain categories of documents in addition to the “core” documents discussed in the OCMO. MLP at 2.

- ii. The MLP also provided for a period of “common discovery” in which the Government would produce to the PCC a set of defined “common documents” pertaining to policies, guidelines, procedures, and analyses pertaining to supervisory mergers and acquisitions during the 1980s. MLP at 3. The PCC would then be responsible for making these common documents available to other plaintiffs’ counsel. The MLP also provided for the propounding of common interrogatories to the Government and for the conduct of common discovery depositions of current and former Government employees, in accordance with the provisions of a different case management order, the Discovery Plan (addressed below).

c. Case-Specific Fact Discovery

- i. The MLP contemplated that non-priority cases would be released for “case-specific” fact discovery in “waves” of 30 cases each, with the first wave commencing in January 1998 and the remaining three waves commencing in January 1999, January 2000, and January 2001, respectively. (These commencement dates for the later waves were later pushed back). Cases were identified for inclusion in particular waves by reference to their date of filing in the CFC, although plaintiffs were given the opportunity to “opt out” of a particular wave. MLP at 4.

- ii. Case-specific fact discovery for each wave was originally required to

be completed within one year. These deadlines for the completion of fact discovery were later extended.

- iii. The parties in each discovery wave were directed to make good faith efforts at coordinating depositions in order to minimize the number of times individual fact witnesses would be deposed.
 - d. Expert Discovery -- The MLP provided that ordinarily expert discovery would not commence until case-specific fact discovery was completed. MLP at 5.
 - e. Procedures for other motions: The MLP also included provisions establishing procedures and deadlines for the briefing of dispositive motions (other than the short-form summary judgment motions governed by the OCMO), and the identification and resolution of additional common issues. MLP at 6-8.
 - f. Trial Assignment: The MLP contemplated that cases would become eligible for trial, and for assignment to a trial judge, 60 days after the completion of case-specific fact discovery. MLP at 9.
3. Procedural Order No. 2: Discovery Plan (“DP”) (Aug. 11, 1997) (Attachment 3)
 - a. The DP applied to all *Winstar*-related cases except *Glendale*, *Statesman*, and the “priority” cases. DP at 1-2.
 - b. The DP established additional conventions and procedures for (1) common discovery (including production of common documents, common interrogatories and requests for admissions, and common discovery depositions); (2) case-specific discovery (including initial disclosures, requests for documents, interrogatories, requests for admissions, and depositions); and (3) expert discovery (including expert reports and expert depositions). DP at 4-10.
 - c. The DP provided that all discovery motions would be filed with and resolved by the Discovery Judge rather than the Managing Judge, Issue Judges, or individual trial judges. It also authorized the parties or the Discovery Judge to bring discovery disputes that appeared to raise generic issues that may be susceptible to common treatment to the attention of the coordinating committees, so that they could consider whether the dispute should be subject to common issue treatment. DP at 10.
 4. Master Protective Order (Nov. 22, 1996) and Amended Master Protective Order (“AMPO”) (April 14, 1998) (Attachment 4)
 - a. The AMPO established procedures and conventions for the production and handling of “confidential” materials (most materials produced in discovery)

and “attorneys only materials” (especially sensitive materials pertaining to thrifts other than the plaintiffs, which with some exceptions could be reviewed only by litigating attorneys and their agents, and not by client officials).

- b. The AMPO also established procedures and conventions for the handling of materials for which privilege was claimed and for the resolution of disputes regarding the withholding of such materials.

5. Priority Cases Pretrial Scheduling Order (April 2, 1997) (Attachment 5)

- a. This order set tentative trial commencement dates (beginning in September 1997 and continuing through February 1998) for the 12 remaining “priority” cases.
- b. The order also provided for discovery by the Government and the FDIC, and by the plaintiffs against third parties (but not against the government, as the plaintiffs had waived any such discovery in return for “priority” treatment).
- c. The order also included provisions establishing procedures and deadlines for expert discovery and other pretrial filings.

II. Other Case Management Efforts

1. Special Master

- a. Two years into life under the OCMO, Chief Judge Smith, noting the “significant work impact” the *Winstar* cases had had on his docket as the Managing Judge, determined that a full-time special master dedicated to the cases was needed.
- b. In August 1998, the Chief Judge appointed William Schulz as the Special Master, to “serve as long as the need exists, but not less than one year,” and to “perform duties at the direction of the managing judge.” The Special Master’s salary was to be paid by the parties: 40% by the plaintiffs, 40% by the Government, and 20% by the FDIC-Receiver.
- c. The Government resisted the appointment of the Special Master and moved for reconsideration of the order appointing him. In an order dated September 4, 1998 (Attachment 6), Chief Judge Smith denied the Government’s motion. Chief Judge Smith clarified that the Special Master would perform “a management and administrative, not a judicial, role” akin to the work Mr. Schulz had already been performing as Chief Judge Smith’s law clerk. The Chief Judge also elaborated on the need for a special master in the context of the *Winstar*-related cases:

It is clearly true that the appointment of a special master is the

exception, not the rule. . . . However, the situation that requires this action goes beyond the exception to the extraordinary.

In the 120 plus *Winstar* cases the government and the plaintiffs have each spent in the tens of millions of dollars on the direct litigation of these cases. The expenditures in the future on each side are likely to reach past the hundred million dollar threshold, if they have not already done so. . . .

Up until the present time the court has adequately addressed this exceptional litigation with no additional resources. This has been a tribute to the court staff. However, the passage of FIRREA, which the Supreme Court found breached at least some of these contracts, occurred in 1989, almost a decade ago. The effect of these cases has begun to take its toll on the resources of the management system. . . .

The case management system . . . has apparently worked well. It has saved each side countless dollars, and duplicative resources. It is also saving valuable time. However, that management system has required additional court resources for which there is no traditional source. Up to this point those resources have come from the court's regular staff. This has had an unfair and disproportionate impact on non-*Winstar* cases. To avoid this result in the future the court has turned to the special master approach, rather than rethinking the original case management system.

- d. The Government sought a writ of mandamus from the Federal Circuit directing the CFC to vacate the order appointing the special master. The court of appeals denied the Government's petition, concluding that "the large number, national importance, and time-consuming and resource-draining nature of the pre-trial phases of the interrelated cases pending here is sufficiently exceptional to warrant the appointment of a special master familiar with their complex procedural posture for the limited management and administrative functions described in the [CFC's] orders." *In re United States*, 185 F.3d 879 (Fed. Cir. Dec. 23, 1998) (table).

2. ADR Efforts

- a. Earlier in 1998, Chief Judge Smith issued another order commenting on the progress of case management efforts to that time and attempting to enhance its efficiency. In a March 3, 1998 order (Attachment 7), the Chief Judge ordered the coordinating committees to designate individuals to meet to discuss and explore "ways in which alternative dispute resolution techniques

may be employed to settle a significant portion of these cases.” The order also noted that the Chief Judge had asked Judge Margolis to meet with the designated individuals to facilitate the work of the ADR group.

- b. In describing the considerations that had led him to issue this order, Chief Judge Smith again stressed the enormous resources being consumed by the *Winstar*-related cases, even under the auspices of the case management process:

The court, after long consideration of the plaintiff’s and defendant’s cases in *Glendale* . . . and the general progress of the 120-plus *Winstar* cases, is deeply concerned about the enormous litigation costs these cases pose for both the plaintiffs and the taxpayers. These costs will clearly be in the hundreds of millions of dollars. The best efforts of the parties will require litigation of these cases well into the first decade of the 21st century. The court feels, in the spirit of comments it made in [*CalFed*], a moral obligation to attempt to avert this colossal expenditure of resources and talent.

- c. Under Judge Margolis’s auspices, a number of *Winstar* cases were chosen for participation in informal ADR efforts. With Judge Margolis’ help, a handful of these cases were settled.

III. THE WINSTAR CASE MANAGEMENT EXPERIENCE – WORTHWHILE BUT DISAPPOINTING

A. General Thoughts

1. There is no doubt that the parties and the Court engaged in the process of devising a case management system for the *Winstar*-related cases in good faith and with the sincere hope and expectation that they could come up with a system that could reduce litigation inefficiencies and conserve the resources (including the time) of all concerned.
2. There is also no doubt that in some respects the *Winstar* case management process did achieve these goals, and that it would probably have been more time consuming and expensive, and undoubtedly more chaotic, to litigate the cases without the case management regime put in place, under Chief Judge Smith’s auspices, under the OCMO and follow-on orders.
3. However, there is also no doubt that the case management regime did not accomplish what the plaintiffs’ community and the Court hoped it would achieve: a procedure that would relatively easily identify those cases in which the basic liability evidence was on all fours with *Winstar* and in which the Government’s

breach of contract liability would therefore be conceded or quickly established, as well as a system that would allow the efficient resolution of basic damages issues. It was hoped that in these ways, the case management process would lead to the development of guidance as to the resolution of basic liability and damages issues that would then foster the settlement of cases, or failing that, their quick resolution.

4. For the most part, that goal was not realized. Aside from a quick flurry of a handful of settlements early in the process, the case management regime did not foster many settlements, and while most *Winstar* cases may have been litigated more quickly and efficiently than they would have been absent the OCMO, the case management process did not achieve the cost savings and efficiencies that had been hoped. Few of the members of the plaintiffs' community would have predicted that in 2012 – more than 15 years after the adoption of case management procedures – there would still remain a handful of *Winstar* cases on both the CFC's and the Federal Circuit's dockets.

B. The (Qualified) Successes

1. Early Common Issue proceedings

- a. The OCMO identified two issues that were amenable to resolution on a common issue basis: (1) whether the statute of limitations barred claims filed more than six years after the enactment of FIRREA; and (2) whether the FDIC-Receiver would be allowed to intervene as a plaintiff in cases involving failed thrifts and remove the private plaintiffs who had brought those claims. Those issues were actually resolved fairly quickly and efficiently pursuant to the common issue procedures established in the OCMO and associated orders.
- b. The statute of limitations issue was addressed by Judge Wiese in a January 1997 opinion. *Plaintiffs in Winstar-Related Cases v. United States*, 37 Fed. Cl. 174 (1997).
- c. The FDIC-Receiver intervention issue was addressed by Judge Turner in a March 1997 order granting the FDIC's motion to intervene in 43 cases but denying the FDIC's motion to completely substitute itself for the shareholder plaintiffs. Judge Turner later issued an opinion providing further explanation of the rationale underlying his 1997 order. *Plaintiffs in All Winstar-Related Cases at the Court v. United States*, 44 Fed. Cl. 3 (1999).

2. Common Discovery procedures

- a. The procedures outlined in the OCMO, MLP, and DP providing for the production by the Government of "common" documents, the propounding of common interrogatories and requests for admissions, and the taking of

common depositions of some Government witnesses undoubtedly saved resources, especially on the Government's part.

- b. Along similar lines, the procedures and conventions established in the AMPO for the production and handling of confidential materials and the resolution of privilege disputes, while perhaps needlessly convoluted, likely helped achieve more uniform treatment of confidential materials and more efficient resolution of some discovery disputes.
- c. The appointment of a single judge as a "discovery judge" likely also led to more consistent treatment and timely resolution of discovery disputes.

3. Early ADR proceedings

- a. As noted, a handful of cases were settled under the auspices of the informal ADR procedures overseen by Judge Margolis.

C. The (Qualified) Failures

1. The "Short Form" summary judgment process

- a. As noted, this process was envisioned as a means of quickly identifying cases in which the basic liability questions (*i.e.*, existence of contract and Government actions that were "inconsistent" with that contract) were directly governed by the *Winstar* decision, so that the parties in those cases could proceed more quickly to the damages stage in the litigation. It did not achieve this goal.
- b. To be sure, some plaintiffs whose transactions and transaction documents were *not* closely similar to the transactions and documents in the *Winstar* triumvirate of cases nevertheless tried to shoehorn their cases under the *Winstar* rubric.
- c. But a far larger aspect of the problem, in the view of the plaintiffs' community, was that the Government in numerous cases frustrated the short-form summary judgment process by refusing to concede that many transactions could not be meaningfully distinguished from *Winstar*. As a result, out of the numerous "short form" summary judgment motions that were filed, the Government conceded the existence of a contract and actions "inconsistent" with that contract in *only one case*. In all other cases, the Government vigorously contested liability, thus requiring the Court and the parties to devote significant resources to resolving many liability questions that were materially indistinguishable from, and thus directly governed by, the controlling *Winstar* precedent.
- d. Along similar lines, the Government also resisted the identification by the Court of "common" liability issues raised by its responses to the short form

motions that could be resolved on a common basis in a single proceeding.

2. Damages proceedings

- a. The OCMO and associated orders devoted considerably more thought to the resolution of liability issues than to procedures that could streamline the litigation of damages issues. This was in part due to the belief in the plaintiffs' community that while the facts underlying the damages calculations in these cases might be relatively complex, the legal principles governing the calculation of contract damages were both straightforward and well-settled (especially when contrasted to the complex and novel liability questions addressed and resolved by the Supreme Court in *Winstar*). The plaintiffs also believed that the upcoming damages trials in two of the original three *Winstar* cases – *Glendale* and *Statesman* – would provide templates for the calculation of damages in cases involving both thrifts that survived (*Glendale*) and thrifts that failed (*Statesman*).
- b. The plaintiffs' hopes that the damages questions would be resolved in a relatively quick and efficient manner proved to be quite naïve. The *Glendale* damages trial lasted for more than a year. (*Statesman* settled near the end of trial). *Glendale* and subsequent damages decisions often turned on unique and complex facts. Many damages decisions, both at the CFC and Federal Circuit level, appeared to reach results that were difficult to reconcile with one another. And the damages claimed in many cases were so substantial that the Government had every incentive to contest virtually every facet of the plaintiffs' damages case.
- c. In addition, the Government's claimed immunity from liability for the payment of prejudgment interest on contract damages awards resulted in an enormous economic benefit to the Government and an enormous economic cost to the plaintiffs, especially as the litigation dragged on. As Judge Smith recently observed in a damages opinion issued in 2011 – 22 years after the enactment of FIRREA – “this Court has said in numerous opinions with regard to the *Winstar* cases [that] the real injustice of this opinion is that it does not include any interest or attorneys' fees award. ... In dollar terms Plaintiffs will receive about one third of the value of what they have lost by the breach. This is unfair and unjust but the Congress, not the Court, must address this injustice.” *AmBase Corp. v. United States*, 100 Fed. Cl. 548, 578-79 (2011).

3. Settlement activities

- a. For many of the reasons discussed above, and despite the handful of settlements in the early stages of the informal *Winstar* ADR program established in 1998, the case management regime did not lead to the creation of conditions that resulted in settlements.

IV. LESSONS LEARNED

- A. **Pursue Case Management Efforts Wherever Possible.** Case management efforts in complex multiple-case litigation scenarios such as the *Winstar*-related cases are worthwhile, and can lead to substantial savings in resources and time.
- B. **Be Realistic About What Such Efforts Can Achieve.** Case management efforts can lead to litigation efficiencies, but they will not, on their own, overcome the dynamics that often work against the efficient resolution of complex damages litigation against the Government.
1. Case management efforts will rarely address the conditions that can incentivize parties to litigate, and relitigate every issue (*e.g.*, size of the litigation stakes, the unavailability of prejudgment interest).
 2. Similarly, case management efforts cannot by themselves remove uncertainties and inconsistencies in underlying substantive law that can sometimes incentivize parties in each individual case to fight to the bitter end. This obstacle to settlement is particularly daunting when inconsistencies in the underlying substantive law are created by conflicting decisions within the related cases themselves.
- C. **Preserve Flexibility to Address Unanticipated Issues.** Whatever case management regime is adopted should provide for procedures to address issues that come up that may not have been anticipated at the outset. Depending on the nature of the litigation and the number of lawyers and judges involved in the litigation effort, it may be useful to provide for periodic meetings between the parties' coordinating committees and hearings with the judge(s) to allow for discussion of new issues that may be coming down the pike. Such meetings and hearings often proved quite beneficial in the *Winstar* effort.

Attachment 1

In the United States Court of Federal Claims

PLAINTIFFS IN ALL WINSTAR-RELATED
CASES AT THE COURT,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Nos. 90-8 C, et al.
(Chief Judge Smith)

OMNIBUS CASE MANAGEMENT ORDER

Pursuant to the Rules 1, 16, 77 and 77.1 of the United States Court of Federal Claims, the Court ORDERS as follows:

1. Scope

a. This Order applies to all Winstar-related cases ("Winstar cases" or "cases"), including any claims, special pleas in fraud, defenses, affirmative defenses, setoffs, counterclaims, or any other issues raised in those cases, except that this Order does not apply to Glendale Federal Bank, FSB v. United States, No. 90-772C, or Statesman Holding Corp., et al. v. United States, No. 90-773C.

b. This Order is intended to supplement, and not to replace, any Rule of the United States Court of Federal Claims, except as inconsistent with this Order.

2. Administration

a. Reassignment Of All Winstar Cases

In order to provide consistent treatment of all matters related to Winstar cases, to conserve the resources of the Court and the parties, and for the efficient administration of justice, all Winstar cases have been reassigned to Chief Judge Smith, who will serve as the Managing Judge.

b. Managing Judge

The Managing Judge will administer this Order and will be responsible for all matters relating to the management of Winstar cases, including, unless otherwise assigned, the resolution of procedural matters upon which the Coordinating Committees are unable to agree.

c. Issue Judges, Trial Judges, Discovery Judges And Special Masters

The Managing Judge may assign specific matters or cases to another Judge or Judges of this Court for resolution. For example, the Managing Judge may assign any issue common to a significant number of cases to another Judge ("Issue Judge"). The Issue Judges will allow all interested parties to participate in the resolution of common issues and will set the briefing and oral argument schedules. Additionally, the Managing Judge may assign cases to other Judges ("Trial Judges") for trial. The Managing Judge also may assign discovery issues to a "Discovery Judge" or to a special master.

d. Status Conferences:

The Managing Judge may schedule status conferences as necessary with the parties' Coordinating Committees. These status conferences will be open to the public and on the record.

e. Certain Pretrial Procedures Suspended

The requirements for Early Meeting Of Counsel and for Joint Preliminary Status Reports set forth in Appendix G of the Rules are suspended for all Winstar cases.

3. Organization of the Parties

a. Plaintiffs

i. The plaintiffs will designate three attorneys to serve as a Plaintiffs' Coordinating Committee. The members of the Plaintiffs' Coordinating Committee will serve as primary spokespersons for plaintiffs on matters relating to the administration of Winstar cases. The Plaintiffs' Coordinating Committee will have the authority to bind all plaintiffs with respect to procedural matters concerning pleadings, motions, discovery, trials, and related scheduling. In situations where the Committee is unable to speak on behalf of all plaintiffs, the Committee may speak to the Court on behalf of the plaintiffs who agree with the Committee's position. In these situations, the Court will provide an opportunity for other plaintiffs to present their differing views to the Court.

ii. Communications among plaintiffs' counsel (except communications with the Federal Deposit Insurance Corporation, to the extent that it is or may seek to participate as a plaintiff ("FDIC as receiver")), will be protected by a joint attorney-client privilege.

iii. The FDIC as receiver, to the extent that it is or may seek to participate as a plaintiff in any Winstar case, will designate one or more attorneys to represent it in all proceedings.

b. Defendant

The defendant will designate three attorneys to serve as a Defendant's Coordinating Committee. The Defendant's Coordinating Committee will have the authority to bind the defendant with respect to procedural matters concerning pleadings, motions, discovery, and related scheduling, except to the extent that any governmental entity is or may seek to participate as a plaintiff.

c. Functions of Coordinating Committees

The Coordinating Committees will develop and implement a Master Litigation Plan, which will include a comprehensive discovery plan and will address such matters as the resolution of common issues, dispositive motions, and trials. Any counsel for any plaintiff or their assistants or staff, and any counsel for the defendant or their assistants or staff, may attend joint meetings of the Plaintiffs' and Defendant's Coordinating Committees; however, the Coordinating Committees (and representatives of the FDIC as receiver) will be the principal spokespersons for the plaintiffs and defendant.

4. Initial Discovery

a. Exchange of Core Documents

i. Within two weeks of the date of entry of this Order, the parties will exchange "core documents," as defined below. If a Master Protective Order has not been entered by that date, the exchange of core documents shall occur within two business days of the entry of that order.

ii. The defendant's core documents consist of case-specific "board packages," "closing books," and assistance agreements that the defendant has gathered to date.

iii. A plaintiff's core documents consist of all documents, in plaintiff's possession to date, that each plaintiff contends constitute the contract(s) in its case, together with all modifications to the alleged contract(s), whether or not these have been previously supplied to the defendant.

iv. Each party will certify that it has made a diligent search for the core documents in its custody or control and will produce that certification along with its core documents. If a party believes that some or all core documents are in the custody or control of third parties, the certification shall so indicate.

v. In cases involving institutions placed in receivership or conservatorship, the parties shall also serve the core documents and certifications on FDIC as receiver.

vi. In any case in which defendant moves to dismiss on grounds of the statute of limitations, a plaintiff may notify the defendant within ten days of the entry of this Order that it will not file a motion for summary judgment until after the motion to dismiss is resolved. In such a case, neither party shall be required to serve core documents on any

other party or on FDIC as receiver until two weeks after the motion to dismiss is denied.

b. Exchange of Document Indices

i. No later than September 26, 1996, counsel for the parties will exchange all available existing indices of documents, or of boxes of documents, that may be relevant to each case. If a Master Protective Order has not been entered by that date, the exchange of indices shall occur within five days of the entry of that order.

ii. Each party will certify that it has made a diligent search for all indices within its custody or control and will produce that certification along with the indices.

5. Initial Determinations Regarding Liability

a. Following the exchange of core documents, any plaintiff may file a motion for partial summary judgment pursuant to Rule 55 of the Rules of the United States Court of Federal Claims, regarding two liability-related issues only: (1) whether a contract(s) existed in each case; and (2) whether the Government acted inconsistently with that contract(s). Any plaintiff may utilize a so-called "short form" format substantially similar to the sample attached to this Order as Appendix A. In any event, neither party shall be required to submit the "Proposed Findings of Uncontroverted Fact" or the "Statement of Genuine Issues" identified in Rule 56(d).

b. The defendant will respond within 60 days with respect to those two issues, except that the defendant need not respond to motions filed in cases in which (1) the defendant has filed

a motion to dismiss on grounds of the statute of limitations, or (2) the FDIC as receiver has moved to intervene and take control of the case. In these cases, the defendant shall respond according to the schedule set forth below in ¶ 5(e). The defendant need not identify any defenses of any kind, counterclaims, setoffs, pleas in fraud, etc. ("defenses") in responding to the motions, and the failure to assert those defenses in its response will not constitute a waiver. Any common issues identified in the defendant's responses shall be resolved in a manner similar to resolution of the issues identified in Paragraph 6 below.

c. The defendant shall not file an answer to the complaint in any case, and no defenses or arguments of any kind shall be deemed waived by reason of the defendant's not having filed an answer to any complaint. In addition, no allegation shall be deemed admitted, nor shall defendant be estopped from denying any allegation, by reason of not having filed an answer to any complaint. No plaintiff shall file an answer to any counterclaim or plea in fraud, and no defense to any counterclaim or plea in fraud, nor any argument of any kind, shall be deemed waived by reason of the plaintiff's not having filed an answer to a counterclaim or plea in fraud. In addition, no allegation shall be deemed admitted, nor shall a plaintiff be estopped from denying any allegation, by reason of that plaintiff's not having filed an answer to a counterclaim or plea in fraud.

d. Within 120 days of the filing of a motion for partial summary judgment, except as set forth in ¶ 5(e), the defendant shall set forth, in accordance with the requirements of the rules of this Court, any defenses of which it knows or has reason to know that relate to the two issues asserted in the motion. The Coordinating Committees will attempt to agree upon further

procedures to resolve any defenses asserted, including any necessary discovery and further motions or cross-motions. If the Committees are unable to agree, they will submit their respective proposals to the Managing Judge for resolution. Any issues or defenses not identified at that time will be addressed in accordance with the Rules of the Court or pursuant to the alternative procedures agreed upon by the Coordinating Committees or ordered by the Court.

e. In cases in which (1) the defendant has filed a motion to dismiss on grounds of the statute of limitations, or (2) the FDIC has moved to intervene and take control of the case as receiver, the defendant shall file its response to the motion for partial summary judgment within 30 days of denial of such motion. This response shall include the matters addressed in ¶ 5(b) and ¶ 5(d) of this Order.

f. The Coordinating Committees will attempt to agree upon procedures applicable to any case in which a party asserts a need to take discovery in order to file or oppose a motion for partial summary judgment regarding the two issues identified above. If the Coordinating Committees are unable to reach agreement, they may submit separate proposals to the Managing Judge for resolution.

6. Resolution of Common Issues

The parties agree that the following issues are common issues requiring prompt resolution before summary judgment proceedings are resolved with respect to affected cases: (1) statute of limitations; and (2) FDIC standing as receiver. These issues are to be resolved in all cases

in which the issue is raised prior to any discovery in those cases, other than the exchange of core documents, in accordance with procedures set forth in Appendix B (for statute of limitations) and Appendix C (for FDIC standing). The Managing Judge may assign these cases to Issue Judges for prompt resolution. The FDIC as receiver may participate in the resolution of an issue if that issue is raised in any case in which the FDIC as receiver may assert an interest. The Coordinating Committees will meet promptly to identify cases that raise these common issues and to advise the Court of these. The Coordinating Committees shall also meet to prepare procedures for resolution of other common issues, including other standing issues, issues identified in the defendant's responses to motions for partial summary judgment, and any other common issues.

7. Master Litigation Plan

a. The Coordinating Committees will attempt to agree by October 1, 1996, upon a Master Litigation Plan to govern all further proceedings. The Master Litigation Plan, which may be in phases, will include procedures for resolving common issues (other than the common issues covered by this Order), dispositive motions, trials, discovery schedules, protocols for depositions, document production, expert witnesses, document numbering systems, joint or uniform discovery requests from plaintiffs, master protective order, and other matters. The cases listed in Appendix D to this Order shall be accorded priority in the scheduling of cases for trial. The first of these trials shall begin four months after completion of trials in Glendale and Statesman, and trials shall continue thereafter until all cases are resolved. If the

Committees are unable to reach agreement concerning a Master Litigation Plan, they may submit separate proposals by October 4, 1996, and the Managing Judge will adopt a plan.

b. In developing a Master Litigation Plan, the parties agree to be guided by the following principles regarding discovery:

i. The parties will coordinate discovery requests to the maximum extent possible to reduce the burden and expense imposed upon any party or witness.

ii. The Coordinating Committees will mutually prioritize cases for case-specific discovery. Discovery regarding liability issues (except as provided in part 4 above) for any case will not proceed until after the later of (1) the entry of a Master Litigation Plan; and (2) the resolution of the statute of limitations and standing-related common issues for that case. Discovery regarding damages issues for any case will not proceed until after the later of (1) the entry of a Master Litigation Plan, or (2) the completion of trials in Glendale and Statesman, but in no event later than March 1, 1997.

iii. A Master Protective Order will be entered for all cases, which provides, among other terms, for the non-waiver of privilege and the protection of confidential information.

September 18, 1996


Loren A. Smith
Chief Judge

Appendix A: Short Form Motion

Appendix B: Statute of Limitations Schedule attached

Appendix C: FDIC Intervention Schedule attached

Appendix D: Priority Cases attached

APPENDIX A

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

[NEW THRIFT HOLDING COMPANY], and

[NEW THRIFT],

Plaintiffs,

v.

UNITED STATES,
Defendant.

No.
(Judge _____)

"SHORT FORM"

MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY:
THE ACQUISITION OF [FAILING THRIFT 1]

Pursuant to Pretrial Order No. 1 in the Winstar-Related Cases, issued September 15, 1996, setting forth optional procedures permitting plaintiffs to file "Short Form" motions for partial summary judgment on liability for breach of contract, plaintiffs respectfully submit this Short Form Motion; a Short Form Motion Summary Sheet; an Affidavit of [name of CEO or other], [title of affiant], which authenticates certain documents submitted with this Motion and which recites the facts of the government's breach of the contract as alleged in the complaint; and copies of the contract documents and other evidence cited therein.

Plaintiffs respectfully submit that these contract documents and affidavit establish the government's liability for breach of the [goodwill/capital credit/other forbearance] terms of the [failing thrift 1] acquisition. Plaintiffs respectfully ask the Court to enter judgment finding the government liable for said breach, in an amount to be determined in future proceedings.

SCOPE OF THIS "SHORT FORM" MOTION

[Alternative One]: This Motion addresses all breach-of-contract counts set forth in the complaint. Resolution of this motion in favor of plaintiffs will resolve all issues of liability in this action.

[Alternative Two]: This Motion addresses only one of [three] separate transactions addressed in the complaint, the acquisition of [failing thrift 1]. Separate "Short Form" Motions filed simultaneously with this Motion address each of the other [two] transactions, the acquisitions of [failing thrift 2] and [failing thrift 3]. These are presented separately because the contracts in each of the three transactions are different. Resolution of all [three] Short Form Motions in favor of plaintiffs will resolve all issues of liability in this action.

[Alternative Three]: This Motion addresses only one of [three] separate transactions addressed in the complaint, the acquisition of [failing thrift 1]. Further discovery of the government is required before plaintiffs can determine whether the government's liability regarding either of the other [two] transactions, the acquisitions

of [failing thrift 2] and [failing thrift 3], may best be resolved using the "Short Form" procedures.

[Alternative Four]: This Motion addresses the government's breach of its [supervisory goodwill forbearance] promise that it made to induce plaintiffs to acquire [failing thrift 1], as set forth in detail in the complaint. The complaint raises other claims regarding (1) [non-forbearance claim 1 (i.e., breaches of tax sharing provisions)] and (2) [non-forbearance claim 2 (i.e., breaches of contract administrative terms)]. These claims fall outside the scope of capital and accounting forbearance claims suitable for resolution under the Short Form procedures employed herein, and these claims shall be addressed in further proceedings.

THE TRANSACTION ADDRESSED IN THIS MOTION

[Briefly describe the transaction addressed in this motion. For illustration only, four examples of such a brief description follow. Different transactions in different cases may involve different types of documents than those cited in these examples, and citation of particular documents in these examples is not intended to suggest that all or any of these documents must be present in a given transaction in order to prove the government's liability under the "Short Form" approach.]

[EXAMPLE 1]

On [date], plaintiffs acquired [failing thrift 1] from the Federal Savings and Loan Insurance Corporation ("FSLIC") through a Merger Agreement and an Assistance

Agreement signed by plaintiff and FSLIC. The Assistance Agreement, see relevant excerpts at Tab A, recited in its Integration Clause, section __, that the documents which expressed the terms of the acquisition included, among other documents, a Forbearance Letter and various Resolutions of the Federal Home Loan Bank Board ("FHLBB"). The Assistance Agreement also stated at section __ that plaintiffs' receipt of the Forbearance letter was a condition precedent to plaintiffs' obligation to complete the Merger. The Forbearance Letter is attached at Tab B.

Goodwill Forbearance

The Forbearance Letter states that plaintiffs may amortize goodwill over __ years: [quote relevant forbearance text].

By Resolution No. 8_-____, dated [date], at page __, FHLBB authorized the issuance of the Forbearance Letter. FHLBB Resolution No. 8_-____ is attached at Tab C.

By Resolution No. 8_-____, dated [date], at page __, FHLBB authorized the amortization of goodwill over __ years: [quote resolution]. FHLBB Resolution No. 8_-____ is attached at Tab D.

The amount of supervisory goodwill at the time of the acquisition of [failing thrift 1] was \$____. [cite relevant document].

Capital Credit

The Assistance Agreement, at section __, authorized plaintiffs to treat, as a permanent credit to regulatory capital, \$__: [quote relevant text].

[EXAMPLE 2]

On [date], plaintiff entered a Merger Agreement ("Agreement") with [failing thrift 1] to acquire that thrift in a supervisory merger that was prompted and facilitated by the FHLBB. The Agreement at page __ expressly conditioned the merger on obtaining appropriate regulatory approval for use of the "purchase of assets accounting methodology" and declared at page __ that, if such approval could not be obtained, the Agreement would be "null and void." A copy of relevant portions of the Agreement is attached hereto at Tab ___.

Thereafter, plaintiff filed an Application for Merger ("Application") with the Federal Home Loan Bank of [Region]. The Application stated that the "purchase of assets" method of accounting would be applied to the merger and included, among its attachments, a copy of the Agreement and an Adjusted Statement of Condition and Income showing the projected generation and recording of \$_____ in supervisory good will. (See Tab ___).

The proposed merger, and specifically its use of the purchase method of accounting, was evaluated by the Supervisory Agent of the Federal Home Loan Bank of [Region]. (See Tab ___). By letter and Board Resolution, [dated], the Principal

Supervisory Agent of that Federal Home Loan Bank informed plaintiff that its Application for merger was approved pursuant to 12 C.F.R. § 563.22(e), as amended effective April 15, 1982. (See Tab ____). Subsection (e) of that regulation permits the Principal Supervisory Agent of a Federal Home Loan Bank to approve a plan of merger under delegated authority. A copy of FSLIC's Final Rule Release No. 82-270 setting forth the circumstances under which delegated authority may be exercised is attached at Tab ____.

As a condition of approval, plaintiff subsequently submitted to the Principal Supervisory Agent "[f]inancial statements from each institution just prior to merger as well as a pro forma statement at the effective date." Plaintiff further submitted "a statement from [its] CPA specifically describing any goodwill or discount arising from the acquisition recorded on [plaintiff thrift's] books," as required by 12 C.F.R. § 563.22(e)(6). (See Tab ____). Thereafter, plaintiff recorded \$_____ in supervisory goodwill to be amortized over a ____ year basis. (See Tab ____).

[EXAMPLE 3]

On [date], plaintiff[s] acquired [failing thrift 1] by means of a supervisory mutual-to-stock conversion pursuant to plaintiff[s]' overall agreement with the FSLIC and FHLBB whereby plaintiff[s] would invest their funds in the stock of the converting institution in exchange for the specific agreement of the FHLBB and FSLIC that they

would allow the use of the purchase method of accounting in the transaction and that the resulting supervisory goodwill would be part of the converted institution's regulatory capital and amortized over a period of ___ years. The FHLBB [resolution] [letter] approving this transaction (together with any related applications, business plans, correspondence, forbearance letters or similar documents) is (are) appended as Tab A. The foregoing evidenced the FHLBB's findings that [failing thrift 1] was insolvent (or in distressed financial condition), and that the transaction was supervisory in nature (or to lessen the insurance risk of the FSLIC). In such [resolution] [letter], the FHLBB also agreed to the accounting treatment as to supervisory goodwill which the plaintiffs specifically required as a condition to their investments. The opinion from the converted institution's independent accountants, which was required by the FHLBB's [resolution] [letter], describing the converted institution's treatment of goodwill resulting from the conversion and substantiating the reasonableness of the amount included as goodwill and the amortization periods attributable to such goodwill, is appended as Tab B.

[EXAMPLE 4]

On [date], plaintiff acquired [failing thrift 1] at the behest of and with the express agreement of FSLIC and FHLBB. Because [failing thrift 1] was failing or in danger of failing, the agreement between plaintiff and the government by which plaintiff

agreed to acquire [failing thrift 1] and assume its liabilities was predicated upon the government's express agreement that plaintiff could use purchase method of accounting and include resulting supervisory goodwill [as well as other intangibles] as capital for purposes of meeting applicable regulatory net worth requirements.

The government's agreement to the critical contractual term(s) regarding regulatory capital is evidenced in the FHLBB [letters] [resolutions] approving this acquisition, together with any related bids, proposals, applications, forbearance letters, business plans, agreements of merger, correspondence or other documents (attached hereto at Tab A). Plaintiff fulfilled all obligations and conditions attendant with this contract, and pursuant to the terms of the agreement with the government, timely submitted a letter from its independent accountant which justified the reasonableness of the amounts and amortization periods attributed to the goodwill asset (attached hereto at Tab B).

Absent the government's agreement on the regulatory capital matters as reflected in the documents appended at Tabs A & B, plaintiff could not have completed the [failing thrift 1] acquisition and the government could not have accepted the transaction either, because to do so would have put plaintiff in violation of applicable capital requirements after the merger.

CONCLUSION

~~These~~ contract documents and other evidence establish plaintiffs' contract rights to the capital and accounting forbearance promises expressed therein. This Court should find that plaintiffs are entitled to damages for breach of contract resulting from the government's failure to honor these promises, with the amount of such damages to be determined in subsequent proceedings.

[Date]

Respectfully submitted,

[Name of counsel]

[address]

[address]

[address]

[Title or Description of Document or Affidavit]:

Tab __

Description of document or affidavit:

[Identify date, parties, signatories, etc.]

Key language:

[Quote key terms]

F. Initial Amounts:

1. Of Supervisory Goodwill
at time of acquisition: \$ _____
Amortized over __ years.
Reflected in:

[Identify document that sets amount] __

2. Of Capital Credit
at time of acquisition: \$ _____
Effective for __ years [or unlimited].
Reflected in:

[Identify document that sets amount] __

3. Of Other Capital and Accounting
Forbearances at time of acquisition:

- a. \$ _____ for
_____ Forbearance
Effective for __ years [or unlimited].
Reflected in:

[Identify document that sets amount]

Tab __

- b. \$ _____ for
_____ Forbearance
Effective for __ years [or unlimited].

APPENDIX B

Statute of Limitations

A. By September 9, 1996, the defendant shall file motions to dismiss, together with a memorandum of law in support, in all cases in which it intends to raise a statute of limitations defense.

B. Plaintiffs shall file responses in each case by October 8, 1996.

C. Defendant shall file replies to plaintiffs' responses by October 28, 1996.

D. If an Issue Judge is appointed to resolve this issue, that Judge may change this briefing schedule.

APPENDIX C

FDIC Intervention as Receiver

A. FDIC as Party Plaintiff. In all matters involving failed financial institutions the following procedures and schedule shall apply to determine whether the FDIC as receiver is a proper party to prosecute some or all of the claims in cases pending before the Court. The enumerated motions to be filed hereunder are intended to seek a general decision by the Court on two central questions involving whether the FDIC as receiver is a proper party plaintiff.

(i) Identification of Cases Involving Failed Financial Institutions. On August 12, 1996, the FDIC as receiver delivered to Plaintiffs' Coordinating Committee and the defendant a list of cases pending before the Court that involve failed financial institutions. All plaintiffs and the defendant shall provide to the FDIC as receiver any proposed additions or deletions to the case list, including a brief explanation of the reasons underlying the proposed modification, no later than September 10, 1996.

(ii) Notification by the FDIC as Receiver. On or before September 16, 1996, the FDIC as receiver shall provide to Plaintiffs' Coordinating Committee, the defendant, and each affected plaintiff, a list of those matters in which the FDIC as receiver (a) does not intend to move to intervene, (b) does intend to move to intervene and to take over all or part of the case, or (c) cannot yet determine whether it will move to intervene and take over all or part of the case, together with a brief statement of the reasons why a determination can not be

readily made and anticipated dates of determination. No more than 25% of the failed financial institutions shall fall within the undecided category.

(iii) Service on FDIC as Receiver. In cases identified in paragraphs (ii)(b) and (c) above, the parties will copy the lead attorney for the FDIC, as receiver, on all discovery and court filings until such time as the Court enters an order on FDIC's standing issues or the FDIC indicates it no longer has any interest in the case as receiver.

(iv) Briefing Schedule.

a. On October 21, 1996, the FDIC shall file its motion(s) and serve its brief to seek with respect to all plaintiffs a general determination of (1) whether FDIC should be substituted in and become the sole plaintiff entitled to prosecute what are, in FDIC's view, derivative suits, and (2) whether FDIC should be substituted in and become the sole plaintiff entitled to seek damages from the defendant for breach of contract based on claims arising from the fact that the plaintiff (typically, but not necessarily, a holding company) was a party to an Assistance Agreement or other contract giving rise to goodwill, capital credits, or FSLIC owned capital instruments and at that time, as part of that transaction, this party invested additional cash or other valuable assets in the failed institution, converted debt to stock in the failed institution, or assumed liabilities of the failed institution.

b. A Select Committee of Affected Plaintiffs, and the defendant, shall each have 30 days to respond. Any plaintiffs who wish to file a brief must also file within the 30 day deadline.

c. FDIC as receiver shall file a reply brief 15 days thereafter, provided that the FDIC as receiver may seek additional time to reply if it must respond to a number of case specific arguments.

(v) If any plaintiff concludes that it cannot in good faith respond to FDIC's motions in part (iv) above, without first having discovery, such plaintiff shall ask the FDIC as receiver to stay its motion as to that plaintiff, and that plaintiff shall not be bound by any determination of the Court under this procedure. If the FDIC as receiver does not consent, such plaintiff may move the Court for such an order.

(vi) During the week of October 21, 1996, FDIC as receiver, Plaintiff's Coordinating Committee, and the defendant shall meet and discuss what further steps should be taken, on what timetable, with regard to FDIC's ownership and control of cases involving failed institutions. The results of that meeting shall be conveyed to the Court.

APPENDIX D

Priority Cases
(in alphabetical order)

Anderson, 91-34C
(filed 1/10/91)

Bank United, 95-473C
(filed 7/25/95; originally filed S.D. Tex. 8/3/93)

Bluebonnet Savings, 95-532C
(filed 8/8/95; originally filed N.D. Tex. 6/6/91)

California Federal, 92-138C
(filed 2/28/92)

Caroline Hunt Trust, 95-531
(filed 8/8/95)

Castle, 90-1291
(filed 9/25/90)

Glass, 92-428
(filed 6/25/92)

Karnes County Savings, 91-993C
(filed 3/7/91)

Landmark Land Co., 95-502
(filed 8/4/95)

LaSalle Talman FSB, 92-652C
(filed 9/21/92)

MACO Bancorp, Inc., 94-625C
(filed 9/23/94)

Security Savings, 92-577C
(filed 8/21/92), consolidated on 6/3/93 with
Bailey, 92-817C, & captioned under Security

Suess, 90-981C
(filed 9/14/90)

Attachment 2

In the United States Court of Federal Claims

(Filed: August 11, 1997)

PLAINTIFFS IN ALL WINSTAR-RELATED CASES AT THE COURT,

Plaintiffs.

v.

THE UNITED STATES,

Defendant.

No. 90-8 C, et al.

PROCEDURAL ORDER NO. 1:
MASTER LITIGATION PLAN

Pursuant to Rules 1, 16, 77, and 77.1 of the Rules of the United States Court of Federal Claims, and to the Omnibus Case Management Order entered by the Court on September 18, 1996 ("Case Management Order" or "CMO"), the Court ORDERS as follows:

I. SCOPE OF THIS ORDER

A. This Order applies to all *Winstar*-related cases before the Court except for (a) the *Glendale* and *Statesman* cases, and (b) the Priority Cases identified in Appendix D to the CMO. In the event that a case is removed from the list of Priority Cases, it shall thereafter be subject to the terms of this Order.

B. This Order establishes a Master Litigation Plan ("Procedural Order No. 1") and incorporates by reference the CMO, the Master Protective Order ("MPO"), the other procedural

orders entered in the *Winstar*-related cases, and the Rules of the Court of Federal Claims to the extent that the Rules are not superseded by orders issued under the CMO or MPO.

C. This Order contemplates that additional provisions regarding a Discovery Plan shall be set forth in a subsequent Procedural Order No. 2.

D. Except insofar as this plan expressly authorizes the parties to agree to modifications of time limits, the parties may not stipulate to an increase or extension of any limitation or deadline in this Master Litigation Plan without approval of the Court.

II. DISCOVERY

A. Phase I: Initial Discovery of Key Documents

1. Phase I discovery shall consist of (a) the exchange of "core documents" and document indices pursuant to Paragraph 4 of the CMO, (b) the exchange of "CD-ROM Documents" and "Reciprocal Documents" pursuant to the Stipulations and Orders Concerning Implementation of Paragraph 5.f. of the CMO, and, (c) if permitted by Court Order of the Discovery Judge, the exchange of core documents pertaining to unassisted transactions ("CDU").

2. Plaintiffs' requests for documents covered by Paragraph II.A.1. shall be submitted to the defendant no later than December 31, 1997.

3. The exchange and production of documents contemplated by Paragraph II.A.1. shall be completed no later than February 15, 1998.

4. For any *Winstar*-related case filed after entry of the CMO, no Phase I discovery shall be required or available except by leave of the Court.

5. All short-form summary judgment motions to be submitted pursuant to the CMO shall be filed no later than April 3, 1998.

B. Phase II: General Fact Discovery

Phase II discovery shall include (a) certain common discovery, and (b) general discovery concerning case-specific issues of liability and damages. Unless otherwise ordered by the Court, expert discovery shall not be taken during Phase II.

Common Discovery

1. Common Discovery shall begin on or after August 11, 1997 and, except for good cause shown, shall be completed by December 31, 1997.

2. On or before August 22, 1997, defendant shall produce to both the Plaintiffs Coordinating Committee ("Plaintiffs Committee") and the FDIC, a set of all documents responsive to the definition of "Common Documents" set forth in Paragraph II.B.3. The Plaintiffs Committee shall be responsible for making such documents available to other plaintiffs' counsel, and defendant shall not be required to make any further production of such documents in individual cases.

3. As used herein, the term "Common Documents" includes:

(a) All documents for the period 1980 through 1989 that relate to the establishment, interpretation, or application of FHLBB, FSLIC, and FHLB policies, practices, guidance, rules and regulations concerning supervisory acquisitions, conversions and/or mergers of thrift institutions and the approval of and accounting for such transactions, including all internal memoranda and tapes and transcripts of meetings relating to such matters.

(b) As they relate to the FSLIC, Resolution Trust Corporation, and the FSLIC Resolution Fund from 1980 to date all documents, other than those containing exclusively case-specific information, referring or relating to: investment account records; investment results; investment policies, procedures, and guidelines; resolution policies, procedures, and guidelines; resolution costs; asset management and disposition procedures, policies, guidelines, and results; and viability, liquidation, and Phoenix modeling systems, procedures, assumptions, policies, guidelines, and models; FSLIC contingency plans, business plans and financial projections; and studies and analyses concerning FSLIC's ability to cope with failures of large thrifts or large numbers of thrift failures, and/or the consequences to FSLIC of such events, including without limitation all internal memoranda and tapes and transcripts of meetings relating to such matters.

4. On or after September 8, 1997, the Plaintiffs Committee and the FDIC may submit common discovery interrogatories to defendant with respect to issues of liability and damages. Such discovery shall be conducted in accordance with the provisions of Procedural Order No. 2.

5. On or after September 8, 1997, the Plaintiffs Committee, the FDIC, and defendant may all conduct common discovery depositions of present and former government employees, with respect to issues of liability and damages. Such discovery shall be conducted in accordance with the provisions of Procedural Order No. 2.

Case-Specific Fact Discovery

6. Cases shall enter Phase II case-specific discovery in waves of 30 cases each; the first 30 cases shall commence on January 2, 1998; the second 30 cases on January 2, 1999; the third 30 cases on January 2, 2000 and any remaining cases shall begin discovery on January 2, 2001.

7. Any plaintiff that does not want to be considered for participation in Phase II case-specific discovery in any given year must "opt-out." Any plaintiff that does not "opt-out" of a particular discovery wave must participate if it subsequently is designated for inclusion in that discovery wave. A plaintiff that "opts-out" shall be eligible to participate in any subsequent Phase II case-specific discovery wave.

8. Each plaintiff that decides to "opt-out" of Phase II case-specific discovery in a given year must provide written notice to the Court, the Coordinating Committees and the FDIC. For the first wave of cases scheduled to begin discovery on January 2, 1998, such notice shall be given no later than 30 days after the Court renders decisions on the Summary Judgment Motions which are the subject of the August 7 and 8, 1997 Oral Arguments. For each succeeding discovery wave, such notice shall be given no later than 90 days before the scheduled start of that discovery wave. The

"opt-out" period shall close at that time and notification of decisions to "opt-out" submitted after that time shall not be effective for the upcoming discovery wave. This "opt-out" process shall be repeated for each succeeding discovery wave.

9. Each year after the "opt-out" period closes, the 30 remaining cases with the earliest filing dates, based on the date of filing in this Court, will be designated to participate in the next scheduled discovery wave. That designation will be made by the Coordinating Committees no later than 30 days after the "opt-out" period closes for each Phase II case-specific discovery wave.

10. Fact discovery concerning each case shall be completed no later than 12 months from the date of commencement of such discovery, except for good cause shown.

11. The plaintiffs in each discovery wave and defendant shall make good faith efforts to coordinate depositions so as to minimize the number of times an individual fact witness is deposed during that discovery wave. The plaintiffs in each discovery wave shall form a Plaintiffs Discovery Committee for this purpose in accordance with the provisions of Paragraph IV.A.2. of Case Management Procedural Order No. 2.

C. Phase III: Expert Discovery

1. Ordinarily discovery of experts and expected expert testimony shall not commence in a case until after Phase II case-specific discovery is completed, and shall be conducted in accordance with the provisions of Section V of Procedural Order No. 2.

2. The Court, under unusual circumstances, may enter an Order allowing particular expert discovery at an earlier time in a given case, for good cause shown.

D. De Bene Esse Depositions

Nothing in this Order shall be construed to limit or restrict the taking of depositions pursuant to the Master Order Concerning De Bene Esse Depositions.

III. PROCEDURES FOR DISPOSITIVE MOTIONS OTHER THAN SHORT FORM
SUMMARY JUDGMENT MOTIONS FILED PURSUANT TO THE CMO

A. General Procedures

1. Any party may submit dispositive motions on liability issues at any time prior to the dispositive motion deadline for a case under Paragraph VI.B.1. All dispositive motions filed prior to the assignment of a case to a Trial Judge shall be filed with the Managing Judge.

2. The Managing Judge may assign any dispositive motion to an Issue Judge for resolution under common issue procedures, or to a Motion Judge for individual resolution. In the event that a dispositive motion has been assigned to an Issue or Motion Judge, all further submissions with respect to that motion shall so indicate in the caption of the case, and shall be directed by the Clerk to the attention of the Issue or Motion Judge.

3. Nothing in this Order shall be construed to limit the availability of discovery necessary to oppose a dispositive motion. Such discovery may be taken by mutual consent of the parties or by Order of the Managing Judge, Issue Judge or Motion Judge, as appropriate.

B. Dispositive Motions on Liability

1. Any party may file a motion for summary judgment seeking a determination of liability at any time prior to the dispositive motion deadline. The opposing party shall have 50 days from the service of such motion to file its response. The moving party shall then have 25 days from the service of the response to file its reply.

2. Cross-motions shall be permitted consistent with Rule 83.2(e) of the Rules of the Court of Federal Claims. If a party files a cross-motion as to liability, the party opposing the cross-motion shall have 50 days from the service of such motion to file its combined reply and response, and the party filing the cross-motion shall then have 25 days from the service of the combined response and reply to file its reply.

IV. PROCEDURES FOR OTHER MOTIONS

A. Resolution of Common Issues

1. A "common issue" is an issue the resolution of which (a) would require minimal discovery; (b) may affect a significant number of *Winstar*-related cases; and (c) can be resolved on facts common to those cases without undue case-specific inquiry.

2. The Coordinating Committees and the FDIC shall monitor all summary judgment motions and other dispositive motions and recommend to the Court any issues that are appropriate to "common issue" resolution.

3. Any party that believes an issue is appropriate for "common issue" treatment shall bring such issue to the attention of the Coordinating Committees and the FDIC.

4. The Coordinating Committees and the FDIC shall attempt to agree whether the issue is appropriate for "common issue" treatment and, if so, shall attempt to reach agreement on the

definition of the issue and on procedures for resolution of the issue. If agreement can be reached, the parties shall submit an appropriate stipulated proposed Order for consideration by the Court.

5. If the Coordinating Committees and the FDIC are unable to reach agreement regarding whether an issue is appropriate for "common issue" treatment and/or regarding the statement of the issue or the procedures for resolution of the issue, then either Coordinating Committee or the FDIC may file a motion with the Managing Judge seeking designation of an issue for "common issue" treatment and proposing procedures for resolution of that issue. Any response to said motion shall be filed within 20 days of service of the motion, and any reply shall be filed within 10 days of service of the response.

6. Procedures for application of rulings on common issues to individual cases shall be established by a separate Order.

V. CONSOLIDATION OF RELATED CASES

A. The parties are encouraged to identify "related cases" in the sense of RCFC 77(f)(2) and to seek consolidation of those cases.

B. Motions to consolidate related cases, whether stipulated or contested, shall be filed with the Managing Judge.

C. Cases that are consolidated shall be treated as one case for purposes of Paragraph II.B.6. of this Order.

VI. PRETRIAL PROCEDURES

A. Responses to Pleadings

1. Within 30 days after the commencement of Phase II case-specific discovery in a case, the defendant shall file a response to the Complaint in accordance with the Rules of this Court,

unless a dispositive motion (including a partially dispositive motion) is pending. In cases in which a dispositive motion is pending, the defendant shall file a response to the Complaint within 30 days after issuance of an Order resolving the motion, to the extent a response is necessary. Plaintiffs shall file responses to any cross-claims, counter-claims, offsets or pleas in fraud, or other pleading, in accordance with the Rules of the Court.

B. Dispositive Motion Deadline

1. All dispositive motions on issues of liability shall be filed no later than 45 days after completion of Phase II case-specific discovery.

C. Assignment For Trial

A case shall become eligible for trial when 60 days have elapsed after completion of Phase II case-specific discovery. Ordinarily, the Managing Judge will not assign a case to a Trial Judge for final pretrial proceedings and trial prior to that time.

D. Further Procedural Order Governing Pretrial and Trial

Final pretrial and trial procedures shall be determined after consultation between plaintiff and defendant in accordance with the provisions of this Order and Procedural Order No. 2, and with the requirements and preferences of the Trial Judge to whom each case is assigned.


LOREN A. SMITH
CHIEF JUDGE

In the United States Court of Federal Claims

PLAINTIFFS IN ALL WINSTAR-
RELATED CASES AT THE COURT,

Plaintiffs,

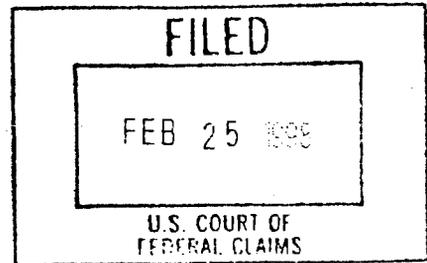
v.

THE UNITED STATES,

Defendant.

Case No. 90-8 C, et al.

Filed: FEB 25 1998

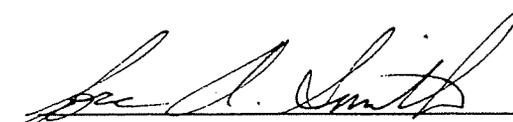


ORDER

Pursuant to the remarks made during the coordinating committee meeting held January 14, 1998, the court makes the following adjustment to Procedural Order No. 1; Master Litigation Plan:

Case-specific discovery for the second 30 cases will begin on April 1, 1999; the third 30 cases shall commence on April 1, 2000 and any remaining cases shall commence on April 1, 2001.

This language supersedes the relevant language contained at Section II(B)(6) of Procedural Order No. 1.


LOREN A. SMITH
CHIEF JUDGE

In the United States Court of Federal Claims

PLAINTIFFS IN ALL WINSTAR-
RELATED CASES AT THE COURT,

Plaintiffs.

v.

THE UNITED STATES,

Defendant.

*
*
*
*
*
*
*
*
*
*
*
*
*
*
*

Case No. 90-8 C, et al.

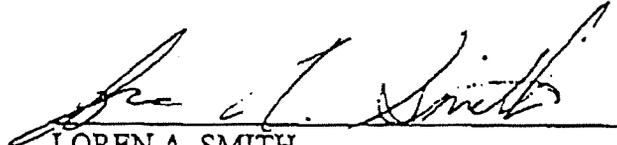
Filed: JAN 27 1999

ORDER

This order memorializes the modifications made to the Master Litigation Plan discovery schedule as set forth at the coordinating committee meeting held on January 5, 1999. Accordingly, the discovery schedule is modified as follows:

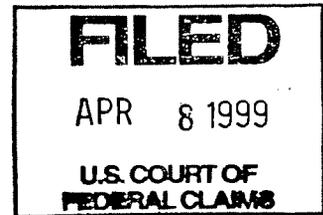
1. Section II.B.10 of Procedural Order No.1 is modified to provide that the deadline for the completion of case-specific discovery in the first 30 cases is extended to June 30, 1999.
2. Section II.B.6 of Procedural Order No. 1 is modified to provide that case-specific fact discovery in the second 30 cases shall commence on July 1, 1999.
3. Pursuant to Section II.B.8, notice to "opt out" of the second discovery wave shall be made by April 2, 1999. Any plaintiff that has filed a notice to opt out of the second discovery wave premised on the second discovery wave commencing April 1, 1999 may rescind the decision to opt out. Any plaintiff that wishes to rescind the decision to opt-out must file a notice withdrawing the original notice to opt out by April 2, 1999.
4. The March 31, 1999 deadline for the completion of the deferred common depositions set forth in the February 26, 1998 Stipulated Supplement to the Discovery Plan (Procedural Order No. 2) with Respect to the Taking of Common Depositions is extended to June 30, 1999.

The Clerk of the Court is directed to send this Order to the attorneys of record in all *Winstar*-related cases, as well as to the representatives of the three *Winstar* coordinating committees.



LOREN A. SMITH
CHIEF JUDGE

In the United States Court of Federal Claims



PLAINTIFFS IN ALL WINSTAR-RELATED CASES AT THE COURT,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Case No. 90-8 C, et al.

Filed: ~~APR 07 1999~~

APR - 8 1999

ORDER

Pursuant to the remarks made at the coordinating committee meeting held on April 5, 1999, the following is ORDERED:

1) The schedule for the remaining unassigned priority cases is adjusted as follows. Trial will commence on the following days:

August 2, 1999	<i>Glass, Landmark Land Company</i>
September 7, 1999	<i>Caroline Hunt Trust Estate, Maco Bancorp</i>
October 4, 1999	<i>Bailey/Security, Anderson</i>

The court is in the process of identifying judges who can begin trials on the dates listed above, so that these dates will remain firm rather than just targets.

2) The court's order of January 27, 1999, which modified various deadlines in Procedural Order No. 1, is hereby modified as follows:

- a) The deadline for completion of case-specific discovery in the first-thirty cases is extended to July 31, 1999;
- b) Case-specific fact discovery in the second-thirty cases shall commence August 1, 1999;
- c) Notice to opt-out of case specific discovery for the second wave shall be made by May 3, 1999. In order to ease the administrative confusion, all prior notices to opt-out are deemed moot, and any plaintiff wishing to opt-out of the second wave must file an opt-out

notice between the date of this order and May 3, 1999. There is hence no need for any plaintiff to file a rescission of a previous decision to opt-out;

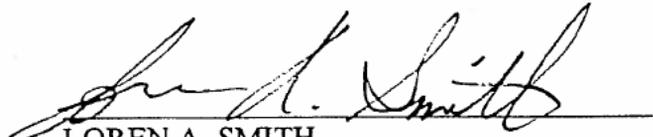
d) Any request for an enlargement of time for the purpose of taking fact-specific discovery in one of the first-thirty cases must be filed by May 28, 1999;

e) Although not specifically discussed at the meeting, it seems appropriate that the deadline for the taking of common depositions should likewise be extended, from June 30, 1999 to July 31, 1999.

3) The stay of proceedings on motions for summary judgment in non-first-thirty, non-priority cases is extended to August 1, 1999.

4) The next coordinating committee meeting shall be held Tuesday, May 25, 1999 at 12 noon, in a room to be determined in the Howard T. Markey National Courts Building. The coordinating committees are requested to file proposed agendas by May 20, 1999, and the court will endeavor to file an agenda for the meeting by May 21, 1999.

The Clerk of the Court is directed to send this order to the members of the three coordinating committees and to the attorneys of record in all *Winstar*-related cases.



LOREN A. SMITH
CHIEF JUDGE

Attachment 3

In the United States Court of Federal Claims

(Filed: August 7, 1997)

11

PLAINTIFFS IN ALL WINSTAR-RELATED CASES AT THE COURT,

Plaintiffs.

v.

THE UNITED STATES,

Defendant.

No. 90-8 C, et al.

PROCEDURAL ORDER NO. 2:
DISCOVERY PLAN

Pursuant to Rules 1, 16, 77 and 77.1 of the Rules of the United States Court of Federal Claims, and to the Omnibus Case Management Order entered by the Court on September 18, 1996, ("Case Management Order" or "CMO"), the Court ORDERS as follows:

I. SCOPE OF THIS ORDER AND GENERAL PROVISIONS

A. This Discovery Plan governs discovery in all *Winstar*-related cases before the court except for (a) the *Glendale* and *Statesman* cases, and (b) the Priority Cases identified in Appendix D to the CMO. In the event that a case is removed from the list of Priority Cases it shall thereafter be subject to the terms of this Order.

B. The Discovery Plan is subject to the CMO, Procedural Order Number One ("Procedural Order No. 1"), the Master Order Concerning De Bene Esse Depositions, the Master Protective Order ("MPO"), and other procedural orders of the Managing Judge. The Rules of the Court of Federal

Claims ("RCFC") govern discovery, except where in conflict with the CMO, Procedural Order No. 1, the MPO, or this Discovery Plan.

C. No provision of the Discovery Plan shall be construed to permit any party any discovery not otherwise permitted by the CMO, Procedural Order No. 1, the MPO, other Orders of this Court, or the RCFC.

D. Except insofar as this plan expressly states that the parties may agree to modification of time limits, the parties may not stipulate to an extension or increase of any Discovery Plan deadline or limitation without approval of the Court.

II. DISCOVERY CONVENTIONS

The following conventions apply to all discovery, including the common discovery procedures set forth in Section III. Production of "Common Documents" shall be governed by the provisions of Paragraph II.B.2. of Procedural Order No. 1.

A. Conventions for Production of Documents

1. Document production shall take place in Washington, D.C. or where the documents are maintained in the ordinary course of business, at the option of the producing party. The parties shall confer prior to a document production to establish dates and procedures for selection, review, and duplication of documents. Where the documents subject to a production are indexed, the producing party may require the requesting party to select groups or boxes of documents for production and review using the most current available indices prior to the commencement of the production.

2. Document production pursuant to a document request shall commence within 30 days of receipt of such document request and be completed within 60 days of receipt of such

document request, absent agreement of the parties to extend the deadline for such production, with such agreement to extend not to be unreasonably withheld.

3. Within thirty days of the deadline for production of documents, the producing party shall provide the requesting party with a privilege log specifically identifying any documents that the producing party did not produce pursuant to an assertion of privilege, and the nature of the privilege claimed. Identification of privileged documents that were produced in accordance with the CMO, shall continue to be subject to the provisions of the MPO. A party need not produce or identify in the privilege log (a) any document prepared pursuant to the attorney-client or work-product privileges prepared in connection with the present litigation, excluding expert reports, which shall be produced in accordance with the provisions of Section V, or (b) any document prepared pursuant to the attorney-client or work-product privileges developed or generated in the context of an enforcement proceeding or investigation, including criminal investigations.

B. Conventions for Depositions

1. Absent agreement between the parties participating in a deposition and the deponent, a deposition shall take place within 75 miles of the deponent's residence or place of employment and ordinarily shall be conducted between 9:00 am. and 5:30 p.m. on successive weekdays, excluding holidays. Depositions may be attended only by a court reporter and persons authorized under the MPO to have access to confidential information absent agreement between the parties.

2. The deponent may be questioned by no more than one attorney for the defendant and one attorney for each plaintiff at a time. An objection by one counsel for a plaintiff shall be deemed an objection by all plaintiffs' counsel who are present at a deposition.

3. Where a deposition is recorded by videotape, the appearance or demeanor of attorneys and the deponent shall not be distorted through camera or sound-recording techniques. To the extent practicable, a videotaped deposition will be conducted in a neutral setting against a solid background, with only such lighting as is required for accurate video recording. Camera angle, lens setting, and field of view will be changed only as necessary to record the natural body movements of the deponent or to portray exhibits and materials used during the deposition. No part of a videotaped deposition shall be released or made available to any member of the press or general public unless authorized by the Court.

4. Where a party intends to examine a non-party witness pursuant to a subpoena duces tecum, the parties shall use their best efforts to arrange for inspection and/or copying of the documents at least one week before the scheduled deposition.

5. The deponent shall execute the original deposition transcript within 30 days after receiving it from the court reporter. The court reporter shall distribute an errata sheet to counsel for the noticing party and to all counsel who requested copies of the deposition transcript. If a deponent fails to execute the deposition transcript within thirty days of receipt, the parties may use the deposition transcript as if it had been executed. The parties may use a certified copy of a deposition transcript in lieu of the original for all purposes.

C. Other Conventions

When serving a discovery request or response, a party shall also provide a copy of the request or response, excluding any produced documents, in an electronic form suitable to the parties.

III. COMMON DISCOVERY

A. General Provisions

1. Common discovery from the Government is limited to the discovery of information and production of documents that are not solely specific to any case or institution. Defendant has no obligation to respond to common discovery requests which seek only case-specific information, and Defendant shall not withhold documents or information directly relevant to common discovery merely because such documents or information also reference specific institutions or specific transactions.

2. Case-specific discovery in individual *Winstar* cases may not duplicate discovery already provided by defendant to Plaintiffs Coordinating Committee ("Plaintiffs Committee") in connection with common discovery under Procedural Order No. 1 and this Discovery Plan.

3. The Plaintiffs Committee is responsible for preparing common discovery interrogatories and a list of individuals or organizations for common discovery depositions as provided in this Discovery Plan. The Plaintiffs Committee is responsible for serving defendant with common discovery requests and ensuring that all common discovery material produced by defendant is available to all *Winstar* plaintiffs.

4. Any disputes concerning discovery referenced in Section III.A., including disputes over whether a request calls for only case-specific information, shall be raised, in the first instance, with the Coordinating Committees and the FDIC. The Coordinating Committees and the FDIC will attempt to resolve any disputes. If they are unable to reach agreement, either Coordinating Committee or the FDIC may file a motion with the Discovery Judge.

B. Common Discovery Interrogatories and Requests for Admissions

The Plaintiffs Committee shall prepare common discovery interrogatories. The Plaintiffs Committee shall serve the common discovery interrogatories on or after September 8, 1997, and

defendant shall serve its responses on the Plaintiffs Committee and the FDIC within 45 days thereafter.

C. Common Discovery Depositions

1. The Plaintiffs Committee shall submit a list to identify individuals or organizations that it will depose for purposes of common discovery. The list may not include damages expert witnesses for the defendant except for, and only to the extent they are, fact witnesses. The Plaintiffs Committee shall serve defendant with its initial list of these individuals and organizations on or after September 8, 1997. For depositions of organizations pursuant to RCFC 30(b)(6), the Plaintiffs Committee also shall inform defendant of the topics on which examination is required.

2. Defendant shall submit a list to identify individuals that it will depose for purposes of common discovery. The list may not include damage witnesses for a plaintiff except for, and only to the extent they are, fact witnesses. Defendant shall serve the Plaintiffs Committee with its initial list of these individuals on or after September 8, 1997.

3. The Coordinating Committees shall attempt to agree on a schedule for all common discovery depositions, including an estimated length of time for each deposition. If the Coordinating Committees are unable to agree, notice of a common discovery deposition and an estimated length of time for that deposition must be served on the opposing party at least 14 days prior to the date of the deposition.

4. At least 7 days prior to the commencement of a common discovery deposition, the Plaintiffs Committee shall identify no more than three attorneys who shall conduct the initial questioning on behalf of all plaintiffs. Additional plaintiffs' counsel, including the FDIC, may question a deponent only after completion of the examination by counsel designated by the Plaintiffs

Committee and may not repeat any questions posed previously in that deposition except to the limited extent required to establish a predicate or framework for examination on a new topic or for more detailed examination of topics previously covered.

IV. CASE-SPECIFIC DISCOVERY IN INDIVIDUAL WINSTAR CASES

A. Initial Disclosures

1. Within 30 days after the commencement of Phase II case-specific discovery in a case, a party shall, without awaiting a discovery request, provide to the other parties, to the extent known, the name and title of any current or former employee, agent, or representative of a party likely to have discoverable information relevant to the allegations in the Complaint, and any Cross-Claim or Counterclaim, identifying the subject of the information.

2. The plaintiffs, including the FDIC, participating in each wave of discovery shall form a Plaintiffs Discovery Committee to attempt, to the extent practicable, to coordinate discovery from third parties and depositions of fact witnesses.

B. Requests For Production of Documents

1. Parties may submit case-specific requests for production of documents at any time after commencement of Phase II case-specific discovery in a case. Such document production requests shall be governed by the provisions of this Order, Procedural Order No. 1 and the MPO.

C. Interrogatories, Requests for Admissions and Depositions

1. In addition to the common discovery and case-specific document discovery discussed above, a party in an individual case may submit case-specific interrogatories and requests for admissions, and take case-specific depositions. Such interrogatories and requests for admission

may not be submitted, and such depositions may not be taken, until 90 days after commencement of Phase II case-specific discovery in a case.

2. A party shall respond to interrogatories and requests for admissions within 45 days of service.

3. Where a plaintiff seeks to depose an individual or organization already deposed during common discovery, the deposition will be focused on case-specific topics. The parties shall attempt to agree on a schedule for all case-specific depositions, including an estimated length of time for each deposition. If the parties are unable to agree, notice of a deposition and an estimated length of time for that deposition must be served on a party at least 14 days prior to the date of the deposition.

4. Disputes over scheduling the deposition of a witness for case-specific discovery shall be resolved by the Discovery Judge.

V. EXPERT WITNESSES

A. Discovery of Plaintiffs' Expert Witnesses

1. Thirty days after Phase II case-specific discovery is completed in a case under the provisions of Procedural Order No. 1, each plaintiff shall provide defendant with the identity of each witness that plaintiff intends to call at trial to offer opinion testimony pursuant to Rule 702 of the Federal Rules of Evidence. The identifying information shall include (a) the witnesses' qualifications, including a curriculum vitae; (b) a list of all publications authored by each witness within the last ten years; (c) the compensation to be paid for each witnesses' study and testimony; and (d) a listing of any other cases in which each witness has testified at trial or by deposition, declaration or affidavit within the preceding four years.

2. Absent agreement of the parties, each plaintiff shall deliver to defendant a final written report prepared and signed by each witness identified pursuant to Paragraph V.A.1. within 60 days after identification. The written report shall contain: (a) a complete statement of all opinions to be expressed by the witness and the basis and reasons for all opinions; (b) the data or other information considered by the witness in forming the opinions; and (c) all exhibits to be used as a summary of or in support for the opinions of the witness.

3. Absent agreement of the parties, defendant shall depose each of plaintiff's expert witnesses within 90 days after receiving the expert's final written report. Each plaintiff shall cooperate in scheduling such depositions and in making each expert witness available for deposition.

4. If a plaintiff fails to comply with the provisions of this section with regard to any expert witness it proposes to call, no opinion testimony will be received from that witness on behalf of that plaintiff.

B. Discovery of Defendant's Expert Witnesses

1. Thirty days after defendant receives a plaintiffs' expert reports pursuant to Paragraph V.A.2. defendant shall provide such plaintiff with the identity of each witness whom defendant intends to call at trial to offer opinion testimony pursuant to Rule 702 of the Federal Rules of Evidence. The identifying information shall include (a) the witnesses' qualifications, including a curriculum vitae; (b) a list of all publications authored by each witness within the last ten years; (c) the compensation to be paid for each witnesses' study and testimony; and (d) a listing of any other cases in which each witness has testified at trial or by deposition, declaration or affidavit within the preceding four years.

2. Absent agreement of the parties, defendant shall deliver to each plaintiff a final written report prepared and signed by each witness identified pursuant to Paragraph V.B.1. within

90 days after identification. The written report shall contain: (a) a complete statement of all opinions to be expressed by the witness and the basis and reasons for all opinions; (b) the data or other information considered by the witness in forming the opinions; and (c) all exhibits to be used as a summary of or in support for the opinions of the witness.

3. Absent agreement of the parties, a plaintiff shall depose defendant's expert witnesses within 60 days after receiving the experts' final report. The defendant shall cooperate in scheduling such depositions and in making each expert witness available for deposition.

4. If defendant fails to comply with the provisions of this section with regard to any expert witness it proposes to call, no opinion testimony will be received from that witness on behalf of defendant.

VI. DISCOVERY DISPUTES

A. All discovery motions shall hereafter be filed with and resolved by the Discovery Judge, unless otherwise directed by the Managing Judge, Issue Judge or the Motion Judge.

B. In the event that a discovery dispute (a) appears to raise generic issues that may be relevant to a significant number of *Winstar*-related cases, or (b) raises concerns regarding a risk of substantial and burdensome duplication of discovery among different cases, the parties shall bring (or the Discovery Judge may refer) the dispute to the attention of the Coordinating Committees and the FDIC to consider whether the dispute should be subject to "common issue" treatment.


LOREN A. SMITH
CHIEF JUDGE

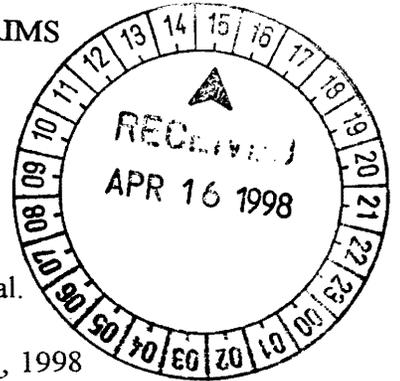
Attachment 4

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

PLAINTIFFS IN ALL WINSTAR-RELATED)
CASES,)
)
Plaintiffs,)
)
vs.)
)
THE UNITED STATES,)
)
Defendant.)

No. 90-8 C, et al.

Filed: April 14, 1998



AMENDED MASTER PROTECTIVE ORDER

WHEREAS on September 18, 1996, the Court entered an Omnibus Case Management Order applicable to all *Winstar*-related cases ("*Winstar* cases", or "cases"), setting forth the schedule and procedures for the litigation of those cases;

WHEREAS discovery and other proceedings in these *Winstar* cases may require the review of numerous documents and other information to determine whether they are protected from discovery by various privileges or other protections;

WHEREAS the interests of all the parties would be advanced by proceeding with discovery with all due expedition and without the waiver of any privilege or other protection;

WHEREAS discovery and other proceedings in these cases may require the disclosure of confidential information of the respective parties or of nonparties;

WHEREAS such confidential information may contain proprietary, business, personal or other confidential information, the unnecessary disclosure of which the Court and the parties have an obligation to prevent;

WHEREAS the Court entered its Master Protective Order ("MPO") to implement steps to protect the confidential information on November 22, 1996;

WHEREAS on May 14 and May 19, 1997, respectively, the Court entered two orders modifying protective orders previously entered in the Glendale and Statesman cases in order, in part, to bring the earlier protective orders into conformity with the MPO ("the Glendale/Statesman sharing orders");

WHEREAS the Court intends to enter this Amended Master Protective Order replacing the MPO and Glendale/Statesman sharing orders in order to reduce unnecessary burdens while still protecting the interests of the parties;

it is hereby ORDERED BY The COURT:

General Provisions

1. For the purposes of this Amended Master Protective Order ("Protective Order"):

(a) the term "Plaintiffs" shall mean each of the Plaintiffs in all *Winstar*-related cases as encompassed by the Omnibus Case Management Order, their respective attorneys, directors, officers, employees, predecessor financial institutions, successors, agents, representatives, consultants, holding companies, and experts, and all other persons acting on behalf of each of the Plaintiffs or person or entity who, by contract or otherwise, has the right to direct the conduct of the case by a Plaintiff;

(b) the term "Defendant" shall mean the United States, its agencies, offices, attorneys, officials, employees, representatives, consultants, experts, and all other persons acting on behalf of the United States, but excludes any agencies, offices, attorneys, officials, employees, representatives, consultants and all other persons on behalf of the United States or any agency thereof to extent that they are or may be acting as a Plaintiff in this litigation;

(c) the Federal Deposit Corporation ("FDIC") shall be a Plaintiff only to the extent that it is or is seeking to become a Plaintiff in any of the *Winstar*-related cases ("FDIC as receiver").

2. (a) In order to facilitate timely and efficient discovery and to minimize the burdens on the parties, the term "Confidential Material" shall mean all discovery materials produced in the *Winstar*-related cases, as well as the information the materials contain and information which is derived from such materials.

(b) The term "Attorneys Only Material" shall mean

- (i) non-public financial information of persons or institutions not placed into conservatorship or receivership that relates to a plaintiff other than the plaintiff to which the material is produced, including, but not limited to, examination reports, supervisory correspondence, business plans, and strategic plans;
- (ii) the undisclosed portions of a plaintiff's examination reports, and defendant's internal notes, memoranda or documents concerning an examination or other regulatory and deposit insurance matters, that were created after January 1, 1990;
- (iii) internal agency information, including, but not limited to, manuals detailing defendant's audit standards or procedures;
- (iv) information that relates to the privacy interests of third parties;
- (v) all confidential material obtained from the Government in the Glendale and Statesman cases as defined by the existing protective orders entered in those cases (including all confidential material served or filed in those actions and confidential material contained in the transcripts of Glendale and Statesman depositions and exhibits to those depositions) until 90 days after the submission of Statesman;
- (vi) materials that make express reference to any Attorneys Only material by quoting from it or otherwise setting forth the substance of the information contained herein.

(c) The materials described in subparagraph (b) of this paragraph shall be treated as Attorneys Only Material for the purposes of this Protective Order without any need for the producing party to so designate them. Additionally, within the time specified in paragraph 5, the

producing party may designate as Attorneys Only Material other documents that contain comparably confidential information such as information the disclosure of which would clearly impinge on the privacy rights of third parties, give the receiving party an unfair competitive advantage or reveal Defendant's investigative procedures.

(d) Notwithstanding subparagraphs (b) and (c) of this paragraph, "core documents" as defined in Paragraph 4 of the Omnibus Case Management Order shall not be considered Attorneys Only Material.

(e) Upon the expiration of the 90 day period specified in paragraph 2(b)(v), any material subject to that provision shall continue to be treated as Attorneys Only material if the material is entitled to Attorneys Only treatment under any other provision of paragraph 2(b). Additionally, the Government may designate any Glendale or Statesman material as Attorneys Only Material prior to the expiration of the 90 day period specified in paragraph 2(b)(v), consistent with the provisions of paragraph 5.

(f) Any confidential material obtained from the Defendant in Glendale and Statesman and disclosed by plaintiffs' counsel in Glendale and Statesman to other plaintiffs' counsel in *Winstar*-related cases shall be marked by the receiving party within five calendar days with the designation "Confidential Glendale/Statesman Material--Subject to Protective Order," in the manner prescribed in paragraph 6(a) of this Amended Master Protective Order, unless it is already marked in this manner. Any material that is to be treated as Attorneys Only under paragraph 2(e) shall be treated and marked by the receiving party as "Attorneys Only Material" pursuant to the terms of this Order.

3. This Protective Order governs the handling of all documents, interrogatory answers, deposition testimony and deposition exhibits, and any other written, recorded or graphic

matter ("discovery material") produced or obtained by any party during the proceedings in the *Winstar* cases after the entry of this Protective Order. This Protective Order supersedes the Interim Protective Order entered by this Court on October 25, 1996, the Master Protective Order entered by this Court on November 22, 1996, and the Glendale/Statesman sharing orders entered May 14, 1997 and May 19, 1997, and any documents produced under the Interim Protective Order or the November 22, 1996 Master Protective Order shall for all purposes be governed by this Protective Order. This Protective Order also supersedes any prior protective order entered in any *Winstar* case, but only with regard to discovery material produced or obtained after October 25, 1996; discovery material already produced under any prior protective order shall be governed by the terms of any such prior protective order. This Protective Order does not, however, affect or place any new or additional limitations on the right of any Plaintiff in the *Winstar* cases or of the Defendant to use other documents or information that is already in that party's possession, that is generated or obtained by that party in the normal course of its business, or that is obtained from any third party, except to the extent that any discovery material is obtained from any such third party pursuant to compulsory process under the provisions of this Protective Order.

Confidential Material

4. All Confidential Material produced in the *Winstar*-related cases shall be subject to the provisions of this Protective Order. All Confidential material produced in the *Winstar* cases shall be used by the respective Plaintiffs and by the Defendant solely for the purposes of the *Winstar* cases and for no other purpose.

5. (a) For a period of 60 days from the production of documents (or 90 days after the submission of Statesman in the case of Glendale/Statesman materials), the producing party may review the produced documents to determine whether they include materials that do not fall

within the categories of Attorneys Only Material described in paragraph 2(b) but that contain comparably confidential information such as information the disclosure of which would clearly impinge on the privacy rights of third parties, give the receiving party an unfair competitive advantage or reveal Defendant's investigative procedures. The producing party may designate such additional materials as Attorneys Only Material. At all times, and notwithstanding whether the producing party has designated a particular document or other material as Attorneys Only Material, any document or other material that is Attorneys Only Material as defined in paragraph 2(b) shall be treated as such.

(b) During that 60 day period (or 90 day period in the case of Glendale/Statesman materials), the receiving party shall accord all documents treatment as Attorneys Only Material, as provided by paragraph 9. After the 60 (or 90) day period, the receiving party shall treat as Attorneys Only Material all documents that fall within paragraph 2(b) and all documents that have been designated by the producing party as Attorneys Only Material under the provisions of subparagraph (a) of this paragraph.

6. Discovery materials shall be marked as follows:

(a) With respect to documents, the producing party shall conspicuously mark each page of the document with the designation "Confidential Material -- Subject to Protective Order". Alternatively, if a document is longer than 20 pages, the producing party may place the designation "Confidential Material -- Subject to Protective Order" on the first page of the document and indicate immediately below that legend the total number of pages in the document. If a producing party selects this alternative, it will be the producing party's responsibility to bind the document in a manner that will prevent pages from becoming detached, and any inadvertent disclosure of Confidential Material designated in this alternative manner shall not subject the

receiving party to any sanctions or any other liability whatsoever. Because all documents are deemed Confidential Material, the need to mark them as such should not in the ordinary course of business be a basis for delaying production. For documents that have been prepared for production prior to entry of this Protective Order, the producing party may identify in a letter to the receiving party the number ranges of such documents that are Confidential Material in lieu of the marking otherwise required by this paragraph;

(b) With respect to documents produced after entry of this Protective Order, the producing party shall individually number each page of every document according to the numbering system set forth in Exhibit A to the November 22, 1996 Master Protective Order prior to production, or prior to the delivery of copies in the case of an on-site inspection of such documents, provided that a party that has begun numbering documents with an equivalent, unique numbering system prior to entry of the November 22, 1996 Master Protective Order may continue to use such other system upon notice to the receiving party;

(c) With respect to Answers to Interrogatories or Requests for Admissions, the responding party shall conspicuously mark the response or any portion thereof with the designation "Confidential Material -- Subject to Protective Order";

(d) In the case of deposition testimony, counsel for any party shall state on the record during the deposition that specific questions and answers or an entire line of inquiry involves Attorneys Only Material and then confirm promptly after receipt of the transcript that the court reporter has marked the relevant portions of the deposition transcript with the designation "Attorneys Only Material - Subject to Protective Order". A failure to designate testimony as Attorneys Only Material on the record during a deposition will not constitute a waiver thereof and the producing party may within fifteen (15) days after receipt of the deposition transcript

designate in the manner described in this paragraph those portions of the deposition that contain Attorneys Only Material;

(e) Upon receipt of documents, the receiving party shall identify all documents that are Attorney Only Material under paragraph 2(b). The receiving party shall mark all such documents as "Attorneys Only Material." The receiving party shall inform the producing party in writing of the number ranges of documents that have been marked as Attorneys Only Material. For documents that are designated as Attorneys Only Material pursuant to paragraph 5 after they have been produced, the producing party shall identify in a letter to the receiving party the number ranges of such documents that are "Attorneys Only Material and the receiving party shall ensure that such documents are marked "Attorneys Only Material";

7. Except as otherwise provided herein, Confidential Material and Attorneys Only Material may not be disclosed or discussed with any person.

8. Subject to the provisions of paragraph 9, each respective Plaintiff in these cases may disclose or permit to be disclosed Confidential Material received from Defendant, the Defendant may disclose or permit to be disclosed Confidential Material received from any Plaintiff, and the parties may disclose or permit to be disclosed Confidential Material obtained through compulsory process pursuant to the provisions of this Protective Order, only to the following persons:

(a) The Court, pursuant to paragraph 18 of this Order,

(b) Counsel retained by that Plaintiff for these cases, counsel and agency personnel employed by the FDIC as receiver and working on these cases, counsel and agency personnel employed by Defendant and working on these cases, and the respective employees and legal support staff of such counsel;

(c) Counsel (and their paralegals and clerical support staff) who are directors, officers or employees of that Plaintiff, provided that before disclosure such counsel shall certify in a writing lodged with the Court that (i) such counsel have reviewed the terms of this Protective Order and agree to be bound by its terms, (ii) such counsel understand the sensitive nature of Attorneys Only Material and (iii) in exchange for access to Attorneys Only Material such counsel shall be screened during the pendency of that Plaintiff's claims from participation in any business decisionmaking of the Plaintiff to which any Attorneys Only Material disclosed to such counsel may be relevant and shall not thereafter make use of any Attorneys Only Material;

(d) Litigation support contractors and subcontractors retained by the Defendant as its agent(s), or retained by the Plaintiff as its agent(s), who are assisting counsel in the prosecution or defense of this litigation;

(e) Persons especially retained by counsel for one or more parties to this litigation to assist in the preparation of this litigation for trial, including experts retained either to provide testimony at trial or as consultants, who are not regular employees of a party to this litigation, and only if such persons have a need to use some or all of the Confidential Material, but not including persons who are officers, directors, shareholders or owners of any kind, or employees of any of the Plaintiffs to these cases;

(f) Any person whose testimony is taken or is to be taken in this litigation, except that such a person may only be shown the Confidential Material during his or her testimony and in preparation for that testimony and then only to the extent necessary for such testimony or for the preparation of such testimony.

(g) Those of that Plaintiffs respective current or former directors or officers, or employees or former employees of such Plaintiff or Plaintiff's institution who are assisting counsel in the prosecution or defense of this litigation.

9. (a) Except as otherwise provided by this paragraph, Attorneys Only Material may be disclosed only to individuals described in paragraph 8(a)-(f).

(b) In the event that any Plaintiff's counsel seeks to disclose Attorneys Only Material to a current director, officer or employee described in either paragraph 8(f) or paragraph 8(g), such Plaintiff's counsel shall provide Defendant with written notice 14 days before disclosure is made, identifying the Attorneys Only Material that counsel intends to disclose. Such notice may be provided at any time after production. In the event that Defendant objects in writing to such disclosure within the 14 day period, the parties shall attempt to reach an agreement regarding the proposed disclosure. If the parties do not reach agreement within 10 days of Defendant's written objection, the parties shall notify the Court, which will hold a hearing to decide the matter within 10 days or as soon as practicable thereafter. The parties shall not submit writings, other than Plaintiff's original notice and Defendant's objection, without leave of the Court. Failure by the Defendant to object in writing within 14 days of the original notice shall constitute the waiver of any objection to the disclosure, except for good cause shown. During the pendency of any objection, Plaintiff's counsel shall not disclose the subject Attorneys Only Material to any individual described in paragraph 8(g).

(c) In the event that any Plaintiff's counsel seeks to disclose Attorneys Only Material to former directors, officers or employees described in either paragraph 8(f) or 8(g), such Plaintiff's counsel shall provide Defendant with written notice 14 days before disclosure is made, identifying the former director, officer or employee to whom Plaintiff's counsel proposes to show

Attorneys Only Material. In the event that Defendant objects in writing to such disclosure within the 14 day period upon grounds that the information to be disclosed has not been identified or upon other grounds, the parties shall attempt to reach an agreement regarding the proposed disclosure. If the parties do not reach agreement within 10 days of Defendant's written objection, the parties shall notify the Court, which will hold a hearing to decide the matter within 10 days or as soon as practicable thereafter. Failure by the Defendant to object in writing within 14 days of the original notice shall constitute the waiver of any objection to the disclosure, except for good cause shown. During the pendency of any objection, Plaintiff's counsel shall not disclose the subject Attorneys Only Material to any individual described in paragraph 8(g).

(d) The above paragraphs (b) and (c) shall not apply at a deposition or at trial, when the need to disclose Attorneys Only Material to a current or former director, officer or employee of the Plaintiff arises from the scope of the Defendant's deposition or trial examination, in which case the parties shall attempt to reach an agreement regarding the proposed disclosure for purposes of plaintiff's cross or re-direct examination, with recourse to the Court absent an agreement.

(e) Notwithstanding the provisions of subparagraph (a) of this paragraph, if the Attorneys Only Material sought to be disclosed contains information pertaining to a party other than the particular Plaintiff or its institution, such disclosure may only be made with the prior consent of such party or order of the Court.

10. Notwithstanding any other provision of this Protective Order, any Plaintiff's counsel may disclose Confidential Material obtained from the Defendant to another Plaintiff's counsel, including plaintiffs' counsel in Glendale and Statesman, as described in paragraph 8(b).

Such other Plaintiffs' counsel, however, may make further disclosure only pursuant to this paragraph and paragraphs 8(a)-(f) of this Protective Order.

11. Counsel of record shall advise all persons to whom Confidential Material is disclosed of the restrictions contained in this Protective Order regarding any use other than in connection with this litigation or further disclosure of such information or material and counsel shall provide any such person with a copy of this Protective Order, and otherwise comply with the provisions of paragraph 15 hereof.

12. If Defendant determines that a discovery request made to Defendant in any *Winstar* case will require the production of material that is Attorneys Only Material of one or more Plaintiffs other than the requesting Plaintiff, Defendant shall provide prompt written notice to such other Plaintiff(s), provided, however, that if at least five Plaintiffs are affected by the request, Defendant may provide notice of the request to all Plaintiffs in the *Winstar* cases so long as such notice describes the Plaintiffs whose Attorneys Only Material will be disclosed pursuant to the request. To the extent that a Plaintiff knows that the Attorneys Only Material of another Plaintiff is the subject of a discovery request that it has made to Defendant, the requesting Plaintiff shall provide written notice to such other Plaintiff. Within 15 days after receipt of notice that its Attorneys Only is the subject of a discovery request, a Plaintiff may file a motion with the Court objecting to the production of such Attorneys Only Material.

13. (a) Nothing contained in this Protective Order shall prevent or in any way limit or impair the right of Defendant or the FDIC in any capacity to disclose any documents or information to the United States Congress or to disclose to an agency of the United States any document or information regarding any potential violation of law or regulation, or prevent or limit in any way the use of such documents and information by an agency in any proceeding regarding

the potential violation of law or regulation. In the event Defendant or the FDIC in any capacity discloses documents or information to the United States Congress, or discloses to an agency of the United States any document or information regarding any potential noncriminal violation of law or regulation, it shall notify Plaintiff of that disclosure within three business days.

Furthermore, the Defendant or the FDIC in any capacity shall, in good faith, attempt to arrange for procedures that maintain the confidentiality of Confidential Material in a manner consistent with this Protective Order.

(b) In the event that a party receives compulsory process issued by any court or administrative tribunal that requires the disclosure of Confidential Material or Attorneys Only Material covered by this Protective Order, that party shall provide prompt written notice to Plaintiffs' Coordinating Committee, Defendant's Coordinating Committee and FDIC as receiver of such compulsory process and, before production, shall call to the attention of such court or administrative tribunal the provisions of this Protective Order. Nothing contained in this Protective Order shall prevent any party from complying with a subsequent order issued by such court or administrative tribunal requiring disclosure of Confidential Material or Attorneys Only Material covered by this Protective Order.

14. Under no circumstances shall Defendant or any Plaintiff disclose or permit the disclosure of any Confidential Material, except in accordance with paragraphs 8, 9, 10, 11, 12 and 13 of this Protective Order, or in accordance with a subsequent order of the Court applicable to the *Winstar* cases or to one or more of those cases.

15. Prior to disclosing any Confidential Material to any person identified in paragraphs 8(c)-(g) of this Protective Order (except for disclosure at deposition or trial), counsel for the Plaintiff or counsel for the Defendant, as appropriate, shall (a) apprise that person of the

confidential nature of the Confidential Material; (b) apprise that person that this Court has enjoined the use of that Confidential Material by him or her for any purpose other than the *Winstar* cases and has enjoined the disclosure of that Confidential Material to any person other than as expressly provided for in this Protective Order; (c) show that person this Protective Order, specifically pointing out paragraph 16 hereof, and (d) obtain from that person a written declaration in the form attached as Exhibit B to the November 22, 1996 Master Protective Order, stating that such person has read this Protective Order and agrees to be bound by it. Such declaration shall be maintained in the possession of the attorney securing the declaration until further order of the Court.

16. Each person given access to, receiving, or in possession of Confidential Material shall segregate such material, keep it strictly secure, maintain such material in his or her possession in a locked or guarded storage facility, or some equivalent manner sufficient to protect such material against unauthorized disclosure, and refrain from disclosing in any manner any information set forth in the material except as specifically provided for by the terms of this Protective Order.

17. In the event any Confidential Material is used in any court proceeding in this civil action, including depositions, it shall not lose its confidential status through such use.

18. Subject to order of the Court, that portion of any pleading, motion, deposition transcript or other document submitted or presented to or filed with the Court containing Attorneys Only Material shall be presented under seal and shall not be available to persons other than the Court and authorized employees of the Court, the attorneys of record for the parties to this action, and other persons authorized by this Protective Order, provided that:

(a) a party seeking to file Attorneys Only Material with the Court without placing the material under seal may elect instead to provide the producing party with written notice 7 days before such filing is made, identifying the Attorneys Only Material that counsel intends to disclose. In the event that the producing party objects in writing to such disclosure within the 7 day period, the material shall be filed under seal pursuant to this paragraph.

(b) In the event that any Attorneys Only Material is used in any Court proceeding herein, the parties shall attempt to stipulate as to the procedures for use of Attorneys Only Material in Court proceedings. If necessary, any dispute regarding the procedures for use of Attorneys Only Material in Court proceedings shall be submitted to the Court for resolution.

(c) In the event any party seeks to have material other than Attorneys Only Material filed under seal, it may seek an appropriate order from the Court.

19. If any party challenges or seeks to modify the designation of any discovery material, such party shall attempt to resolve, through consent of the opposing party, the question of whether the document or information should be treated as Attorneys Only Material. If the parties are unable to agree as to whether the document or information should be treated as Attorneys Only Material, the party challenging the designation or seeking modification, as the case may be, shall notify the opposing party in writing that it intends to file a motion in the Court seeking an Order determining whether the document or information shall be covered by paragraphs 2 or 5 of this Protective Order. Such party shall have no more than fifteen (15) days following such notification in which to file a motion in the Court seeking an Order determining whether the document or information shall be treated as Attorneys Only under this Protective Order. The opposing party shall have no more than fifteen (15) days alter the filing of such a

motion in which to file a response. Until a resolution of the dispute is achieved through Court Order, the parties shall treat the designated document or information as Attorneys Only Material.

Privileged Material

20. In view of the large volume of documents that may be produced during discovery in these cases, the parties may produce documents that could have been withheld in whole or in part upon the basis of privilege or some other protection. Therefore, any such production of all or part of a document shall not constitute a waiver of any privilege or other protection as to any portion of that document, in this or in any other proceeding, provided that the producing party notify the receiving party or parties within 60 days after the production of all or portions of a privileged or otherwise protected document (except that disclosure by Glendale and Statesman counsel of discovery material produced by the Defendant shall be subject to the provisions of paragraph 21). Such notice shall be in writing, shall be served upon counsel of record, and shall contain information sufficient to (1) identify the document, including information as necessary to locate the materials produced; and (2) to identify the privilege or protection alleged. Notice may be made orally on the record at a deposition or hearing, provided that it is subsequently confirmed in writing within 10 days from receipt of the deposition transcript. Failure to provide notice within the specified time and thereby preserve a privilege or protection shall be deemed a waiver of the claim of privilege or protection for purposes of this litigation. Failure to assert or preserve a privilege or other protection as to part or all of a document, however, shall not be a waiver of the privilege or other protection for purposes other than this litigation and shall not constitute a waiver of the privilege or other protection as to any part of the document not produced or as to any other document, communication, or information, even involving the same subject matter.

21. The disclosure by plaintiffs' counsel in Glendale or Statesman to plaintiffs' counsel in any *Winstar* case shall not constitute a waiver by the Government of any privilege or other protection concerning such document or any portion thereof provided that the Government notify all Plaintiffs' counsel in the manner described in paragraph 20 of this Protective Order, disregarding the time limits therein, but such notice must be sent no later than the 90th day after submission of Statesman to the Court for decision. Should any *Winstar* counsel, at any time prior to the submission of Statesman seek to use in any pleading, deposition, motion or other filing any discovery material produced by Defendant in Glendale or Statesman and received by such *Winstar* counsel pursuant to this Protective Order or the Glendale/Statesman sharing orders, such counsel shall, at least 10 business days prior to the deposition or the filing of such pleading or motion, provide written notice to counsel for Defendant, and include copies of the discovery material in question. The Defendant's counsel shall, no later than seven business days after receiving the notice, advise plaintiffs' counsel if Defendant contends any of the discovery material is subject to a claim of privilege or other protection, and shall state the basis for that contention. Discovery material to which the defendant asserts a privilege or protection shall thereafter be handled pursuant to the provisions of paragraph 23 through 25 of this Protective Order.

22. In light of the Court's Glendale/Statesman orders and the terms of this order providing plaintiffs access to certain discovery material produced by Defendant in Glendale and Statesman, Defendant is hereby relieved, except for good cause shown, from any future obligations to produce those same materials again to any plaintiff. In return, the Defendant stipulates that such materials, if obtained pursuant to the terms of this Order or the Glendale/Statesman sharing orders, shall be treated for all purposes as if they had been produced directly to those plaintiffs by Defendant.

23. Upon proper and timely notice from the producing party pursuant to paragraph 20 of this Protective Order, the parties shall attempt to reach agreement regarding the privilege or protection that may apply to the document or any portion of the document. If the parties do not reach an agreement within 10 days after notice, the receiving party shall return the document and any copies to the producing party (or make appropriate redactions) and shall not refer to the allegedly privileged or protected material in any manner, whether written or oral, in any interrogatory, request for admission, document request, interview, deposition, oral argument, trial or submission to the Court; nor will the receiving party disclose the substance of that material to any third party. The party contesting a privilege or protection may file a motion to compel production within 30 days after the notice, after which it waives any right to dispute the privilege or protection with respect to that document. Pending resolution of the claim of privilege or protection by the Court, the receiving party shall neither refer to the allegedly privileged or protected material in any manner, whether written or oral, in any interrogatory, request for admission, document request, interview, deposition, oral argument, trial or submission to the Court, nor will the receiving party disclose the substance of that material to any third party.

24. The Court's or the receiving party's recognition of the producing party's claim of privilege shall be followed immediately by expurgation by the receiving party of the pertinent documents produced and destruction of any copies, notes, memoranda, or other material derived therefrom or relating thereto.

25. A party may challenge the assertion of any privilege or other protection for any documents originally withheld from production, or asserted as an objection to any Interrogatory or interposed during any deposition by filing a timely motion to compel, provided, however, that within 60 days of the objection or withholding, the moving party notify in writing the party

claiming the privilege or protection that the assertion of a privilege or protection is being challenged. The notice required by this paragraph shall contain information sufficient to (1) identify the document, the Interrogatory, or deposition at issue; (2) identify the privilege or protection that is being challenged; and (3) briefly explain the basis for the challenge. The parties shall in good faith attempt to resolve the matter. If the matter has not been resolved within 30 days from the receipt of the notice required by this paragraph, the party challenging the privilege or the protection may file a motion to compel.

26. Nothing in this Protective Order shall prohibit a party from withholding from review and/or production any document covered by any privilege(s) or protection.

Administration of This Order

27. If Defendant or any Plaintiff has cause to believe that a violation of this Order has occurred or is about to occur, it shall have the right to petition this Court for appropriate relief.

28. For good cause shown, any Plaintiff or Defendant may seek a modification of this Protective Order. No part of the provisions of the Protective Order may be modified except in accordance with this Protective Order. The provisions of this Protective Order, and any subsequent amendments thereto and modifications thereof shall continue to be binding after the termination of the *Winstar* cases unless otherwise ordered.

29. Any party seeking a modification of this Protective Order for the *Winstar* cases or for one or more of those cases, must first provide the Plaintiffs' Coordinating Committee, the FDIC as Receiver ("FDIC-R"), and (unless the Defendant is the party seeking such modification) Defendants' Coordinating Committee with at least 10 days written notice prior to filing any such motion with the Court. During that 10 day period, the parties shall attempt to agree to a proposed modification. If such agreement is reached, the Plaintiffs' Coordinating Committee, the FDIC-R

and the Defendant's Coordinating Committee and the party requesting modification shall execute a stipulation setting out such modification, which will then be presented to the Court for approval. If no agreement is reached within the 10 day period, the party seeking the modification may apply to the Court for such relief, upon notice to all parties to the *Winstar* cases. Consistent with the terms of the Omnibus Case Management Order, the Court shall provide an opportunity for the parties to present their respective views to the Court before approving a stipulated request for modification or before granting a motion seeking modification.

30. Within 90 days of the exhaustion of all appeals in any *Winstar* case, the parties to that case shall undertake reasonable and prudent efforts to return all original Confidential Material to the disclosing party and to destroy all copies of and all notes, summaries, and references relating to such Confidential Material and, further, the parties shall certify to the Court that such reasonable and prudent efforts have been undertaken.

Date: April 14, 1998

Loren A. Smith
by Marie Blanton, Judge
LOREN A. SMITH
CHIEF JUDGE

Attachment 5

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

PLAINTIFFS IN ALL WINSTAR-RELATED)	
CASES AT THE COURT,)	
)	
Plaintiffs,)	No. 90-8C, <u>et al.</u>
)	(Chief Judge Smith)
v.)	
)	
THE UNITED STATES,)	Filed: APR 02 1997
)	
Defendant.)	

PRIORITY CASES PRETRIAL SCHEDULING ORDER

I. SCOPE

A. This Order is issued to clarify and facilitate the scheduling of the Priority Cases, which are the cases identified in and subject to Appendix D of the Court's Omnibus Case Management Order, dated September 18, 1996 ("CMO").

B. The pretrial scheduling for the Priority Cases is subject to the CMO, Procedural Order Number One ("Phase I Order") if and when it is entered by the Court, the Master Protective Order entered on November 22, 1996 ("MPO"), and the Court's Order concerning scheduling of trials for the Priority Cases entered on January 3, 1997, except to the extent that such Orders are inconsistent with this Order.

C. The Rules of the U.S. Court of Federal Claims (hereafter "RCFC" or the "Rules of this Court") govern the pretrial scheduling for the Priority Cases, except as inconsistent with this Order or the orders identified in the preceding paragraph.

II. TRIAL DATES AND PROTOCOL

A. After completion of the trials in Glendale and Statesman, the Managing Judge either will assign a trial date for each Priority Case or he will assign each Priority Case to a Trial Judge, who then will assign trial dates that are consistent with this Order (hereafter the "Assigned Trial Dates"). Absent assignment of a later date, the Assigned Trial Date for the first two Priority Cases (Suess and CalFed) shall be the first non-holiday Monday of the first month that begins at least four months after completion of the trials in Glendale and Statesman. For the remaining Priority Cases, until exact Trial Dates are assigned, the Assigned Trial Date shall be presumed to be the first non-holiday Mondays of succeeding months, as provided herein.

B. The trial dates set out below and the resulting schedule of pretrial events assume that the trials of both Glendale and Statesman will be concluded by the end of April 1997. If both trials are not concluded by that time, appropriate changes will be made in the trial dates set out below so that trials will commence in the Priority Cases not earlier than four months after the conclusion of the Glendale and Statesman trials, and in no event, before September 2, 1997. As used in this paragraph, the conclusion of the Glendale and the Statesman trials shall mean the dates on which both cases have been submitted to the Court for decision. Consistent with these

assumptions and the Court's order dated January 3, 1997, the trials of the Priority Cases will begin during the following months:

September 1997	<u>Suess; CalFed</u>
October 1997	<u>LaSalle Talman; Castle</u>
November 1997	<u>Bluebonnet; Bank United</u>
December 1997	<u>Glass</u>
January 1998	<u>C. Hunt Trust Estate; Landmark</u>
February 1998	<u>Bailey/Security; Anderson;</u> <u>MACO Bancorp</u>

Hereafter in this Order, these months shall be referred to as the "Assigned Trial Months" for the Priority Cases.

C. Any such Assigned Trial Month or Assigned Trial Date may be changed only by order of the Managing Judge or the Trial Judge or by the agreement of the parties and the Court. Where a trial is postponed and remains necessary, the Trial Judge will reschedule the trial for the next available trial date.

D. The trials in Priority Cases will address all remaining damages and liability issues in each case.

E. If all plaintiffs in a Priority Case agree that such case should no longer be a Priority Case, plaintiffs may remove such case from the Priority Case list, without leave of Court, by notifying the Managing Judge or Assigned Trial Judge, provided that such notice is filed within 10 days after completion of the trials in Glerdale and Statesman. If any plaintiff seeks to

remove a Priority Case from Schedule D of the CMO after this date, this may be sought by written motion setting forth good cause for the request, but in no event shall such motion be filed after the date provided in Paragraph VI of this Order for the production of final expert reports by the plaintiffs in each case. Any case removed from Schedule D of the CMO shall no longer be subject to this Order or any other provisions of Court orders applicable to the Priority Cases. The FDIC's concurrence with any request made by a private plaintiff in accordance with this paragraph, shall not be considered as an effort by FDIC to delay a Priority Case trial.

III. FACT DISCOVERY

A. By Defendant. Notwithstanding any prior Order, the Defendant may take discovery in any of the Priority Cases subject to the RCFC, including RCFC 56(g) in those cases where the plaintiff has moved for partial summary judgment in accordance with Paragraph 5 of the CMO. The parties shall attempt to schedule document productions and depositions for mutually convenient times and locations.

B. By FDIC. In addition to any other discovery rights and obligations generally applicable to the parties in the Priority Cases, the FDIC may initiate discovery in the Priority Cases in which it has been permitted to intervene, as follows:

1. To the extent that plaintiffs and defendants have produced or will produce documents, including

"core documents," to each other and not to FDIC, those documents shall also be provided to FDIC.

C. By Plaintiffs.

1. The plaintiffs in Priority Cases, including FDIC, may not demand discovery from the Defendant except for "core" document exchanges and expert discovery as provided in Paragraph IV herein.

2. Plaintiffs' discovery from third-parties shall be limited to 15 subpoenas for documents and 8 subpoenas for testimony by each plaintiff in each Priority Case (with the private plaintiffs as a group and the FDIC considered as separate plaintiffs in each case in which FDIC has been permitted to intervene). Further, it is understood that Priority plaintiffs' discovery from third-parties shall not be construed to include discovery aimed at current or former government employees (i.e., current or former government employees of the federal banking and thrift agencies involved in this litigation and their predecessor agencies). Plaintiffs' discovery from third-parties, as provided in this paragraph shall be arranged for mutually convenient dates and times between or among the parties if possible. Further, plaintiffs agree to provide to the defendant, copies of the documents received and/or the transcript(s) of any deposition testimony taken as a result of plaintiffs' third-party discovery. Plaintiffs shall provide such copies at their own expense for up to 500 pages from each subpoena production or deposition. Copies

in excess of 500 pages shall be provided at the expense of the defendant, and in the instance of voluminous document productions, the plaintiff shall contact defendant in advance of making such copies to determine if the defendant wishes to bear such expense.

D. Any discovery disputes that arise in connection with fact discovery undertaken pursuant to the foregoing Paragraphs III.A through C shall be resolved, by written motion of the complaining party, by the assigned Discovery Judge or if such assignment has not yet been made, by the Managing Judge. Any discovery motion shall contain a statement by the movant that the parties have consulted in good faith in an effort to resolve the matters in dispute.

E. Nothing in this order or the CMO will restrict the parties' ability to take de bene esse depositions of witnesses who would otherwise be unavailable to testify at trial, which shall be taken and offered in accordance with the RCFC. In addition, all parties may obtain discovery of "core" documents pursuant to Paragraph 4 of the CMO.

IV. EXPERT DISCOVERY

A. On the date set forth herein, the parties shall identify each witness whom the party intends to call at trial to offer opinion testimony pursuant to Rule 702 of the Federal Rules of Evidence. For each expert witness, the identification shall include: (a) the witness's qualifications, including a

curriculum vitae; (b) a list of all publications authored by the witness within the preceding 10 years; (c) the witness's compensation to be paid for his/her study, report and testimony; and (d) a list of any other cases in which the witness has testified at trial, or by deposition, declaration, or affidavit, within the preceding 4 years.

B. On the date set forth herein, the parties shall produce a final written report for each expert witness. The report shall be executed by the witness, and shall contain: (a) a complete statement of all final opinions to be expressed by the witness, and the basis for each opinion; (b) a listing by category of all data or other information considered by the witness in forming the opinion(s); and (c) any exhibits to be used as a summary of or support for the opinion(s). In addition, on the same date that the reports are produced, each party shall produce copies of all materials relied upon by each expert in connection with the preparation of his/her report.

C. The parties shall produce their expert witnesses for depositions, and each may take depositions of other parties' expert witnesses after the receipt of each witness's report in accordance with the schedule set out herein.

D. Except as provided in Paragraph IV.F herein, any disputes about expert witness discovery shall be resolved in the manner set forth in Paragraph III.D. above. The assigned

Discovery Judge will give priority to disputes involving expert witness matters in Priority Cases.

E. Absent good cause, if a party does not comply with the provisions in this section regarding an expert witness, within the periods specified in this Order, no opinion testimony shall be received from the witness on behalf of the party in its case-in-chief.

V. OTHER SCHEDULING MATTERS

A. The deadline for filing motions to dismiss or motions for summary judgment is set forth herein. An exception to this deadline is available to the defendant only for defenses that are based on information discovered by defendant after the applicable deadline. Consistent with the Assigned Trial Dates set for each Priority Case, the Court will provide for accelerated response and briefing dates if necessary to deal with individual motions.

B. The parties shall be subject to the following modified RCFC Appendix G procedures, except that the filing dates shall be those set out in this Order rather than the dates contained in RCFC Appendix G:

1. The filing of a Memorandum of Contentions of Fact and Law, pursuant to Appendix G, paragraph 11.
2. The filing of a witness list and any motions to submit deposition testimony, pursuant to Appendix G, paragraph 12.

3. The filing of an exhibit list, pursuant to Appendix G, paragraph 13. The list shall identify documents by Bates number (to the extent previously Bates-labelled), in addition to the identification required by paragraph 13. Provided, however, that a party need not provide a synopsis or statement of significance for its exhibits unless the party intends to introduce more than 500 exhibits.
4. The exchange of exhibits, pursuant to Appendix G, paragraph 10(a).

C. The parties may file motions in limine, and oppositions to these motions, in accordance with the deadlines set forth herein. The parties shall not file replies in support of motions in limine, unless special leave is granted for good cause shown.

D. On any date that is not less than 60 days before the Assigned Trial Date, the parties may serve any requests for admissions; however, such requests for admissions shall be limited to 30 requests per party in each Priority Case (with the private plaintiffs as a group and the FDIC considered as separate parties in each case in which FDIC has been permitted to intervene). Requests for admissions also shall be limited to issues of fact and shall not seek admissions regarding contentions of law or the application of law to facts. Responses shall be served within 30 business days of receipt.

E. On any date that is not less than 30 days before the Assigned Trial Date, the parties may serve proposed stipulations. Responses shall be served within 20 business days of receipt.

F. At least four days before presentation of each side's case-in-chief, the parties shall confer and establish an expected list of witnesses and exhibits for each projected day of trial. The parties shall seasonably advise one another of changes in this schedule, taking into account developments at trial. Subject to the direction of the Trial Judge, the parties also shall confer in advance of any rebuttal phase.

G. The Trial Judge may schedule pretrial conferences as appropriate for each case.

VI. SCHEDULING OF PRETRIAL EVENTS

The parties shall adhere to the following deadlines for pretrial procedures, in addition to other dates and requirements set forth in this Order. The deadline is indicated by the number of days before each Assigned Trial Date:

<u>Event</u>	<u>Deadline for Months 1, 2, 3</u>	<u>Deadline for Months 4, 5, 6</u>
Identification of Plaintiff's Experts and Final Reports by Plaintiff's Experts	105	120
Defendant's Depositions of Plaintiff's Experts	75-96	85-110
Close of Fact Discovery	75	85
Identification of Defendant's Experts and Final Reports by Defendant's Experts	70	80

Plaintiff's Depositions of Defendant's Experts	41-62	45-70
Last Day for Motions to Dismiss and for Summary Judgment	60	65
Plaintiff's Modified Appendix G Filings	35	40
Defendant's Modified Appendix G Filings	25	30
Motions in Limine	15	20
Responses to Motions in Limine	8	10

Dated: 4/2/97



LOREN A. SMITH
CHIEF JUDGE

Attachment 6

In the United States Court of Federal Claims

PLAINTIFFS IN ALL WINSTAR-
RELATED CASES AT THE COURT,

Plaintiff's.

v.

THE UNITED STATES,

Defendant.

Case No. 90-8 C, et al.

Filed: SEP 04 1998

ORDER

After careful consideration of the Motion of the United States for Reconsideration of the Order Appointing a Special Master the court must deny that motion for the reasons following.

It is clearly true that the appointment of a special master is the exception, not the rule. This is the first time in thirteen years on the bench that this court has ever contemplated such an action. However, the situation that requires this action goes beyond the exception to the extraordinary.

In the 120 plus *Winstar* cases the government and the plaintiffs have each spent in the tens of millions of dollars on the direct litigation of these cases. The expenditures in the future by each side are likely to reach past the hundred million dollar threshold, if they have not already done so. Based on statements in the press by all sides the amounts in dispute are in the ten to fifty billion dollar range.

Up until the present time the court has adequately addressed this exceptional litigation with no additional resources. This has been a tribute to the effort of the court staff. However, the passage of FIRREA, which the Supreme Court found breached at least some of these contracts, occurred in 1989, almost a decade ago. The effect of these cases has begun to take its toll on the resources of the management system.

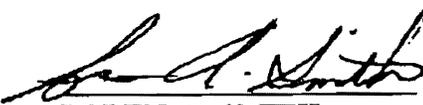
While "justice delayed is justice denied" is an old cliché, its poignance is not lost on these cases. Each active judge of the court has a full docket. While the collective impact of the *Winstar* cases has delayed some other cases on the managing judge's docket, the impact has been relatively limited until now. It is for the purpose of avoiding future impacts, that the court has taken this modest and highly cost efficient step of naming a special master. The appointment of a special master is also consistent with the government's request for a coordinated case management system. While plaintiffs argued for the right of all 120 plus cases to be heard immediately following the Supreme Court's *Winstar* ruling, the government argued convincingly that even the uncoordinated discovery requested in all cases would have cost it in excess of \$100 million dollars.

The case management system, developed by the court, with the cooperation of all the parties through their coordinating committees, was a response to the government's request. It has apparently worked well. It has saved each side countless dollars, and duplicative resources. It is also saving valuable time. However, that management system has required additional court resources for which there is no traditional source. Up to this point those resources have come from the court's regular staff. This has had an unfair and disproportionate effect on non-*Winstar* cases. To avoid this result in the future the court has turned to the special master approach, rather than rethinking the original case management system.

In response to the government's legitimate desire for a clarification of the special master's role the court notes the following. The use of special masters is a flexible tool that must be shaped by the needs of the fair and efficient administration of justice. Extraordinary circumstances require innovative management procedures. The court currently contemplates using the special master in exactly the same way as Mr. Schulz has been utilized in the last two years in these cases. As a special master, he will fill a management and administrative, not a judicial, role. The only difference would be that he would be able to devote all of his time to these cases rather than to the non-*Winstar* cases that have also made up part of his considerable work load. This would insure that no current procedural protections would be lost. To the extent any new tasks of the more traditional special master role would be added it would only be done after all parties were given an opportunity to comment and with the traditional protections appropriate to a special master.

The clerk is directed to distribute this order only to members of the three *Winstar* Coordinating Committees.

IT IS SO ORDERED



LOREN A. SMITH
CHIEF JUDGE

Attachment 7

ORIGINAL

In the United States Court of Federal Claims

FILED
MAR 3 1998
U.S. COURT OF FEDERAL CLAIMS

PLAINTIFFS IN ALL WINSTAR-RELATED CASES AT THE COURT,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Case No. 90-8 C, et al.

Filed: MAR 03 1998

ORDER

The court, after long consideration of the plaintiff's and the defendant's cases in *Glendale Federal Bank v. United States* and the general progress of the 120-plus Winstar cases, is deeply concerned about the enormous litigation costs these cases pose for both the plaintiffs and the taxpayers. These costs will clearly be in the hundreds of millions of dollars. The best efforts of the parties will require litigation of these cases well into the first decade of the 21st century. The court feels, in the spirit of the comments it made in *California Federal Bank v. United States*, a moral obligation to attempt to avert this colossal expenditure of resources and talent.

Courts are an institution of last resort when all consensual means of resolving conflicts have failed. They must impose a fair and just solution when the parties cannot. However, the imposed judicial decision can never be as just as one voluntarily agreed to by the parties, and tailored to the just result in each case. Given this fact the court will order one final attempt to resolve this group of cases through alternative procedures, while not delaying or interfering with the existing and effective management structure and orders.

The court orders each coordinating committee to designate one individual, who may have assistants, to meet over the next 50 days and explore ways in which alternative dispute resolution techniques may be employed to settle a significant portion of these cases. The individual chosen should not be a member of the coordinating committees for two reasons: first, so that the committee members are not diverted from their primary management focus, and second, so that the ADR committee might develop a settlement perspective somewhat removed from the front-line battle. In this way settlement may be given a final chance.

The coordinating committees are directed to designate their representatives within 10 days

of this order. The 50-day period will commence 10 days after the date of this order. The designation should be provided in the form of a notice to the court and served upon the other coordinating committees within the initial 10-day period. The court has asked Judge Lawrence S. Margolis to meet with the three members initially and during this period as needed to facilitate the work of this group.

The ADR group is directed to submit to the court a final common report within 60 days from the date of this order with any and all possible practical structures for settling these cases short of litigation. After this report is filed the court will schedule a conference within 10 days to discuss the report with the three representatives. Submissions from other individuals can be filed with the Clerk's office, which will forward any submissions to the members of the ADR group. They should be filed using the caption Winstar-ADR Group under Case Number 90-8C.

The court expects the parties to negotiate in good faith and, it is hoped, develop a settlement framework or structure to which all the parties may agree. While the challenge is daunting it certainly is feasible if each party is committed to the goal of resolving these cases efficiently.

IT IS SO ORDERED.



LOREN A. SMITH
CHIEF JUDGE

April 2012

2012 Federal Circuit Judicial Conference
U.S. Court of Federal Claims and Board of Contract Appeals
Breakout Session

Lessons Learned from the *Winstar* and Spent Nuclear Fuel Cases

Spent Nuclear Fuel Damages Cases: A Chronological “Cheat Sheet” of Some Key Decisions by the United States Court of Appeals for the Federal Circuit

Brad Fagg
Morgan, Lewis & Bockius LLP

The Nuclear Waste Policy Act of 1982 required the U.S. Department of Energy to accept and dispose of spent nuclear fuel and high level radioactive waste “beginning not later than January 31, 1998,” in return for fees paid by owners of such waste. The Act authorized the DOE to enter into contracts for such disposal—which came to be called “Standard Contracts”—with parties possessing spent nuclear fuel, and such contracts were effectively made mandatory for nuclear utilities. As the 1998 date approached with the prospect of DOE performance unlikely, industry groups petitioned the United States Court of Appeals for the D.C. Circuit, directly under the Act, to compel performance. The D.C. Circuit held that there was an unconditional statutory obligation on the part of DOE to commence performance by January 31, 1998, but stopped short of granting mandamus relief or compelling the DOE to actually commence acceptance of spent

nuclear fuel. The D.C. Circuit held that there was a potentially adequate alternative remedy for the utilities, namely damages for breach of contract.

With the spent nuclear fuel accumulating at reactor sites, utilities began to incur substantial costs for storage and management of the waste. The first “spent nuclear fuel,” or “SNF,” damages lawsuits were filed in the U.S. Court of Federal Claims in 1998, and by 2004 every utility in the country had filed such a lawsuit. Those cases inevitably resulted in appeals to the United States Court of Appeals for the Federal Circuit, and some of the key decisions to date are listed, chronologically, below.

- *Northern States Power Company v. United States*, 224 F.3d 1361 (Fed. Cir., August 31, 2000) and *Maine Yankee Atomic Power Company v. United States*, 225 F.3d 1336 (Fed. Cir., August 31, 2000).

Resolved threshold question of jurisdiction: because DOE’s breach “involved all of the utilities that had signed the contract—the entire nuclear electric industry,” the claims were for breach, not claims arising under the remedies provisions of the contracts. Specifically, the “delays” clause of the contracts did not apply, and no administrative exhaustion requirement need be satisfied before claims for breach could be brought directly in U.S. Court of Federal Claims.

- *Roedler v. Department of Energy*, 255 F.3d 1347 (Fed. Cir., July 6, 2001).

Purported class action by utility ratepayers in federal district court, seeking recovery from United States for fees paid to DOE and into Nuclear Waste Fund by utilities. Although district court had jurisdiction under the “Little Tucker Act,” rate payers were not third party beneficiaries of utility contracts with DOE, and therefore could not state a claim for breach of contract. The Court also held that the facts did not establish implied-in-fact contracts between DOE and ratepayers, nor could ratepayers state claims for compensation under a “takings” theory.

- *Indiana Michigan Power Company v. United States*, 422 F.3d 1369 (Fed. Cir., September 9, 2005).

First appeal after a trial on the merits of a utility’s damages claims. Multiple significant

rulings which helped to define the landscape for subsequent cases. Confirmed the requirements of foreseeability, causation, and reasonable certainty for recovery of mitigation damages. Confirmed that damages actions by utilities under the applicable scheme were, necessarily, for “partial, not total, breach.” Pre- and post-breach damages are potentially recoverable under a partial breach theory, but, in a “partial breach” case, there is no recovery of future damages, not yet incurred. Rather, successive claims or lawsuits must be brought. Those successive lawsuits are not barred by rules of merger or bar, and the applicable six year statute of limitations runs from the date that the last damages sought in the prior proceeding are incurred.

- *PSEG Nuclear v. United States*, 465 F.3d 1343 (Fed. Cir., September 26, 2006).

After one Court of Federal Claims judge dismissed utility claims for lack of jurisdiction (in favor of judicial review provisions in courts of appeal in Nuclear Waste Policy Act), Federal Circuit held that Court of Federal Claims did, in fact, have jurisdiction over damages claims under the Tucker Act.

- *Pacific Gas & Electric Company v. United States*, 536 F.3d 1282 (Fed. Cir., August 7, 2008), *Yankee Atomic Power Company v. United States*, 536 F.3d 1268 (Fed. Cir., August 7, 2008), and *Sacramento Municipal Utility District v. United States*, 293 Fed. Appx. 766, 2008 WL 3539880 (Fed. Cir., August 7, 2008), *reconsideration denied*, (August 6, 2009).

Trilogy of cases decided on the same day clarified a key determinant of damage calculations, namely, the legal “acceptance rate” by which DOE was obligated to take spent nuclear fuel upon commencement of performance on January 31, 1998. (The legal acceptance rate can have a significant impact upon damage calculations, with higher rates resulting in higher damages in some cases, because less utility storage mitigation activities would have been necessary under such assumptions.) The controlling acceptance rate was determined by the Court to be that set forth in certain 1987 DOE documentation, which was not a position specifically advocated by either party. The Court also determined that Greater-Than-Class-C waste, which is a type of radioactive waste different than spent nuclear fuel, was covered by the DOE Standard Contracts. In *Yankee Atomic*, Court held that, in a partial breach case, payments of fees due upon performance were not yet owed, and government could not secure offsets upon basis of such not-yet-due fees. In *Sacramento*, the Court rejected government challenges to recovery for costs associated with utility’s internal labor efforts, and held that “foreseeability” did not require that the specific type of dry storage equipment utilized by utility for mitigation be foreseeable at time of contract formation.

- *Carolina Power & Light Company v. United States*, 573 F.3d 1271 (Fed. Cir., July 21, 2009).

Remanded for consideration of damages in light of acceptance rates established in subsequent *Pacific Gas et al.* decisions, which had been issued after the Court of Federal Claims' decision. (Ultimate recovery by plaintiff on remand exceeded original award by some \$9 million.) Rejected government challenges to recovery of fixed overhead and indirect costs, where those costs were properly allocated to the mitigation projects for which damages were being claimed. Also rejected government arguments that costs of loading hypothetical DOE canisters that were not supplied due to breach should be deducted from present damage award, as such costs were not "avoided," but, at most, only deferred.

- *Nebraska Public Power District v. United States*, 590 F.3d 1357 (Fed. Cir., January 12, 2010) (*en banc*).

Prior D.C. Circuit rulings (in *Northern States Power Company v. U.S. Department of Energy*, 128 F.3d 754 (D.C. Cir. 1997)) that DOE could not avoid its statutory obligation to commence accepting spent nuclear fuel on January 31, 1998 by invocation of the "unavoidable delays" clause of the Standard Contract did not impermissibly intrude upon Court of Federal Claims' exclusive Tucker Act jurisdiction. Such rulings regarding the "unavoidable delays" clause by the D.C. Circuit must therefore be given preclusive *res judicata* effect, notwithstanding the fact that the rulings would necessarily affect subsequent contract-based litigation in the Court of Federal Claims.

- *Southern Nuclear Power Company v. United States*, 637 F.3d 1297 (Fed. Cir., March 11, 2011).

For costs allegedly avoided due to DOE's breach, which government argues must be deducted from any damage award, government bears a burden of moving forward to point out any costs it believes the plaintiff has avoided, and in appropriate circumstances producing supporting evidence. Upon such showings, a plaintiff then bears a burden of establishing damages that rebut or account for such allegedly saved costs. With respect to the "unavoidable delays" clause addressed in *Nebraska Public Power District*, panel "need not reach" question posed in a concurrence to that decision regarding availability of a potential defense, in light of the fact that any such defense was waived by the government under the facts of the Southern Nuclear case.

- *Energy Northwest v. United States*, 641 F.3d 1300 (Fed. Cir., April 7, 2011).

For certain site modifications undertaken in connection with mitigation activities, plaintiff must prove that such modifications would not have been necessary to accommodate DOE performance. With respect to indirect overhead expenses, as in *Carolina Power*, such costs are recoverable. Finally, costs associated with financing of the mitigation measures taken may not be recovered as damages, pursuant to the “no interest” rule applicable to claims against the government.

- *Dominion Resources, Inc. v. United States*, 641 F.3d 1359 (Fed. Cir., April 25, 2011).

Nuclear Waste Policy Act provision allowing for “rights and duties of a party to a contract” to be assigned allowed assignment of right to pursue pre-assignment damages claims—such assignments were not barred by the Anti-Assignment Acts. Also, as in *Yankee Atomic*, government could not, as a matter of law, seek discovery or an offset based upon alleged benefits conferred by non-payment of fees that are not due until actual DOE performance.

- *Dairyland Power Cooperative v. United States*, 645 F.3d 1363 (Fed. Cir., June 24, 2011).

Affirmed trial court’s award of damages based upon causation theory that utility would have participated in a market for “exchanges” of DOE acceptance allocations, pursuant to the “exchanges” clause of the Standard Contract, and affirmed the trial court’s deduction from the damage award costs that utility would have expended to acquire such DOE acceptance allocations. Properly allocated fixed overhead costs are recoverable, as in *Energy Northwest et al.*

- *Southern California Edison Company v. United States*, 655 F.3d 1319 (August 23, 2011).

Indirect overhead costs are recoverable as damages, as in *Carolina Power* and *Energy Northwest*.

- *Boston Edison Company v. United States*, 658 F.3d 1361 (Fed. Cir., September 28, 2011).

A seller of a nuclear power plant could not recover damages from the government under a “diminution in value” theory in these partial breach cases, because such damages necessarily involve the sort of speculation about future non-performance (and attempted quantification of damages attributable to that future non-performance) that cannot be recovered under *Indiana Michigan* in a partial breach case. In addition: recovery of certain allegedly increased NRC fees required further factual development; properly

allocated fixed indirect overhead costs are recoverable as in *Southern California Edison, Energy Northwest, and Carolina Power*; and financing/cost of capital damages are precluded under the “no interest” rule, as in *Energy Northwest*.

- *System Fuels, Inc. v. United States*, 666 F.3d 1306 (Fed. Cir., January 19, 2012), and *System Fuels, Inc. v. United States*, 2012 WL 255301 (January 19, 2012).

Financing/cost of capital damages are precluded under the “no interest” rule, as in *Energy Northwest et al.* Properly allocated fixed overhead costs are recoverable, as in *Carolina Power et al.* Award of damages for certain plant modification costs was permissible, notwithstanding the failure by the trial court to recite the burdens analysis identified in the subsequent *Southern Nuclear* and *Energy Northwest* cases, issued after decision of the trial court. And, government may not seek an offset upon the basis of fees not yet due, as in *Yankee Atomic* and *Dominion*.

- *Pacific Gas & Electric Company v. United States*, ___ F.3d ___ (Fed. Cir., February 21, 2012).

“Mandate rule” did not bar trial court’s award of damages on remand. Recovery of costs expended for potential off-site storage project was not barred as unforeseeable or speculative, on record in that case. Finally, damages awarded upon the basis of “exchanges” of DOE acceptance allocations were not barred upon the basis of the mandate rule, and were sufficiently supported as an evidentiary matter.

- *Consolidated Edison Company of New York, Entergy Nuclear Indian Point v. United States*, ___ F.3d ___ (Fed. Cir., April 16, 2012).

Where evidence was that certain claimed storage costs would have been incurred even had DOE performed, award of such storage costs as damages was reversed. Award of damages for allegedly increased NRC fees also failed as a matter of proof.

Financing/cost of capital damages are precluded under the “no interest” rule, as in *Energy Northwest et al.* Properly allocated fixed overhead costs are recoverable, as in *System Fuels, Inc.* and *Boston Edison*.