A TEXAS PUBLIC POLICY FOUNDATION REPORT

PAYMENT FOR BROKEN PROMISES:
Takings, Sovereignty, and the Winstar Case

by

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I. INTRODUCTION

This is a story about promises made and promises broken and who pays the consequences. In particular, it is the story of the S&L debacle. In this article, we will focus on the agreements made to business people to get them involved in what was, at the very least, a risky proposition. The story of the S&Ls starts simply.

The S&L debacle was based on a novel approach to regulation - - free market in some respects, almost socialist in others. The theory was to let private interest take care of a huge public problem using incentives as a regulatory device. Whether this idea would have worked will never be known - - the plan was aborted before the mechanism had a chance to act. Those who were asked to help the government by supporting a private-sector bailout were left hanging out to dry.

For most of the history of the savings and loan industry, savings and loan associations ("S&Ls" or "thrifts") were dedicated almost entirely to promoting home ownership through home mortgage lending.[1] Prior to the 1970s, their primary business consisted of accepting monies in the form of savings deposits and using these monies to fund loans to buyers of single-family homes.[2] The loans were secured by first mortgages on the purchased homes and the S&Ls held the loans for collection.[3]

The mortgage loans were usually payable over a term of thirty years and bore a fixed rate of interest.[4] The difference between the interest collected from borrowers and the interest paid depositors plus operating expenses amounted to a thrift's income.[5] The rate that an S&L paid to depositors was fixed by the government.[6] The rate charged to borrowers for mortgage loans was also, in effect, set by the government.[7] The difference between the rate paid to depositors and the rate charged to borrowers, known as the interest rate spread, was about two percent.[8] With positive interest spreads, S&Ls merely had to control operating expenses relative to its level of deposits and loans in order to make money.[9]

In the 1970's, new competition for savings deposits emerged.[10] National stock brokerages created money-market funds for the purchase of government securities and offered this new investment opportunity to customers.[11] The stock brokerages provided a greater return on their customers' investments than S&Ls were allowed to pay.[12] Additionally, investment in a money-market fund presented little risk since the purchased securities were backed by the full faith and credit of the U.S. government.[13] The combination of higher yields and low risk drove money out of the S&Ls and into the money-market funds.[14]

Congress reacted to the outflow of funds from the thrift industry by phasing out interest rate caps

on deposits and deregulating the types of investments that an S&L could make.[15] Congress also increased Federal Savings and Loan Insurance Corporation ("FSLIC") coverage to $100,000.[16] With the ability to offer market interest rates, S&Ls were able to replenish their deposits.[17]

In the 1970s and early 1980s, inflation presented a serious problem for S&Ls.[18] Inflation drove up interest rates, which in turn increased interest expenses for S&Ls.[19] In 1981, the prime rate - - the rate that influenced what S&Ls paid depositors - - hit an all-time high of 21.5 percent.[20] When certificates of deposits matured, they were replaced with new certificates at higher rates.[21] At the same time, the bulk of the S&Ls' assets continued to earn the lower fixed rates on long-term mortgage loans.[22] Most home mortgages contained an interest rate of 8 percent or less.[23] The rising interest rates of the 1970s and early 1980s had a devastating effect on S&Ls.[24] Locked into long-term, low yielding, fixed rate mortgages, S&Ls experienced enormous operating losses.[25] In 1981, nearly 90 percent of the S&Ls in the country were losing money and the number of those dying was increasing at an alarming rate.[26] If all the S&Ls failed, the cost to the government for liquidation could have exceeded $100 billion.[27]

Congress and the Reagan Administration's response to the problems in the savings and loan industry included: (1) rapidly expanding the scope of S&L investment powers; (2) immediately expanding S&Ls' ability to compete for funds with other service providers; (3) offering relief from strict regulatory enforcement in the areas of investments and capital requirements for S&Ls; and (4) providing incentives for corporations and healthy S&Ls to buy endangered S&Ls in order to relieve the government of some of the costs associated with liquidating the failed thrifts.[28]

Even with these changes, the economic downturn in the Southwest left the savings and loan industry struggling for survival, and virtually wiped out the FSLIC deposit insurance fund.[29] In hopes of salvaging the savings and loan industry, President Bush offered a plan that was modified and passed by Congress under the title of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA").[30]

This paper reviews the government's reaction to the S&L crisis. Part II contains a discussion of the history of the thrift industry and presents the important legislation in the S&L area. Part II also explains the roles of the various governmental bodies, pre- and post-FIRREA, that were charged with overseeing the thrift industry. Part III examines the recent cases of *Winstar v. United States of America* and *United States of America v. Winstar*, wherein specific provisions of FIRREA were challenged. In Part IV, the authors set forth the basic principles contained in the Federal Circuit Court of Appeals *en banc*

***Winstar* opinion. In Part V, all principles are applied in a case study format to Southmark Corporation. The Southmark insolvency was the largest real estate insolvency up until its time, and was caused almost entirely by the re-evaluation of the Southmark asset base in violation of Regulatory Accounting Principles (RAP).**

II. HISTORY OF THE SAVINGS & LOAN INDUSTRY

A. Pre-FIRREA

The pre-FIRREA thrift industry structure was established during the Great Depression, when borrowers' failure to service their mortgages led to the collapse of more than 1,700 thrifts.[31] In total, Depression-era thrift depositors lost roughly $200 million.[32] In reaction to the thrift crisis, President Hoover signed into law the Federal Home Loan Bank Act.[33] The primary purpose of the Act was to shore up the failing thrift industry by funneling cash to S&Ls.[34] The legislation authorized the creation of twelve district banks to lend money to thrifts, and established the Federal Home Loan Bank Board ("FHLBB") to oversee the district banks.[35]

Additional Depression-era legislation highlighted the commitment on the government's part to provide home loan sources: (1) Congress enacted the Home Owners' Loan Act (HOLA) in 1933;[36] (2) Congress passed the National Housing Act ("NHA")[37] which established the Federal Housing Administration ("FHA");[38] and (3) Congress established the Federal Savings and Loan Insurance Corporation ("FSLIC") to insure S&L deposits.[39] FHA insurance was intended to protect mortgage lenders by guaranteeing repayment of defaulted loans covered by FHA programs.[40] FSLIC insurance was intended to protect small depositors (originally, only deposits in amounts up to $5,000 were insured) and thereby encourage the public to reinvest funds in S&Ls.[41]

As mentioned, inflation became a problem in the 1970s and 1980s. In 1978, Congress passed the Financial Institutions Regulatory and Interest Rate Control Act ("FIRIRCA") which provided for tighter controls on insider abuse, and enhanced the enforcement powers for financial institution regulators.[42] The Act extended federal regulators' authority to set the maximum interest rates paid by S&Ls on thrift deposits until 1980.[43] In addition, the Act authorized the FHLBB to charter federal savings banks and increased FSLIC insurance coverage to both IRA and Keogh accounts from $40,000 to $100,000.[44]

Despite this fix attempt, however, in 1979 the Federal Reserve embarked upon a different course

in the conduct of its monetary policy - - this time to combat inflation.[45] Under Paul Volcker, the Federal Reserve switched from a policy of stabilizing interest rates to a policy of controlling the growth of the money supply.[46] This policy shift resulted in a dramatic rise in interest rates and in the cost of funds at thrifts.[47] At the same time, S&L assets were locked into long-term, low-yield, fixed-rate mortgages.[48] Thus, thrifts were paying more to attract funds than they were earning on their mortgage portfolios.[49] This negative interest rate spread was the genesis of the modern S&L crisis.[50]

In hopes of alleviating the crisis, on March 31, 1980, President Carter signed into law the Depository Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA").[51] The DIDMCA: (1) phased out interest rate caps on bank and thrift deposits; (2) raised federal deposit insurance coverage for all types of deposits from $40,000 to $100,000; (3) authorized the Federal Reserve to set reserve requirements on short-term accounts at all depository institutions; and (4) authorized depository institutions nationwide the opportunity to offer Negotiable Order of Withdrawal ("NOW") accounts to enable them to compete for funding with money market mutual funds.[52]

With interest rate caps being phased out and deposit insurance coverage raised to $100,000, S&Ls were again able to compete in the marketplace for depositor funds.[53] The competition for funds with financial service providers again forced S&Ls to pay higher interest rates to customers, dramatically increasing costs for deposit funds.[54] At the same time, permissible investments for S&Ls continued to be low-yield, fixed-rate, long-term home mortgages.[55] The restriction on S&L investments meant that thrifts were unable to make adjustments in their investment portfolios sufficient to earn the extra income to cover the increased interest rates paid to depositors.[56]

The problem is illustrated by the August 1981 position of the thrift industry.[57] In August 1981, 53% of S&Ls' interest-bearing liabilities were in short-term certificates of deposit paying high market rates, while 85% of the industry's assets were in low-yield, long-term, fixed rate mortgages.[58] In 1981, S&Ls had accumulated losses of $4.6 billion, and 81 had failed.[59] In 1982, S&Ls lost $4.3 billion, and 252 failed.[60] The following year, 102 more S&Ls failed.[61]

To stem the flood of deposit monies rushing away from the thrift industry, President Reagan signed into law the Garn-St. Germain Depository Institutions Act of 1982 ("Garn-St. Germain").[62] Originally considered the most significant piece of thrift legislation since the Great Depression, the Act allowed thrifts to offer money market deposit accounts with no interest rate limitations.[63] Garn-St. Germain also: (1) authorized federally-insured thrifts to commit up to 10% of their assets to commercial

or agricultural loans; (2) increased the non-real estate-secured loan limit from 20% to 40% of assets; (3) lifted educational loan restrictions, making all educational loans permissible; (4) authorized thrifts to invest 100% of their assets in state or municipal securities; (5) permitted investments in time deposits and savings accounts of other thrifts; (6) increased the permissible level of assets committed to consumer loans from 20% to 30%, including inventory and floor-planning loans; (7) authorized S&Ls to accept demand deposits from individuals and corporations; and (8) allowed the use of net worth certificates to assist ailing FSLIC- and FDIC-insured institutions.[64]

B. INCENTIVIZATION OF S&Ls

Prior to the 1980s, all federally chartered S&Ls were mutual associations owned by their depositors.[65] Beginning in 1983, many associations took advantage of new rules that allowed mutuals to convert to stock associations by selling newly issued shares to the public.[66] Also in the 1980s, stockholder requirements were changed to permit a single person to own all of an S&L's voting common stock.[67] S&Ls became acquisition targets of wealthy individuals and nonbank corporations,[68] and regulators, in hopes of saving problem thrifts, strongly encouraged healthy S&Ls, nonbank corporations, and others to purchase capital-depleted S&Ls.[69]

In 1980, 51 percent of FSLIC-insured S&Ls were still state-chartered and received their powers from state legislatures.[70] By 1984, more than a third of the states had granted their state-chartered thrifts investment powers that exceeded those permissible for federally-chartered institutions.[71] As the federal government paid for the expenses associated with failed state-chartered thrifts, state legislatures were often favorably inclined toward industry demands for additional investment powers.[72] During the Reagan Administration, when federal regulators offered incentives in troubled S&Ls, the state regulatory agencies accepted them.

A new type of S&L owner entered the market, attracted by the regulators' promises and the new deregulated environment.[73] The new owners were accountable to stockholders who demanded strong earnings, increased share values, and dividends.[74] In the new deregulated environment, S&Ls had the unequaled and highly desirable combination of broad investment powers and insured deposits.[75] Depending on where the new S&L was chartered, it might not be required to make any home mortgage loans.[76] With deregulation of deposits, S&Ls could use national brokers to find customers for their certificates of deposit.[77] Through the use of deposits, S&L owners could raise large amounts of funds.[78]

Changed regulations allowed S&Ls to own subsidiaries that could pursue a wide range of business opportunities.[79] Thus, the large amounts of funds generated through deposits could be invested directly by the S&L or through its subsidiaries into virtually any chosen line of business.[80]

To avoid a bailout of the S&L industry, Regulatory Accounting Practices ("RAP") were promulgated by the FHLBB and endorsed by Congress in the early 1980s.[81] The RAP standards allowed thrifts to avoid insolvency and closure by the FSLIC.[82] As many S&Ls were purchased at a time when their respective GAAP net worths were negative, use of RAP accounting gave S&L purchasers the crucial time necessary to reorganize business and investment practices in an attempt to return the S&Ls to profitability.

Accounting incentives promulgated by the FHLBB included: (1) permitting thrifts to defer losses from the sale of assets with below market yields; (2) permitting the use of income capital certificates authorized by Congress in place of real capital; (3) allowing qualifying mutual capital certificates to be included as RAP capital; (4) allowing FSLIC members to exclude certain contra-asset accounts from liabilities when computing net worth, including loans in process, unearned discounts, and deferred fees and credits; and (5) permitting the inclusion of net worth certificates, qualifying subordinated debentures and appraised equity capital into RAP net worth.[83]

In addition to RAP accounting, the FHLBB also reduced the permissible minimum net worth requirement for thrifts from 5% to 4% in 1980, and again to 3% in 1982. These lower net worth requirements, again, were intended to buy troubled thrifts time for returning businesses to profitability. The idea was to hold off on closing thrifts due to insolvency and to wait for the negative interest rate spread situation to correct itself so as to enable a return to profitability.

Many S&Ls tried to grow out of the negative interest rate spread problem.[84] The basic strategy was to add layers of higher-yielding securities and loans to the investment portfolio in order to offset the lower-yielding paper that they already held.[85] The grow-out-of-the problem strategy was strongly encouraged by the RAP incentive program.

Spurred in part by growing acceptability of broker-originated deposits, FSLIC-insured thrifts attracted new net deposits of $110 billion in 1983 and $111 billion in 1984.[86] In 1984, FSLIC-insured liabilities increased $152.6 billion, or 20%.[87] From 1983 through 1986, total thrift liabilities grew a remarkable 65% - - from $674 billion to $1.1 trillion -- with $824 billion insured by FSLIC.[88]

During 1988, thrifts remained the nation's predominant mortgage lender, originating 49% of all

residential mortgages in 1988 (up from 46% in 1987) for a dollar volume of $160.7 billion in mortgage loans.[89] Thrifts remained a leading supplier to the secondary mortgage market, selling $271.8 billion in mortgage loans during 1988.[90]

Differences between RAP and GAAP accounting were significant. In 1984, the difference between RAP and GAAP net worth at S&L's stood at $9 billion. By 1986, the difference had grown to $13.3 billion. In 1988, RAP capital stood at $61.1 billion while GAAP capital was $46.2 billion.

State chartered institutions in Texas and California suffered major losses resulting from the respective economic downturns in these two regions. For example, during 1988, 70 percent of all FSLIC expenditures went to pay for losses associated with state-chartered thrifts in California and Texas.[91]

As of December 31, 1988, there was a total of 2,949 FSLIC-insured savings and loans operating nationwide that held deposits of $971 billion and assets of $1.35 trillion.[92] In total, these institutions lost $12.1 billion in 1988.[93]

The deteriorating condition of the thrift industry overwhelmed the resources of the FSLIC. During 1988, the FSLIC acted on 223 problem thrifts, including 179 assisted mergers and acquisition, 26 liquidations, and 18 consolidations.[94] On a cash basis, these deals ultimately cost the FSLIC at least $60-70 billion.[95] During 1987, the FSLIC lost $8.5 billion.[96] At year-end 1988, there were 364 operating thrifts judged insolvent by federal regulators.[97]

The following table represents the financial condition of the S&L industry at the end of 1988.[98]

Type of Thrift	Number of Thrifts (Dec. 31, 1988)	Total Assets (billions)	1988 net income (billions)	Percent Profitable
Healthy (GAAP capital greater than 3%)	2,195	923.2	3.7	81
GAAP-insolvent (GAAP capital < 0)	364	113.5	(14.8)	12
Troubled (GAAP capital 0-3%)	390	314.8	(1.0)	56
Total FSLIC-insured	2,949	1,351.5	(12.1)	70

C. FIRREA

In 1989, when Congress and the President revisited the S&L industry situation with the enactment of FIRREA, many of the government-created RAP standards were labeled "accounting gimmicks"[99] and

summarily abolished. In FIRREA, Congress restructured the thrift regulatory scheme.[100] In an attempt to reduce FSLIC's risk exposure to losses caused by the failure of rapid growth thrifts, the FHLBB began adopting regulations contrary to its original RAP program. It linked net worth requirements to growth rates and required thrifts to obtain supervisory approval before directly investing more than 10 percent of their assets in potentially high-risk ventures, such as real estate development or subsidiary service corporations.[101] This shift in FHLBB policy, with its renewed attempt at regulating S&L investment practices, ended many of the benefits associated with ownership of S&Ls, and exacerbated the problem supposedly cured by the incentive programs. S&L owners, who had relied on the newly deregulated environment when making investment decisions, had their financial tables turned upside down.

No account was taken for the reliance that S&L owners had placed in these incentive programs. The Congressional intent underlying the enactment of FIRREA is expressed in the "purposes clause," which explains that FIRREA is intended to: (1) promote a safe and stable system of affordable housing finance; (2) strengthen capital, accounting, and other supervisory standards to improve the supervision of savings associations; (3) curtail investments and other activities of savings associations that pose unacceptable risks to the deposit insurance funds; (4) strengthen the enforcement powers of federal regulators of depository institutions; and (5) strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their depositors.[102]

FIRREA abolished the FHLBB and FSLIC.[103] The Office of Thrift Supervision ("OTS") replaced the FHLBB as the primary federal regulator of all federal and state thrifts.[104] By amending the Federal Deposit Insurance Act , Congress also amended the FDIC, transferring to it the former FSLIC's responsibility for insuring the deposits of S&Ls.[105] The Resolution Trust Corporation ("RTC") was created to manage and resolve most of the S&Ls, for which a conservator or receiver was appointed from January 1, 1989 to August 9, 1992.[106] The RTC and FDIC were closely related entities: the Board of Directors for the FDIC also served as the Board of Directors for the RTC.[107]

FIRREA created the Resolution Trust Corporation (RTC) to manage and dispose of the assets acquired from failed thrifts. The RTC was a wholly-owned government corporation directed by a five member board including the Secretary of the Treasury who served as the Chairperson, the Chairman of the Board of Governors of the Federal Reserve, the Attorney General of the United States, the Secretary of Housing and Urban Development and a real estate or finance expert from the private sector.

FIRREA provided for Congressional oversight of the RTC, and attempted to prevent dumping of

thrift assets at deeply discounted prices.

The institutions and assets under the jurisdiction of the RTC were to be managed and disposed of in a manner that would not impair local real estate markets; would return maximum funds to the RTC or the institution under its management; and would respond to low-income housing needs as appropriate. To accomplish these multiple goals, the Committee established the Real Estate Asset Division ("READ"). READ extended the life of the RTC from five to ten years in an attempt to prevent the dumping of assets; allowed the RTC additional time for the orderly disposition of such assets; and adopted provisions to provide access to residential properties within the jurisdiction of the RTC to lower income families.

Also, to assure the orderly disposition of real property assets managed by the RTC, READ exercised primary responsibility over the actions of conservators, receivers, or managers of institutions regarding the management, sale or disposal of real property assets. National and regional advisory boards composed of representatives of the real estate and financial professions, as well as representatives of low- and moderate-income consumers and small businesses, were to provide advice on real estate disposition on a local basis.

The RTC was required to establish guidelines for the management and disposition of real property assets, including guidelines for establishing the market value of assets based upon standard analysis, valuation and appraisal practices. In establishing the market value under this standard, the RTC was to look for the "fair value" of such assets, *i.e.*, the cash prices that might reasonably be anticipated in a current deal under all conditions required to achieve fair value as described by Office of the Comptroller of Currency in 12 C.F.R. 7.3025. The principles of the standard are that a buyer and a seller must each act prudently, knowledgeably, and under no necessity to buy or sell. Fair value was not the value received from a forced or liquidation sale. It represented a price that might be received upon exposure to the open market for a reasonable time, considering the property type and local market conditions.

When establishing the RTC, it was argued that the thrift crisis resulted from the use of accounting incentives that created the impression of high capitalization. After all, a depository institution's capital, such as common and preferred stockholder's equity and retained earnings, provide a cushion against losses incurred in times of poor financial performance. FIRREA expressly abrogated those incentives in the hope of establishing higher quality capital in the future.

FIRREA sought to provide this protection against losses by re-establishing a core capital requirement of 3% of assets for savings institutions.[108] The 3% core capital standard took effect on June

1, 1990. On that date, only a few "qualifying" intangibles could be included, and only on a declining basis until, on January 1, 1995, the 3% was without any intangibles. [109]

FIRREA eliminated the granting of supervisory goodwill - - one of the core incentives of the St. Germain program - - for most S&Ls while quickly phasing it out for others. [110] In abolishing this asset, a significant portion of S&L capital disappeared overnight. [111]

FIRREA required each federally-insured financial institution to have an annual audit conducted by an independent public accountant. For institutions with under $150 million in assets, alternative, less costly audit standards were provided. In addition, each insured institution was required to report to the supervisory agencies on compliance with safety and soundness rules such as the adequacy of internal controls, and on the institution's compliance with applicable laws and regulations.

FIRREA effectively abrogated a primary, embedded RAP incentive, the ability to invest in high risk real estate ventures, by creating a conservative set of real estate appraisals standards.

D. Post-FIRREA Resolution of Failed Thrifts

The OTS had the exclusive power to appoint a receiver or conservator for a federally-chartered S&L if one or more of the following conditions existed: (1) insolvency (assets less than obligations); (2) substantial dissipation of assets or earnings due to any violation(s) of law or regulations or to any unsafe or unsound practice(s); (3) violation(s) of laws or regulations, or unsafe and unsound practices that are likely to cause insolvency or substantial dissipation of assets or earnings or otherwise weaken the condition of the S&L, or seriously prejudice the interests of its depositors;[112] (4) an unsafe or unsound environment for the transaction of business, including ownership of substantially insufficient capital; (5) willful violation of a final cease-and-desist order; (6) concealment of records or assets of the S&L or refusal to submit records or affairs of the S&L for inspection to an examiner; (7) the S&L is not likely to be able to meet the demands of its depositors or pay its obligations in the normal course of business; or (8) the association has incurred or is likely to incur losses that will deplete all or substantially all of its capital, and there is no reasonable prospect for the replenishment of the S&L's capital without federal assistance.

The RTC resolved failed thrifts by: (1) liquidating the assets of an S&L and using the proceeds to pay depositors up to the amount of their FSLIC-insured deposits; (2) merging an entire thrift, including

all of its assets and liabilities, into a healthy existing thrift; or (3) dismantling a thrift and selling the deposits to other S&Ls or banks.[113]

Thrifts under RTC control lost value due to two primary factors: (1) core deposit runoff occurring after the takeover, reducing the amount that the RTC could realize from a sale; and (2) asset atrophy, because the thrift was no longer making loans to generate new assets, and because current assets were not managed and developed in an efficient manner.[114]

III. WINSTAR

A. Introduction to the Issues in Winstar

As discussed in Part II, *infra*, FIRREA strengthened capitalization requirements for thrift institutions and restricted the use of intangible assets such as goodwill to meet those requirements. The Winstar plaintiffs are the owners of two defunct and one currently operating thrift institutions.[115] Plaintiff Winstar Corporation ("Winstar") owned the now-defunct United Federal Savings Bank.[116] Plaintiff Statesman Savings Holding Corporation owned the now-defunct Statesman Bank for Savings.[117] The third plaintiff, Glendale Federal Bank, FSB ("Glendale"), currently operates the thrift formed by merging Glendale with First Federal Savings and Loan of Broward County.[118] The Winstar plaintiffs collectively asserted that they had contracts with the United States Government regarding regulatory treatment of goodwill, and that the Government breached those contracts by applying to them the statutorily mandated capitalization requirements of FIRREA.[119]

B. Individual Transactions at Issue in the Consolidated Winstar Case

(1) Glendale

In November, 1981, Glendale negotiated a merger with a failing thrift institution - - First Federal Savings and Loan Association of Broward County - - and the two thrifts entered into a Merger Agreement, which required FSLIC regulatory approval.[120] Glendale applied for FSLIC permission for the merger, and also requested substantial financial assistance from the Government.[121] Later that month, Glendale and the FSLIC entered into a Supervisory Action Agreement, which contained the

terms of potential Government assistance for the proposed merger.[122] This agreement which expired in November, 1991 said nothing about the treatment of goodwill. At this time, the FHLBB issued a "forbearance letter", whereby the agency stated that it would forbear from bringing enforcement proceedings against Glendale for the failure to satisfy regulatory capital requirements following the merger. This forbearance letter did not address goodwill either.[123]

The FHLBB also issued a resolution at that time that approved the proposed merger. The resolution required Glendale to provide a justification under GAAP for the use of the purchase method of accounting for the merger. Glendale provided that justification, indicating that it would amortize over $716 million in goodwill over 40 years.[124] Glendale's accounting for goodwill conflicted with the requirements contained in the later-enacted FIRREA.[125]

(2) Winstar

In 1983, the FHLBB solicited bids for Windom Federal Savings & Loan, which had shown considerable losses. Winstar Corporation was formed in 1984 for the purpose of acquiring Windom, and the FHLBB and the FSLIC negotiated terms under which Winstar and United Federal Savings Bank would acquire Windom in 1984.[126]

As part of the regulatory approval of the acquisition, the Government signed an Assistance Agreement under which it would contribute over $5.5 million to United, while Winstar contributed $2 million to United. That agreement expired in July 1986.

The Bank Board issued a forbearance letter in July, 1984 which permitted United to account for goodwill from the acquisition (approximately $9.1 million) by the purchase method of accounting, and which allowed amortization over 35 years.[127] The Bank Board, in Resolution No. 84-363, conditionally approved of the acquisition, and Winstar agreed to a Net Worth Maintenance Stipulation requiring compliance with capitalization regulations "as now or, hereafter in effect * * *."[128] Under this stipulation, Winstar agreed to contribute cash to the thrift in order to maintain compliance with capital standards.

Winstar's treatment of goodwill was inconsistent with FIRREA's terms, enacted five years later, and the thrift failed to meet the new statutory capital requirements.[129] Even if Winstar had been able to count all goodwill fully, the thrift would most likely have fallen below FIRREA capital standards.

Consequently, the OTS Director appointed a receiver for the thrift, and it no longer exists.[130]

(3) Statesman

Statesman approached the FHLBB in 1987 concerning acquisition of a subsidiary of an insolvent thrift in Florida. The FSLIC informed Statesman that the Government could monetarily assist in the acquisition, but only if Statesman also took over the insolvent thrift. Further, under then-existing regulations, the acquired thrift had to have a certain level of assets.[131] In order to reach that level, FSLIC offered Statesman three other thrifts located in Iowa. Statesman accepted the offer.[132] As part of the transaction, FSLIC and Statesman entered into an Assistance Agreement under which the Government made cash contributions of $60 million.[133] Under that agreement and an FHLBB resolution, $26 million of that amount was in the nature of a "capital credit," which the thrift was allowed to count as RAP goodwill towards its regulatory capital.[134] The FHLBB resolutions also permitted use of the purchase method of accounting for the acquisitions. Thus, Statesman was allowed to amortize $25.8 million more in supervisory goodwill for 25 years.[135]

Statesman's accounting of both types of goodwill were contrary to FIRREA.[136] FIRREA, however, did not impair Statesman's ability to count the FSLIC cash assistance as a capital asset. See 12 U.S.C. 1463(b)(2)(A). However, RAP goodwill was treated as "other qualifying goodwill" for purposes of computing a thrift's capital compliance under the current regulatory scheme. See 12 C.F.R. 567.5(a)(2)(iii)(B). This limits the double counting of cash assistance that was previously permitted. As a result, Statesman Bank failed to meet the capital requirements, and the OTS Director appointed the RTC as a receiver for the thrift in July, 1990.[137]

C. Procedural History of the Winstar Case

The Winstar plaintiffs filed three separate actions against the United States in the Court of Federal Claims, asserting breach of contract and a taking of their contractual rights without just compensation in violation of the Fifth Amendment.[138]

The Winstar plaintiffs based their contract claims primarily on agreements that they signed with FSLIC and on regulatory approvals and letters issued by the FHLBB.[139] The plaintiffs claimed that the government was contractually obligated to recognize supervisory goodwill and capital credits created by

the mergers as an intangible capital asset for purposes of compliance with regulatory capital standards.[140] The plaintiffs argued that they were entitled to amortize supervisory goodwill for the periods established at the time of their acquisition of the failed thrifts.[141] All of the plaintiffs filed motions for summary judgment on the issue of liability.

The government defended on several grounds: (1) that there were no such contractual rights as alleged by the plaintiffs; (2) that in any event, the alleged agreements were subject to statutory and regulatory changes; (3) that the thrifts impermissibly sought to enjoin Congress's power to legislate and regulatory agencies' power to regulate (relying principally on Bowen v. Public Agencies Opposed to Social Security Entrapment ("POSSE")); and (4) that the sovereign acts doctrine precluded recovery for any contractual rights breached by FIRREA.

The Court of Federal Claims granted summary judgment to the plaintiffs on the issue of liability under the contract claims and did not reach the Fifth Amendment takings claims. Three opinions were issued by the Court of Federal Claims: (1) <u>Winstar Corp. v. United States</u> [21 Cl. Ct. 112 (1990)], in which the court found an implied-in-fact contract but requested further briefing on contractual issues; (2) <u>Winstar Corp. v. United States</u> [25 Cl. Ct. 541 (1992)], in which the court found breach of contract and entered summary judgment on liability in favor of Winstar; and (3) <u>Statesman Savings Holding Corp. v. United States</u> [26 Cl. Ct. 904 (1992)], in which the court granted summary judgment on liability for breach of contract to Statesman and Glendale.

A summary of the Court of Federal Claims rationale in finding for the <u>Winstar</u> plaintiffs is instructive. First, the court found that binding contracts were made between plaintiffs and the FSLIC in each of the three merger transactions.[142] The court then held that these contracts were breached when the regulatory capital requirements of FIRREA, and the regulations promulgated under FIRREA, were applied to the plaintiffs.[143] Next, the court distinguished POSSE on the grounds that POSSE did not involve bargained-for contract rights, but rather, involved an entitlement program.[144] The court further distinguished POSSE because the relief sought therein was an injunction to prevent the government from acting in its sovereign capacity, whereas in the instant case, the <u>Winstar</u> plaintiffs claimed only monetary damages for breach of their contracts.[145] In rejecting the government's sovereign acts defense, the court found that because FIRREA aimed directly at thrifts with contracts like those obtained by the <u>Winstar</u> plaintiffs, it was not a sovereign act.[146]

The Court of Federal Claims certified its decisions in the three related cases for interlocutory

appeal pursuant to 28 U.S.C. § 1292(b). The Federal Circuit Court of Appeals granted the appeal.[147] An initial split panel decision of the Federal Circuit Court of Appeals reversed the Court of Federal Claims.[148] The Federal Circuit Court of Appeals next vacated the panel opinion and agreed with the Winstar plaintiffs' request to consider the cases *en banc*, where it adopted the position of the original Court of Claims' opinions.[149]

D. Certiorari Granted by United States Supreme Court

The United States filed a petition for a writ of certiorari to the United States Supreme Court in December of 1995. Drew Days, Solicitor General of the United States, requested certiorari on the issues of whether: (1) "the alleged contractual terms fall squarely within the unmistakability principle articulated by [the Supreme Court]"; (2) the unmistakability doctrine is limited to contractual interpretation but not contractual relief; (3) there exists any authority for the regulators to enter contracts that restrict the sovereignty of Congress; (4) the relevant sections of FIRREA were public and general acts, and thus fall within the sovereign acts doctrine; and (5) the amount of federal money at issue warrants Supreme Court review.[150]

In response, the Winstar plaintiffs synthesized the case into the following question presented: "Whether the federal government can deliberately repudiate, without liability, specifically negotiated, unambiguous, and express contractual commitments for which it has received valuable consideration simply by changing the law."[151] Respondent pointed out that the United States at this point in the case had basically conceded that there was a breach of contractual terms relating to the application of RAP to the Winstar plaintiffs.

E. Facts Found

The Supreme Court found the following facts describing the S&L crisis relevant to its decision: Faced with the growing number of current and threatened S&L failures, FSLIC realized that its insurance fund would soon be depleted.[152] In formulating its approach to this looming S&L crisis, the government faced two options: it could directly assume the liabilities of the ailing thrifts and bail out the entire industry, or it could provide tax incentives to healthy thrifts, thereby enticing them to take on the burden of the accumulated debt.[153] In evaluating the two options, the government recognized that it

could not afford to reimburse all insured depositors in FSLIC banks. The extent of the government's difficulty was underscored by Former Bank Board Chairman Richard Pratt in his testimony before Congress:[154]

Thus, as an alternative to the wholesale liquidation of failing thrifts and the consequent exhaustion of FSLIC insurance funds, the government made a conscious decision to pursue its second option. The FHLBB and FSLIC fashioned a new policy aimed at encouraging healthy thrifts to merge with the failing ones. This policy focused on fostering the growth of supervisory mergers.[155]

The government was encouraging healthy thrifts to consider supervisory mergers that would not have made economic sense but for favorable accounting treatments.[156] The FHLBB and FSLIC designed accounting incentives that allowed merged thrifts to meet the government's minimum regulatory capital requirements without needing to put up large amounts of their own money.[157] Among the incentives offered by the FSLIC and the FHLBB was the use of the purchase method of accounting under which "supervisory goodwill"[158] resulting from the merger would satisfy part of the merged thrift's regulatory capital requirements. Not only was supervisory goodwill credited against the minimum capital requirements, but thrifts were also allowed to amortize this goodwill over periods which could extend up to 40 years.[159]

The purchase method of accounting for mergers under GAAP accounts for the surplus of the purchase price over the fair market value of the acquired organization as the intangible asset of goodwill.[160] Under purchase method accounting, the book value of the acquired thrift's assets and liabilities are adjusted to fair market value at the time of acquisition, and any excess in the cost of the acquisition over the fair market value of the acquired assets, including liabilities assumed by the acquirer, was separately recorded on the acquirer's books as goodwill.[161] Goodwill was generally considered as an intangible asset that could be amortized on a straightline basis over a number of years.[162] The GAAP approach to purchase method accounting mergers provided a bridge which allowed the FHLBB to encourage the necessary consolidation of the industry, while at the same time husbanding the financial resources which were then available to it.[163]

Another commonly offered incentive was the use of "capital credits" that could be counted toward regulatory capital requirements.[164] The capital credits incentive policy benefitted the government in that

it permitted newly merged thrifts to assume deposit liabilities of ailing thrifts without requiring the government to extend large amounts of monetary assistance.[165]

Though the government produced a seductive array of accounting incentives to spark interest in supervisory mergers, the backbone of the Bank board and FSLIC approach to the thrift buy-outs was the FSLIC's contribution of cash to newly-merged thrifts.[166] Thrift regulators considered a portion, or in some instances the full amount, of the contribution in partial satisfaction of the merged thrift's regulatory capital requirements.[167] To further sweeten the pot, the cash contribution was not always treated as an asset when calculating supervisory goodwill generated by the merger.[168]

As predicted, allowing acquirers of failing thrifts to treat supervisory goodwill and capital credits as regulatory capital resulted in many acquisitions that would not have occurred

without the changes to supervisory mergers.[169] Winstar,[170] Statesman,[171] and Glendale[172] responded to the government's new policy by acquiring insolvent thrifts after receiving the government's approval and assurances of assistance. The acquisitions saved the government millions of dollars that it would have had to pay to insured depositors had the failing thrifts been liquidated.

Congress considered strengthened capital requirements as crucial for the prevention of a thrift crisis recurrence. It determined that strengthening thrift institution capitalization serves two key functions: (1) it "provide[s] the self-restraint necessary to limit risk-taking by Federally insured savings associations" since "[w]ithout sufficient capital, [thrift] owners have little incentive to limit the risks taken with depositors' funds"; and (2) it "protects the deposit insurance fund by providing a cushion against losses if the institution's condition deteriorates."[173]

Accordingly, FIRREA instructs OTS to "require all savings associations to achieve and maintain adequate capital" by meeting or exceeding the new minimum capital standards.[174] As an essential element of this new requirement, Congress severely restricted the use of goodwill as a component of capital. In Congress's view, goodwill was "one of the remaining poisons of the savings and loan industry"[175], and its use as capital was considered entirely antithetical to the goal of requiring greater thrift capital. As Congress recognized, "[g]oodwill is not cash. It is a concept, and a shadowy one at that. When the Federal Government liquidates a failed thrift, goodwill is simply no good. It is valueless. That means, quite simply, that the taxpayer picks up the tab for the shortfall."[176]

Numerous members of Congress explained how allowing use of goodwill to meet capital requirements would be at odds with the regulatory goal of discouraging imprudent practices. The

limitation on goodwill as capital was deemed necessary because, as Representative Wylie stated, when a thrift is operating on the basis of goodwill, the thrift's owners and management are not really gambling with their own money because they do not have any money up front. [Instead,] [they are gambling with the public's money. If the business succeeds, management gets the profits. If the business goes down the drain, the [federal insurance fund] pick[s] up the losses * * *.[177] Thus, a legislative demand for hard money capital was an essential *quid pro quo* for the expenditure of more than a $100 billion to be provided by the United States Treasury to restore the deposit insurance fund to health and to bring back public confidence in the thrift industry. Congressman Frenzel explained: "How can we face those taxpayers who [sic] we have to stick with costs of the bailout, if we can't guarantee to them they won't have to bail out the industry again?" 135 Cong. Rec. 12075 (1989).

As a result of FIRREA and OTS regulations, many thrifts that were previously in full compliance with the capital requirements regulations failed to satisfy the new capital standards and immediately became subject to seizure.[178] Although Glendale, Statesman and Winstar went before the court, hundreds of others were waiting in the wings with identical promises.

IV. WINSTAR PRINCIPLES

The *Winstar* case can be viewed at its core as, simply, a breach of contract action.[179] However, the federal government attempted to frame the issues in the case in a more complex manner that involved the application of the unmistakability and sovereign acts doctrines.[180] By alluding to the large sums of money that the government might have to pay, the federal government made an effort to shift the focus away from the clear principles espoused in the *en banc* decision of the Federal Circuit Court of Appeals and the subsequent Supreme Court ruling. In this section, we develop the principles contained in the *en banc* Winstar decision, the Supreme Court's grant of certiorari, and the final opinion.

Perhaps an important principle related to the granting of certiorari in Winstar is that the Supreme Court is much more likely to grant certiorari if a large amount of federal money is at stake. It is unlikely that the Supreme Court would have granted certiorari had the federal government not alluded to the large amounts of federal money at issue. If the government views its case in its simplest terms as a loser, it has plenty of opportunity to obfuscate the basic underlying issues under a veneer of governmental authority arguments. Essentially, the Winstar case boils down to the question of whether

the government is free to walk away from contractual commitments when the Congress changes its policies, for better or worse, in the midstream of a crisis situation.[181] The government unsuccessfully attempted to hide the simple breach of contract issue behind sophisticated legal arguments presented in terms of the unmistakability and sovereign acts doctrines. In addition, the government seems to implicitly make a "Robin Hood" argument that those wealthy individuals who attempted to benefit from governmental incentives deserve to suffer monetarily.[182] The simpler questions were: (1) is the government free to breach its contracts with impunity? and (2) can the government take property rights? In an increasingly complex and regulated society, the government's ability to unilaterally abandon contractual obligations made with citizens ultimately amounts to an end run around the Contracts Clause and Fifth Amendment protections for property.

The government attempts to utilize the unmistakability and sovereign acts doctrines in an attempt to avoid liability for breach of contract.[183] The sovereign acts doctrine does have at its core an important fundamental principle of governance: times change and regulators should not be allowed to contract away the government's ability to respond to crises. The unmistakability doctrine, at its core, is a hermeneutic device necessary for the continued vitality of the sovereign acts doctrine. However, in Winstar, the Supreme Court equated sovereignty with the ability to act and not with immunity from damage awards for acts in contravention of agreements.[184] Lower courts have previously adopted such an analysis in a taking cases - - the government can do what it wants, but it will have to pay.[185]

The following principles can be gleaned from the Winstar opinion: (1) where the government induces citizens to act by offering incentives, and citizens take actions that incorporate these incentives, the citizen acquires contractual rights against the government; (2) the government cannot be enjoined from acting in crisis situations, but it can be forced to pay monetary damages from legislative actions; and (3) regulatory involvement and regulatory writings are necessary forms of evidence to prove the existence of a contract with the government. Each of these principles will be discussed in turn.

The first principle from the Supreme Court's decision, that citizens acquire contractual rights against the government as a result of arms-length negotiations, rests on fundamental principles of contract law. The Court applied a straightforward contracts analysis in which it attempted to discern the parties' contractual intent.[186] The Plurality Supreme Court explained the process of reviewing potential governmental contractual liability by stating that "any governmental contract that not only deals with regulatory change but allocates the risk of its occurrence will, by definition, fail the further condition of a successful impossibility defense, for it will indeed indicate that the parties' agreement was not meant to

be rendered nugatory by a change in the regulatory law."[187]

This approach to determining governmental contractual liability does not apply to public and general acts.[188] Clearly, the government is free to change general provisions of the tax code. However, limited and focused legislative acts that abrogate specific governmental agreements subject the government to monetary liability. For contract rights to attach, there must be bargained-for consideration between the citizen and the government, as opposed to an entitlement that the government provides without bargained-for consideration to the citizen.[189]

Therefore, limited and focused acts which result in bargained-for consideration between citizens and the government give rise to contractual rights. This principle is limited and should not conflict with the government's general sovereignty. Further, this principle encourages citizens to contract with the government under the secure belief that they have rights.

Examples of this principle in action might include home mortgage interest deductions. The home mortgage interest deduction is a public and general law that is an unbargained-for entitlement offered to all citizens. Its abrogation, although costly to many citizens, would not imply a governmental breach of contract from which monetary damages could flow.

As a counter example, if the government were to encourage imports from Russia by means of specifically negotiated export-import credits, the government would not then be free to abrogate those credits midway through the deal based on a change in relations with Russia. This is because the credits involved were not an entitlement, but rather a bargained-for exchange (but for the credits, the important transaction would not have evolved and benefitted the citizen and the federal government). Legislation that abolished the credits would be limited and focused so that it only applies to those in the import-export business who bargained for and were promised credits.

The second principle from the plurality Supreme Court opinion, that the government must pay monetary damages for breach of contracts, rests on the distinction between the effects of monetary and injunctive relief on the government's ability to act. The court found that money damages, unlike injunctive relief, presented small threat to the government's sovereign powers.[190] Therefore, protection of the sovereign's legislative power through use of the sovereign acts doctrine is not necessary where money damages are the only form of relief sought.[191] In short, the government is free to act and change the existing law, but where the legislative changes breach existing governmental contractual obligations, the government must pay.[192]

The third principle, which can be found in the Federal Circuit Court of Appeals opinion, is an evidentiary one. None of the Winstar contracts involved a sale from the government to the citizen, but rather, involved mergers between private parties in which the government oversaw the mergers and granted monetary concessions to facilitate the mergers and to (hopefully) save the government's insurance funds.[193] Essentially, the government is a third party beneficiary that would have been forced to have paid more money absent the takeover transactions that the government approved. The evidentiary support needed is some kind of writing by the regulatory body specifically laying out the *quid pro quo* - - *e.g.,* that the regulators will approve the action if the citizen completes certain requirements.[194] The document approved and signed by the government must indicate regulatory consent for the takeover transaction.[195] A black letter rule that requires specific regulatory involvement and a writing limits governmental liability, and is coextensive with the concept of general and public acts. It encourages businesses to negotiate with governmental regulators as opposed to relying independently on legislative and regulatory provisions.

In the previously-mentioned home mortgage interest deduction example, there is no bargaining - - the home purchaser takes the interest deduction offered. In the home purchase case, the government does not get specifically involved in the home purchase decision - - nor does the government ever supply the home purchaser with a letter promising that the home purchaser can use the deduction over a set period of years. Also, the government does not receive a direct advantage from the purchase of an individual home. However, in the S&L takeover cases, each S&L takeover saved the government from having to pay for insured deposits.[196]

In the import-export example, the government specifically benefits with each import transaction because it saves the government from having to give funds to the Russian government. Individual credits are specifically bargained for, and a specific writing passes from the government to the citizen indicating the amount and nature of the credit. In the next section, the Winstar principles will be applied to the facts in Southmark.

V. SOUTHMARK CORPORATION: A CASE STUDY

In the early eighties, upon its acquisition by Gene Phillips, a real estate investor with a proven track record for growth as owner of the Syntek Corporation,[197] Southmark soon became the nation's largest publicly-traded real estate investment firm. Profits more than doubled, the total equity increased

by $100 million, and stock prices tripled. In March, 1984, Business Week named Southmark the number one rated high growth stock for a five year period (1979-1983). At the close of Southmark's fiscal year in June, 1985, shareholder equity had grown from $16 million to $528 million.[198] Product holding increased, with overall equity reaching $17 billion in 1987, with 197,000 apartments and 50 million square feet of commercial space.

One of the cores of Southmark's phenomenal growth was its acquisition and use of San Jacinto Saving and Loan. San Jacinto, a wholly owned subsidiary of Southmark, was purchased in 1983 and became the thrift arm of Southmark. While San Jacinto's primary operations where thrift-related, following its acquisition by Southmark, it diversified its operation to include activities conducted by real estate subsidiaries of Southmark. Previously a failing thrift, it was transformed into a lucrative investment, primarily because of the incentive package granted by the Garn-St. Germain Act. While held by Southmark, the regulatory provisions were used, as they were by S&L acquirers throughout the country, to return assets back to the holdings of these cash strapped institutions.

During the regulation of the late eighties and the abrogation of RAP, San Jacinto and Southmark came under the same sort of pressures experienced by others in the industry. The federal regulators began to exert pressure on the already ailing company,[199] ousting its driving forces, Mr. Phillips and Mr. Friedman. This was due to the regulators' jurisdiction over Southmark under section 3(q) of the FDIA, 12 U.S.C. 1813(g), as it was a holding company of a savings association.[200] In 1985, the FHLBB attacked San Jacinto's use of RAP accounting and the resulting overvaluation of its assets. In early 1986, David Bradley, supervisory agent for the FHLBB, negotiated and entered into an agreement with the FSLIC on behalf of San Jacinto that San Jacinto would cease to provide financing to syndications sponsored by affiliates of its holding company. The agreement, however, allowed San Jacinto to sell real estate to a holding company affiliate for cash for the greater of the book value in the property or its appraised value. This agreement was required by the FHLBB.[201]

On July 1989, Southmark filed for bankruptcy protection. The court turned over the determination of the financial status of Southmark to a court appointed examiner, Neil Batson.[202] The document produced by Batson[203] is an excellent case study in wide-ranging violations of the <u>Winstar</u> principle. The Report and subsequent report-based actions that were taken breached almost every promise made by the government to Southmark to induce it to save the failing savings and loan.

The Batson Report starts off early by determining that generally accepted accounting principles (GAAP), much less RAP, are not dispositive in his analysis. Under insolvency analysis, which he uses, a company may appear to be solvent when GAAP is used to prepare financial statements, but after adjusting for "fair value", the company may be actually insolvent. His concept of "fair value" under Bankr. § 101(31) is then based on FIRREA principles of real estate analysis which are accepted uncritically. In other words, when he values the asset consistent with its nature, he discounts to its "appropriate value". If the examiner determines that no buyer would purchase the asset, then he sets its value to zero.

In order to determine the asset based, *i.e.*, adjusted, "fair value" equity of the company, the examiner clustered the assets of Southmark into twenty groups. He chose to value operating assets in a conservative manner inconsistent with the principles of RAP. For instance, the examiner chose to write off millions of dollars in loans because of the poor quality of the real estate collateral. This ignored the fact that much of the value of the real estate was in full compliance with requirements of Garn-St. Germain. On the basis of this analysis, the examiner wrote down the real estate by $700 million.

Further, in violation of the regulatory goodwill provisions of St. Germain, the examiner wrote off all of the goodwill of San Jacinto and related companies. His justification for this writeoff was that the company was “sick.” However, the regulatory good will provisions of St. Germain and other acts made no linkage between actual "good will" commonly measured by consumer loyalty. It was simply a device to make S&Ls a more palatable investment.

Almost unbelievably, the examiner, in one fell swoop, and without examining any of the contracts and promises made to Southmark as an acquirer of San Jacinto through Garn-St. Germain and other laws and regulations, wrote this $3.3 billion dollar institution off. Southmark’s largest asset was its wholly owned subsidiary, the San Jacinto Savings Association.[204] The examiner stated that San Jacinto was used by Southmark as a captive financial institution, and since the current calendar year for Southmark was poor, the value of the S&L was non-existent.

The report makes the idea of a "captive financial institution" seem like a shady enterprise. Although this was contrary to the financial practice and regulation of the time, the examiner made it the basis of the writeoff of a significant amount of assets and the Southmark Corporation's financial nerve center.

On December 14, 1990, San Jacinto Savings and Loan was placed into receivership by federal thrift regulators for falling short of the capital requirements mandated by FIRREA. It had been in

conservatorship of the RTC since Nov. 30, 1990.[205] The seizure turned Southmark, at its peak a diversified financial and real estate company, into a liquidating trust, selling its remaining assets to pay creditors.[206]

The examiner's report and subsequent action by the OTS and RTC violated the <u>Winstar</u> principle in multiple ways. First, there was clearly a contract between Southmark, San Jacinto and the regulators to allow San Jacinto to appraise realty through a purchase method of accounting. The 1986 operating agreement, as well as numerous letters and memos between Southmark, San Jacinto and the regulators, provided sufficient evidence in that regard. As a holding company for a thrift, Southmark was also the beneficiary of these contractual provisions. By eliminating (for accounting purposes) and then seizing a $3 billion dollar asset, the regulators could not have more intentionally violated the property rights of Southmark.

As with almost all thrift acquisitions, Southmark saved the government significant money in the early eighties. In order to induce Southmark to engage in this transaction, a regulatory environment and specific promises regarding that environment were made. The regulators later decided that those promises were not a good idea, and reneged. These broken promises should have given rise to unconstitutional conditions and causes of action under the contracts and takings clauses. At that time, however, such actions were not available. In the future, and based on <u>Winstar</u>, presumably such gross constitutional infirmities will not go uncompensated. The Supreme Court has ended the discussion by upholding the Federal Circuit Court of Appeals decision on all grounds.

About the Author

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ENDNOTES

[1] **H.R. REP. NO. 101-54(I), 101st Cong., 1st Sess. 291 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 87; *see* Fidelity Fed. Sav.& Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982) (describing the rationale for the establishment of Savings and Loans during the Great Depression).**

[2] **JACK D. ATCHISON, LEGAL EXTORTION: THE WAR AGAINST LINCOLN SAVINGS & CHARLIE KEATING 1 (1995); *see* CHARLES E. SCHUMER & J. BRIAN GRAHAM, *Savings & Loan Crisis: Lessons and A Look Ahead*, 2 STAN. L. & POL'Y REV. 68, 71 n.10 (1990).**

[3] **ATCHISON, *supra* note 2, at 1.**

[4] ***Id.*; SCHUMER & GRAHAM, *supra* note 2, at 71 n.10.**

[5] **ATCHISON, *supra* note 2, at 2*;* SCHUMER & GRAHAM, *supra* note 4, at 71 n.10.**

[6] **Regulation Q, 12 C.F.R. § 217 (1960) (regulating the interest rate S&Ls could offer on deposits); H.R. REP. NO. 101-54 (I), *supra* note 1, at 295, *reprinted in* 1989 U.S.C.C.A.N. at 91. This regulation was phased out with the passage of the Depository Institutions Deregulation and Monetary Control Act of 1980, *see infra* p.10 and note 52.**

[7] **ATCHISON, *supra* note 2, at 2.**

[8] ***Id.***

[9] ***Id.***

[10] ***Id.***

[11] **ATCHISON, *supra* note 2, at 2.**

[12] ***Id.***

[13] ***Id.***

[14] ***Id.***

[15] **ATCHISON, *supra* note 2, at 2. The FSLIC was established by Congress to insure the accounts at all Federal S&Ls and certain state-chartered S&Ls. National Housing Act, Pub.L. No. 73-402(a), tit. IV, 48 Stat 1256 et seq. (codified as amended 12 U.S.C. 1725 *et seq.*).**

[16] ***Id.***

[17] ***Id.***

[18] ***Id.***

[19] **SCHUMER & GRAHAM, *supra* note 4, at 71 n.11 (noting that the index of the prime rate for commercial loans jumped from 7.86 percent in 1975 to 12.67 percent in 1979, 15.27 percent in 1980 and 18.87 percent in 1982).**

[20] **ATCHISON, *supra* note 2, at 2.**

[21] ***Id.***

[22] ***Id.***

[23] ***Id.***

[24] **H.R. REP. NO. 101-54 (I), *supra* note 1, at 291, *reprinted in* 1989 U.S.C.C.A.N. at 87.**

[25] **SCHUMER & GRAHAM, *supra* note 4, at 71 (observing that the S&L industry was losing billions each quarter) (citing "Thrift Losses Decline Significantly in Third Quarter," Federal Home Loan Bank Board News Release, 13 December 1988, FHLBB Doc. No. 88-258)**

[26] **ATCHISON, *supra* note 2, at 4. *See also* H. R. REP. NO. 101-54 (I), *supra* note 1, at 296, *reprinted in* 1989 U.S.C.C.A.N. at 92; Olympic Fed. Sav. & Loan Ass'n v. Director, OTS, 732 F. Supp. 1183,1185 (D.D.C. 1990) (noting that the FSLIC insurance fund was in danger of depletion due to the number of bank failures).**

[27] **ATCHISON, *supra* note 2, at 4.**

[28] ***See* H.R. REP. NO. 101-54 (I), *supra* note 1, at 291-93, *reprinted in* 1989 U.S.C.C.A.N. at 87.**

[29] **H.R. REP. NO. 101-54 (I), *supra* note 1, at 291-92, *reprinted in* 1989 U.S.C.C.A.N. at 87-88.**

[30] **H.R. REP. NO. 101-54 (I), *supra* note 1, at 292, *reprinted in* 1989 U.S.C.C.A.N. at 88.**

[31] **Widespread default on loans dried up the availability of mortgages in more than half of the counties in the country, leaving approximately one-fifth of the total population without home-financing options. Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 159-60 (1982).**

[32] **H.R. REP. NO. 101-54 (I), *supra* note 1, at 292, *reprinted in* 1989 U.S.C.C.A.N. at 88.**

[33] Federal Home Loan Bank Act, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C. 1421 *et seq.* (1932)).

[34] H.R. REP. NO. 101-54 (I), *supra* note 1, at 292, *reprinted in* 1989 U.S.C.C.A.N. at 88.

[35] Federal Home Loan Bank Act, 47 Stat. 726, 12 U.S.C. §1423 (authorizing the creation of up to twelve district banks); *Id.*, 47 Stat. 736, 12 U.S.C. § 1437 (establishing the FHLBB); *see* Coit Indep. Joint Venture v. Federal Sav. & Loan Ins. Corp, 489 U.S. 561, 568 (1989).

[36] Home Owners' Loan Act of 1933 (HOLA), Pub. L. No. 73-43, 48 Stat. 128 (codified at 12 U.S.C. 1424 et seq.) (1995)) (establishing federally charted Savings and Loan institutions). HOLA was enacted "to provide emergency relief with respect to home mortgage indebtedness" after it became clear that the FHLBB had not curtailed the growing number of defaults. H.R. CONF. REP. NO. 210, 73d Cong., 1st Sess., 1 (1993). Later considered "a radical and comprehensive response to the inadequacies of the existing state systems," HOLA provided for the creation of a system of federal S&Ls. Conference of Fed. Sav. & Loan Assns. v. Stein, 604 F.2d 1256, 1257 (9th Cir. 1979), *aff'd*, 445 U.S. 921 (1980).

[37] National Housing Act, Pub. L. No. 73-479, tit. IV, 401 et seq., 48 Stat. 1246 *et seq.* (1934) (codified at 12 U.S.C. 1724 *et seq.* (1995)).

[38] Federal Housing Administration, established by NHA, Pub. L. No. 73-479, tit. I, §§ 1-5, 48 Stat. 1246, 1246-47 (1934) (codified at 12 U.S.C. §§ 1701-1703, 1705 (1995).

[39] *See supra* note 16.

[40] H.R. REP. NO. 101-54 (I), *supra* note 1, at 293, *reprinted in* 1989 U.S.C.C.A.N. at 89.

[41] *Id.*

[42] H.R. REP. NO. 101-54 (I), *supra* note 1, at 294, *reprinted in* 1989 U.S.C.C.A.N. at 90.

[43] *Id.*

[44] *Id.*

[45] H.R. REP. NO. 101-54 (I), *supra* note 1, at 295, *reprinted in* 1989 U.S.C.C.A.N. at 91. The $40,000 insurance limit was retained for all other types of deposits. *See id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *See* SCHUMER & GRAHAM, *supra* note 4, at 71 (explaining the realtionship between increasing interest rates and declining S&L profitability).

[50] *Id.*

[51] Depository Institutions Deregulation and Monetary Control Act of 1980, Pub.L. No. 96-221, 94 Stat. 132 (1980).

[52] H.R. REP. NO. 101-54 (I), *supra* note 1, at 295, *reprinted in* 1989 U.S.C.C.A.N. at 91.

[53] H.R. REP. NO. 101-54 (I), *supra* note 1, at 296, *reprinted in* 1989 U.S.C.C.A.N. at 92.

[54] *Id.*

[55] *Id.*

[56] *Id.* For a general discussion of the need for balanced portfolios and the inherent risk in investing in home-mortgage loans, see CARL FELSENFELD, The S&L Crisis: Death and Transfiguration, 59 Fordham L. Rev. 7, 9 (1991).

[57] H.R. REP. NO. 101-54 (I), *supra* note 1, at 296, *reprinted in* 1989 U.S.C.C.A.N. at 92.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] H.R. REP. NO. 101-54 (I), *supra* note 1, at 296, *reprinted in* 1989 U.S.C.C.A.N. at 92.

[62] Garn-St. Germain Depository Institutions Act of 1982, 96 Stat. 1469; *Id.*

[63] *Id.*

[64] H.R. REP. NO. 101-54 (I), *supra* note 1, at 296, *reprinted in* 1989 U.S.C.C.A.N. at 92. The Federal Deposit Insurance Corporation was established by the Banking Act of 1933, Pub.L. No. 73-66, § 12B, 48 Stat. 162, 168 (1933).

[65] Federally chartered S&Ls were mutual associations, and mutual associations did not have stockholders; rather, mutual associations, like the S&Ls, were owned by their depositors. ATCHISON, *supra* note 2, at 6.

[66] *Id.*

[67] Prior to this change, the regulations required that voting common stock be distributed among a minimum of four hundred shareholders. *Id.*

[68] *Id.*

[69] *Id;* Housing and Urban Recovery Act of 1982: Hearings Before the Subcommittee on Housing and Community Development of the Committee on Banking, Finance and Urban Affairs, 97th Cong., 2d Sess. 1490, 1502 (March, 1982) ("[The FHLBB] is seeking to spread as much of the industry's own net worth as possible over the industry's trouble spots as a means of conserving FSLIC's insurance fund.") (statement of Richard T. Pratt, Chairman of FHLBB).

[70] H.R. REP. NO. 101-54 (I), *supra* note 1, at 297, *reprinted in* 1989 U.S.C.C.A.N. at 93.

[71] *Id.*

[72] *Id.*

[73] ATCHISON, *supra* note 2, at 6.

[74] *Id.* at 7.

[75] *Id*.

[76] *Id.*

[77] ATCHINSON, *supra* note 2, at 7.

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] H.R. REP. NO. 101-54 (I), *supra* note 1, at 297-98, *reprinted in* 1989 U.S.C.C.A.N. at 93-94.

[82] *Id.*

[83] *Id.*

[84] **ATCHISON, *supra* note 2, at 15.**

[85] ***Id*.**

[86] **H.R. REP. NO. 101-54 (I), *supra* note 1, at 299, *reprinted in* 1989 U.S.C.C.A.N. at 95.**

[87] ***Id*.**

[88] ***Id*.**

[89] **H.R. REP. NO. 101-54 (I), *supra* note 1, at 299, *reprinted in* 1989 U.S.C.C.A.N. at 95.**

[90] ***Id.***

[91] ***Id.***

[92] ***Id*.**

[93] **H.R. REP. NO. 101-54 (I), *supra* note 1, at 303, *reprinted in* 1989 U.S.C.C.A.N. at 99.**

[94] **H.R. REP. NO. 101-54 (I), *supra* note 1, at 304, *reprinted in* 1989 U.S.C.C.A.N. at 100.**

[95] ***Id*.**

[96] ***Id.***

[97] ***Id*.**

[98] ***Id*.**

[99] ***Id*.**

[100] **H.R. REP. NO. 101-54 (I), *supra* note 1, at 304, *reprinted in* 1989 U.S.C.C.A.N. at 100.**

[101] ***Id.***

[102] **Financial Institutions Reform, Recovery & Enforcement Act of 1989 (FIRREA), Pub.L. No. 101-73, 103 Stat. 183 (1989) (codified in scattered subsections of 12 U.S.C. §1464 (1994)); *see generally* Vicki O. Tucker et al., *The RTC: A Practical Guide to the Receivership/Conservatorship Process and the Resolution of Failed Thrifts*, 25 U. Rich. L. Rev. 1, 1 (1990) (discussing the Congressional intent underlying the passage of FIRREA).**

[103] ***Id.***

[104] ***Id.***

105 ***Id.***

106 **H.R. REP. NO. 101-54 (I), *supra* note 1, at 304, *reprinted in* 1989 U.S.C.C.A.N. at 100.**

107 ***Id.***

108 ***United States v. Winstar Corp.*, 116 S.Ct. 2432, 2446; 12 U.S.C. §1464 (t)(2)(A).**

109 ***Id.***

110 ***Id.***

111 ***Id.***

112 ***Id.***

113 **59 Fordham L. Rev. 339 (1991).**

114 ***Id.*; ATCHISON, *supra* note 2.**

115 ***United States v. Winstar Corp.*, 116 S.Ct. at 2447.**

116 ***Winstar v. United States*, 64 F3d 1531, 1538.**

117 ***Id.* at 1537.**

118 ***Id.* at 1536.**

119 ***United States v. Winstar Corp.*, 116 S.Ct. at 2447.**

120 ***Id.* at 2448.**

121 ***Id.***

122 ***United States v. Winstar Corp.*, 116 S.Ct. at 2449.**

123 ***Id.* at 2448.**

124 ***Id.***

125 ***Id.* at 2446.**

126 ***Id.*** **at 2450.**

127 ***United States v. Winstar Corp.*****, 116 S.Ct. at 2450.**

128 ***Winstar Corp. v. United States,*** **64 F.3d at 1544.**

129 ***United States v. Winstar Corp.*****, 116 S.Ct. at 2447.**

130 ***Winstar Corp. v. United States,*** **64 F.3d at 1539.**

131 ***United States v. Winstar Corp.*****, 116 S.Ct. at 2450-2451.**

132 ***Id.***

133 ***United States v. Winstar Corp.*****, 116 S.Ct. at 2450-2451.**

134 ***Id.***

135 ***Winstar Corp. v. United States,*** **64 F.3d at 1539.**

136 ***United States v. Winstar Corp.*****, 116 S.Ct. at 2446.**

137 ***Winstar Corp. v. United States,*** **64 F.3d at 1539.**

138 ***Id.***

139 ***Id.***

140 ***Id.***

141 ***Id.***

142 ***United States v. Winstar Corp.*****, 116 S.Ct. at 2447.**

143 ***Id.***

144 ***Winstar Corp. v. United States,*** **64 F.3d at 1545-1548.**

145 ***Id.***

146 ***United States v. Winstar Corp.*****, 116 S.Ct. at 2447.**

147 **979 F.2d 216 (Fed. Cir. 1992).**

148 **994 F.2d 797 (Fed. Cir. 1993).**

[149] ***Winstar Corp. v. United States*, 64 F.3d at 1531.**

[150] **Petitioners Brief to the Supreme Court [fix cite form]**

[151] ***United States v. Winstar Corp.*, 116 S.Ct. at 2451.**

[152] ***Winstar Corp. v. United States*, 64 F.3d 1531(citing *Olympic Fed. Sav. & Loan Ass'n v. Director*, OTS, 732 F. Supp. 1183, 1185 (D.D.C. 1990)); *United State Corp*** *v. Winstar Corp.*, 116 S.Ct. at 2440-2442.

[153] ***Id.***

[154] ***Id.* (citing Savings and Loan Policies in the Late 1970s and 1980s: Hearings Before the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 2d Sess., No. 176, at 227 (1990).**

[155] ***Id.***

[156] **The Supreme Court Brief for Respondent Glendale Federal Bank discusses the importance of the favorable accounting treatment for goodwill, and argues that, absent such favorable treatment, the supervisory mergers were not financially sensible:**

> **"In suggesting that the government's contractual recognition of Glendale's right to use goodwill as capital was nothing more than a license revocable at will, the government offers an interpretation that is financially nonsensical ... if, *arguendo*, the government's position were correct -- Glendale would have been subject to closure the day after the transaction and every day thereafter based on a statutory change or any regulator's unfettered decision to cease recognizing the goodwill and thus to render Glendale insolvent by approximately *$460 million*."**

Supreme Court Brief for Respondent Glendale 30-31.

[157] ***Winstar Corp. v. United States,* 64 F.3d at 1535-1536.**

[158] **In the context of a supervisory merger, supervisory goodwill equals the difference between the fair market value of the failing thrift's liabilities assumed by an acquirer and the fair market value of the failing thrift's assets. *Id.***

[159] ***Id.***

160 ***Id.***

161 ***Id.*** **(citing lower court opinion.)**

162 ***Id.*** **(citing lower court opinion.)**

163 ***Id.***

164 ***Id.*** **See Bank Board Memorandum R-31b (1981); *United States v. Winstar Corp.*, 116 S.Ct. 2432, 2442.**

165 ***United States v. Winstar Corp.*, 116 S.Ct. 2432, 2442.**

166 ***United States v. Winstar Corp.*, 116 S.Ct. 2432, 2444-2446.**

167 ***Id.*** **at 2444.**

168 ***Id.***

169 ***Winstar Corp. v. United States,*** **64 F.3d at 1536.**

170 **Winstar Corporation, a holding company, was formed by investors for the purpose of acquiring Windom Federal Savings and Loan Association (Windom). Winstar formed United Federal Savings Bank, a new wholly-owned federal stock savings bank, to merge with Windom. In 1983, Windom was in dire straits. Windom's board of directors determined that the thrift would fail without assistance from the FSLIC. The FSLIC estimated that the cost of liquidating the thrift could run as high as $12 million dollars; thus, it chose to solicit bids for the acquisition of Windom as an alternative to expending its own funds to bail out the thrift. The merger was to be financed by cash contributions from both the investors and the FSLIC. Winstar's plan, like Glendale's and Statesman's, called for the use of the purchase method of accounting. Supervisory goodwill was to be recorded as an intangible asset to be amortized over a period of 35 years. The FSLIC recommended to the Bank Board that it approve the negotiated merger lan, which it did, subject to the presentation of an opinion letter from Winstar's independent accountants justifying the use of the purchase method of accounting and reciting the resulting supervisory goodwill. The FSLIC signed as Assistance Agreement with Winstar Corporation as part of the transactions, and the Bank Board issued a forbearance letter. According to the forbearance letter, intangible assets ensuing from use of the purchase method of accounting "may be amortized . . . over a period not to exceed 35 years by the straight-line method."**

By the government's own estimates, the savings flowing from Winstar's merger with Windom Federal Savings and Loan amounted to $7 million.

171 **Statesman approached the FSLIC in 1987 about the possibility of acquiring a**

subsidiary of First Federated Savings Bank, an insolvent state-chartered FSLIC insured savings and loan in Florida. The FSLIC informed Stateman that it would not provide government assistance for the merger unless Statesman acquired all of First Federated, and three other financially troubled thrifts. Statesman and the FSLIC negotiated for over a year to hammer out the details of a complex plan governing Statesman's acquisition of the four insolvent thrifts.

The Bank Board granted the FSLIC the authority to enter into its negotiated Assistance Agreement with Statesman as long as Statesman provided an opinion letter from its independent accountants justifying its use of the purchase method of accounting and supervisory goodwill. Statesman provided the opinion letter to the agency's satisfaction.

According to the terms of the Statesman plan, Statesman and its co-investor, American Life and Casualty Company, would invest $21 million in Statesman's Savings Holding Company. The company would then purchase $21 million of stock in a newly-formed federal stock savings bank named Statesman Bank for Savings. Finally, the Statesman Bank for Savings would merge with the four failing thrifts.

During negotiations, the FSLIC agreed to provide a $60 million cash contribution to the Statesman Bank for Savings. This understanding was formalized in an Assistance Agreement entered into with Statesman. According to the terms of the Assistance Agreement, and the Bank Board Resolution approving the merger, Statesman's regulatory capital would be permanently credited with $25.8 million of this cash contribution (including a $5 million debenture that Statesman was required to pay back to the government) so that it could meet the government's minimum regulatory capital requirements. The resolution and the purchase method of accounting recognized the $25.8 million as supervisory goodwill resulting from the merger as a capital asset, and permitted Statesman to amortize that goodwill over 25 years.

Statesman's acquisition of First Federated Savings Bank saved the government approximately $50 million.

[172] **When First Federal Savings and Loan Association of Broward (Broward) approached Glendale in September, 1981 about the possibility of negotiating a merger, its balance sheet reflected significant losses: Broward's liabilities exceeded its assets by approximately $734 million. Glendale, on the other hand, was a profitable thrift, in full regulatory compliance. Glendale was interested in Broward's proposition, but had no intention of anchoring its solid assets to Broward's sinking ship without definitive assurances of governmental assistance.**

The merger proposal that Glendale submitted to the FSLIC was formulated in accordance with the same purchase method of accounting as used by Statesman and Winstar. The supervisory goodwill resulting from this accounting was listed as an intangible asset, amortizable over a period of up to 40 years. Prolonged negotiations over the terms and conditions of the merger followed Glendale's submission, after which the FSLIC agreed to assist the merged entity and to recommend that the FHLBB Board approve the transaction.

The FHLBB issued a resolution in which it approved the Glendale-Broward merger

on the condition that Glendale provide a satisfactory opinion letter, from independent accountants, justifying the use of the purchase method of accounting. The opinion letter was also to include a detailed description of any goodwill arising from the merger; confirm the reasonableness of the sums ascribed to goodwill; and verify the consequent amortization periods and methods. In accordance with the Bank Board resolution, Glendale provided the Board with the accountants' justification and an opinion letter satisfactory to the Board. The opinion letter explained that "$18,000,000 of the resultant goodwill . . . will be amortized on a straight line basis over 12 years" and the "remaining goodwill of $716,666,000 will be amortized on a straight line basis over 40 years."

The resolution issued gave the FSLIC authority to enter into a Supervisory Action Agreement (SAA) with Glendale. The SAA was signed in November, 1981, and Glendale promptly concluded its merger with Broward. The merger of First Federal Savings and Loan Association of Broward County with Glendale saved the government, by its own estimates, approximately three quarters of a billion dollars.

[173] **H.R. Conf. Rep. No. 101-222, 101st Cong., 1st Sess. 404 (1989), reprinted in 1989 USCCAN 432, 443.**

[174] **12 U.S.C. 1464(s).**

[175] **135 Cong. Rec. 12068 (1989) (Rep. Price).**

[176] ***Id.* at 11795.**

[177] **135 Cong. Rec. 12064 (1989).**

[178] ***United States v. Winstar Corp*., 116 S.Ct. at 2446.**

[179] ***Id*. at 2476.**

[180] ***United States v. Winstar Corp*., 116 S.Ct. at 2477.**

[181] ***United States v. Winstar Corp*., 116 S.Ct. at 2473**

[182] **The Federal Government specifically references the amount of federal money at issue. The fact that $10 billion of federal money might be at risk does not matter one way or another unless the argument is that the $10 billion is better left in government hands than in the hands of those who attempted to benefit from S&L incentives. The Supreme Court Brief for Respondent Glendale states: "[T]he emotional premise underlying the government's brief is that the government should win because this case involves savings and loans." Supreme Court Brief for Respondent Glendale 35.**

[183] ***Id.* at 2475.**

[184] ***United States v. Winstar Corp*., 116 S.Ct. 2432, 2447.**

[185] *See generally* Katherine Dunn Parsons, *Billboard Regulation After Metromedia and Lucas,* 31 HOUS. L. REV. 1555, 1584-93 (1995) (presenting an overview of taking jurisprudence with special emphasis on the important cases *Lucas v. South Carolina Coastal Commission*, 112 S. Ct. 2886 (1992) and *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987)).

[186] *United States v. Winstar Corp*., 116 S.Ct. at 2448.

[187] *Id.* at 2471. *See also Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 957-959 (rejecting the sovereign acts defense where the contract was interpreted as expressly allocating the risk of change in governmental policy); Posner & Rosenfield, 6 J. Leg. Stud., at 98 (noting that, subject to certain constraints, "[t]he contracting parties' chosen allocation of risk" should always be honored as the most efficient one possible). *Id.* At 1546. *See* Restatement (Second) of Contracts § 261 (no impossibility defense where the 'language or the circumstances indicate allocation of the risk to the party seeking discharge).

[188] *United States v. Winstar Corp.*, 116 S.Ct. at 2466.

[189] *Id.* at 2470-2471.

[190] *Id.* at 2453.

[191] *Id.* at 2458.

[192] *Id.*

[193] *Id.* at 2442-2448.

[194] In each of the *Winstar* plaintiffs' cases, the government asked for and received specific documentation, such as letters from independent accounting agencies, providing the justification for and amount of supervisory goodwill created in the mergers. *United States v. Winstar Corp*., 116 S.Ct. at 2477 (concurring opinion).

[195] *United States v. Winstar Corp.*, 116 S.Ct. at 2448-2450, 2472, 2476-2477.

[196] *Id.*

[197] Sherrid, Pamela, "REIT Revisited," <u>Forbes</u>, July 5, 1982, at 171.

[198] San Jacinto grew from a $450 million thrift before its acquisition by Southmark in 1983 to a $3 billion dollar thrift by 1986. [Other Shoe Finally Drops at San Jacinto Savings, <u>National Mortgage News</u>, December 17, 1990 at p.2]

[199] Muolo, Paul, <u>National Mortgage News</u>, January 23, 1989, p. 5.

[200] ***In re: Southmark Corporation*****, 113 Bankr. 280, 282 (Bankr. N.D. Tex. 1990) (noting that "because of its ownership of San Jacinto, Southmark is considered a savings and loan holding company subject to supervision and regulation by the Office of Thrift Supervision.")**

[201] ***Integon Life Insurance Co. v. Southmark Heritage Retirement Co.*****, 813 F.Supp 783, 785 (S.D. Alabama 1992).**

[202] **Trotty, Michael, "Examiner: Management Damaged Firm," Dallas Times Herald, July 12, 1990 at b1.**

[203] ***In Re: Southmark Corporation*****, No.389-36324-SAF-11, (Bankr. N.D. Tex. 1990) (Report of Examiner Neal Batson).**

[204] ***In re: The Consolidated Companies*****, 113 Bankr 269, 275 (Bankr N.D. Tex. 1989).**

[205] **San Jacinto Savings Association placed in receivership, Business Wire, December 14, 1990, available on Nexis;** ***Brown v. RTC*****, 1994 U.S.App. Lexis 18730 at *3 (4th Cir 1994)].**

[206] **Loren Steffy, Houston Thrift Seized, Dallas Times Herald, Dec, 1, 1990 at b1.**