

In the United States Court of Federal Claims

No. 90-878C
(Filed April 29, 2005)

ALFRED D. HUGHES and EL *
PASO HOLDING CORPORATION, *
Plaintiffs, *
v. *
THE UNITED STATES, *
Defendant. *

ORDER

This matter is before the court on defendant’s Renewed Motion for Summary Judgment Based Upon EPHC’s Assumptions of the Risk of Regulatory Change. The court held a lengthy and voluminous trial on the issue of damages after granting summary judgment to plaintiffs that (1) contemporaneous documents formed a contract that included a promise by the government to allow a newly-formed thrift to count supervisory goodwill towards regulatory capital and amortize it over a twenty-five year period; and (2) FIRREA broke that promise. See Hughes v. United States, 58 Fed. Cl. 291 (2003). Defendant contends that this court’s rejection of its argument that by virtue of a clause in the Regulatory Capital Maintenance Agreement (the “successor regulation clause”), El Paso Holding Company (“EPHC”) assumed the risk of regulatory change, has now been decided by Admiral Financial Corp. v. United States, 378 F.3d 1336 (Fed. Cir. 2004) (“Admiral III”), in favor of the government. See also Guaranty Fin. Servs., Inc. v. Ryan, 928 F.2d 994 (11th Cir. 1991); First Commerce Corp. v. United States, 63 Fed. Cl. 627 (2005); Bayside Fed. Sav. & Loan Assoc. v. United States, 64 Fed. Cl. 15 (2004); Coast to Coast Fin. Corp. v. United States, 62 Fed. 469 (2004). Accordingly, defendant urges the court to reconsider and reverse Hughes in this regard, and enter a summary judgment of dismissal of plaintiffs’ breach of contract claims.

This court previously held that the government breached its contract with plaintiffs to allow New El Paso to use the purchase method of accounting and amortize

supervisory goodwill over a twenty-five year period when it passed the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”), Pub. L. No. 11-73, 103 Stat. 183 (1989). See *Hughes*, 58 Fed. Cl. at 301 (citing *Winstar Corp. v. United States (Winstar II)*, 64 F.3d 1531, 1544-45 (Fed. Cir. 1995); *Cal. Fed. Bank, F.S.B. v. United States (Cal Fed II)*, 245 F.3d 1342, 1348 (Fed. Cir. 2001)). The court rejected the government’s argument that provisions in the Regulatory Capital Maintenance/Dividend Agreement (“RCMA”) assigned the risk of change to plaintiffs. Instead, it chose to interpret the successor regulation clause in conjunction with the forbearance letter which also contained a promise to allow goodwill to count as regulatory capital but without the successor regulation caveat. In the interests of harmonizing these provisions, *Hughes* concluded that the “‘successor regulation’ provision in the RCMA recognized New El Paso’s obligation to conform to existing regulatory capital requirements as well as any successor regulations except those that had been waived by the government in the forbearance letter.” *Hughes*, 58 Fed. Cl. at 306. The RCMA recognized the government’s right to change the minimum regulatory capital level while preserving plaintiffs’ right to include supervisory goodwill in meeting that requirement. The court held that the government’s interpretation, repeated here, would render the contract illusory.

In light of the Federal Circuit’s recent holding in *Admiral III* that Admiral’s RCMA assigned the risk of regulatory change to the plaintiff, and that the enactment of FIRREA did not breach its contract, this court must reexamine the provisions relied upon by the government in this case. In this regard, the parties dispute whether or not consideration was provided by the government in addition to the goodwill forbearance assertedly subject to the *Guaranty* clause. Determination of whether additional consideration was provided and other factual as well as legal disputes are best resolved in the context of the case-in-chief.

Accordingly, **IT IS ORDERED** that defendant’s Renewed Motion for Summary Judgment Based Upon EPHC’s Assumptions of the Risk of Regulatory Change shall be **DEFERRED**, and carried with the case for subsequent resolution together with the matters tried.

James F. Merow
Senior Judge