04-4997, 4999

IN THE

United States Court of Appeals

for the

Second Circuit

AGENCY FOR DEPOSIT INSURANCE, REHABILITATION, BANKRUPTCY AND LIQUIDATION OF BANKS, AS BANKRUPTCY ADMINISTRATOR OF JUGOBANKA A.D. AND BEOGRADSKA BANKA A.D., BEOGRAD,

Petitioner-Appellee,

– against –

SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT SUPERINTENDENT OF BANKS OF THE STATE OF NEW YORK AND IN SUPPORT OF REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

This statement is submitted pursuant to Federal Rule of Appellate Procedure 26.1.

The Clearing House Association L.L.C. is a non-profit trade group based in New York City and organized under the laws of New York State. It has no parent corporation and has issued no stock or publicly traded securities.

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The Clearing House Association L.L.C. ("The Clearing House") submits this brief as *amicus curiae* in support of the appeal by the Superintendent of Banks of the State of New York (the "Superintendent") from the Opinion and Order dated June 11, 2004, 310 B.R. 793 (S.D.N.Y. 2004), and the Memorandum and Order dated August 15, 2004, 313 B.R. 561 (S.D.N.Y. 2004) (the "Orders"), by the Honorable Jed S. Rakoff, United States District Judge, of the United States District Court for the Southern District of New York.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Clearing House is an association of leading commercial banks that, through an affiliate, provides payment, clearing, and settlement services to its member banks and other financial institutions.[1] The Clearing House banks are among the most important participants in the international banking and payments systems and among the world's principal intermediaries in interbank funds transfers. The Clearing House, through an affiliate, operates

[1] The Clearing House members are: Bank of America, National Association; The Bank of New York; Citibank, N.A.; Deutsche Bank Trust Company Americas; HSBC Bank USA, National Association; JPMorgan Chase Bank, N.A.; LaSalle Bank National Association; U.S. Bank National Association; Wachovia Bank, National Association; and Wells Fargo Bank, National Association.

the Clearing House Interbank Payment System, a funds-transfer system that serves more than 50 major banks around the world and that each day processes over 250,000 international and domestic payment orders involving a daily average volume of $1.25 trillion.

The free flow of funds in countless transactions requires stability and certainty in the worldwide banking and payments systems. Similarly, certainty of rules for the regulation and, if necessary, liquidation of the operations of banks is critical to the functioning of the banking and payments systems, both domestically and internationally. The Clearing House submits this brief because the Orders threaten to undermine that stability and certainty. Federal and state banking laws have established longstanding rules for the regulation of banking institutions in the United States, including foreign bank offices licensed to conduct banking business here. Those settled rules encompass a regulatory regime for the liquidation of such banks that is inseparable from other rules regulating the licensing and operation of those banks. The federal bankruptcy laws have for more than a century expressly deferred to such bank liquidation rules.

It would create unprecedented confusion if ancillary proceedings under § 304 of the Bankruptcy Code (the "Code") could now be invoked to

undermine the settled expectations of market participants about the controlling provisions of law applicable to the liquidation of licensed foreign banking operations in the United States. If the discretionary regime of ancillary proceedings can be used to displace specialized and settled federal and state liquidation rules for licensed foreign banks, participants in the financial markets will be unable to ascertain how their transactions and claims will be treated in the event of an insolvency of a foreign bank branch or agency office in the United States. Moreover, Bankruptcy Court judges will be given discretion to preempt state law in unpredictable ways without a clear statement from Congress specifically delegating such authority. There is no warrant in the history or language of the Code to support such a radical departure from the longstanding policy of the federal bankruptcy laws of deferring to federal and state bank liquidation rules for regulated banking institutions.

ARGUMENT

I. THE BANKRUPTCY CODE DOES NOT DISPLACE THE LONGSTANDING FEDERAL AND STATE REGULATORY REGIME FOR THE ORDERLY LIQUIDATION OF BANKS

A. An Integrated Regulatory Regime for the Creation, Supervision, and Liquidation of Banks Governs Domestic and Foreign Banking Operations in the United States

A pervasive federal and state regulatory system applies to both domestic banks and foreign banks engaged in the banking business in the United States. *See* Kenneth Spong, *Banking Regulation: Its Purposes, Implications, and Effects* 184-200 (5th ed. 2000). Regulators set forth the rules by which banks obtain the licenses necessary to operate in a particular jurisdiction and also to conduct the banking business once open. A foreign bank may operate in the United States through a separately incorporated bank subsidiary chartered under federal or state banking law. In addition, if not otherwise prohibited by state law, a foreign bank may operate in the United States through a branch office or agency office licensed under federal or state banking law. *See* John C. Dugan & James A. McLaughlin, *Forms of Entry, Operation, Expansion, and Supervision of Foreign Banks in the United States, in Regulation of Foreign Banks: United States and International* 1, 27-38 (Gruson and Reisner eds., 4th ed. 2003).

The licensing of branch offices and agency offices provides a foreign bank with the flexibility and advantages of operating through an office rather than through a separate banking subsidiary. At the same time, federal and state banking laws impose regulatory requirements on these offices that provide customers and other creditors with protections comparable to the protections they would have if the foreign bank had been required to conduct business through a separate banking subsidiary.[2]

Accordingly, the banking regulatory system permits regulators to ensure the soundness of foreign bank offices that operate under their supervision. Regulators have the power, for example, to order a foreign bank that is licensed to operate a branch or agency office here to keep additional assets on hand in order to offset risks to the bank's stability—as the Superintendent required the foreign bank offices in this case to do. *See* U.S. Dep't of Treasury & Board of Governors of the Fed. Reserve Sys.,

[2] In 1991, Congress required the Secretary of the Treasury and the Board of Governors of the Federal Reserve System to study whether foreign banks should be required to conduct their banking operations through separate subsidiaries rather than through branches. That study concluded that the protections of the subsidiary form could be achieved by regulatory means. *See* U.S. Dep't of Treasury & Board of Governors of the Fed. Reserve Sys., Subsidiary Requirement Study 3 (1992).

Subsidiary Requirement Study 3 (1992) ("For purposes of protecting safety and soundness, measures other than a subsidiary requirement also may be applied to branches of foreign banks experiencing financial difficulties. These include asset maintenance requirements and restrictions on transactions between a branch and the foreign bank's other offices . . . .").

Similarly, the banking regulatory system permits regulators to protect customers and other creditors in the event of a liquidation of a foreign bank that has obtained a license to operate a branch office or an agency office in the United States. *See, e.g.*, 12 U.S.C. § 3102(j); N.Y. Banking Law § 606(4) (McKinney 2001). Among the provisions of federal and state banking law applicable to foreign banks licensed to engage in the banking business in the United States are requirements governing the maintenance of assets and the pledge of assets or "capital equivalency" deposits to support the supervisory and regulatory regime. *See, e.g.*, 12 U.S.C. § 3102(g) (setting forth the asset maintenance and capital equivalency deposit requirements for a federally licensed branch or agency); N.Y. Banking Law § 202-b(1) and (2) (McKinney 2001) (setting forth the asset maintenance and pledge requirements for a New York state licensed branch or agency). These regulations generally require that designated assets of a licensed

foreign bank office be dedicated first to the customers and other creditors who transact business with that licensed office. These regulations are one of the primary means by which banking regulators protect the customers and other creditors who transact business with regulated foreign bank offices.

Unlike other general commercial businesses, therefore, regulated banking operations exist under a unitary scheme governing their regulation, supervision, and, if necessary, liquidation. The regulatory regime for the liquidation of licensed foreign bank offices is an integral part of the overall system of banking regulation and supervision.

The two foreign bank agencies in question here were licensed by the Superintendent to operate in New York, were supervised by the Superintendent in their operations, and were required by the Superintendent to comply with specified asset maintenance and pledge requirements as part of the comprehensive regulatory regime established by the New York Banking Law. The Superintendent also took possession of the assets of the two licensed entities in accordance with the provisions of the New York Banking Law that provide for the liquidation of such licensed entities. Each of these actions was part of the comprehensive regulatory regime designed

to protect the customers and other creditors who had transactions with these licensed entities.

B. The Bankruptcy Code Expressly Recognizes the Primacy of Bank Regulatory and Liquidation Rules

The federal bankruptcy laws have for over a century recognized the primacy of the bank regulation and liquidation rules with respect to domestic banking institutions. In adopting the Code, Congress expressly recognized the primacy of those rules with respect to licensed foreign banking operations as well. The Code provides that a "domestic . . . bank" may not be a debtor under the Code. 11 U.S.C. § 109(b)(2). Section 109(b)(3) similarly provides that a "foreign . . . bank . . . engaged in such business in the United States" may not be debtor under the Code. 11 U.S.C. § 109(b)(3). Federal and state banking laws require a license for any foreign bank engaged in the banking business in the United States. *See, e.g.*, N.Y. Banking Law § 200. Accordingly, the effect of the phrase "engaged in such business in the United States" as used in § 109(b)(3) is to exclude any licensed foreign bank branch or agency operation in the United States from commencing a case as a "debtor" under the Code.

The reason for the exclusion of licensed foreign banking operations from the Code is the same as the reason for the exclusion of domestic banks: the acknowledged primacy of specialized bank liquidation rules. The legislative history on this issue is explicit:

> Banking institutions and insurance companies are excluded from liquidation under the bankruptcy laws because they are bodies for which alternate provision is made for their liquidation under various [federal and state] regulatory laws.

See H.R. Rep. No. 95-595, at 318 (1977); *see also* S. Rep. No. 95-989, at 31 (1978).

Section 109 of the Code reflects a policy that has a long and unbroken history. For more than a century, the federal bankruptcy laws have expressly recognized and deferred to the federal and state banking laws and their regime for the liquidation of regulated banking operations. The Bankruptcy Act of 1898, for example, excluded "national banks or banks incorporated under State or Territorial laws." Bankruptcy Act of 1898, ch. 541, § 4(b), 30 Stat. 544 ("Bankruptcy Act"). The legislative history confirms the reason for the exclusion: special provisions in the banking law were designed to protect "all interests" connected with the banking law. *See* H.R. Rep. No. 55-65 (1897) (noting existing congressional legislation in

respect of national banks); *see also In the Matter of Israel-British Bank (London) Ltd.*, 401 F. Supp 1159, 1165 (S.D.N.Y. 1975) (noting that state regulated banks "can be better dealt with" under state law than federal bankruptcy law, quoting 31 Cong. Rec. 6426 (1898)).

When federal bankruptcy law was expanded in 1910 to make corporations eligible for voluntary as well as involuntary bankruptcy, the exclusion of banking operations remained. *See* Bankruptcy Act § 4(b) (codified as amended at 11 U.S.C. § 22 (1976)) (permitting any person "except a . . . banking corporation" to become a voluntary bankrupt). The language of the statutory exclusion was changed from "national banks or banks incorporated under State or Territorial laws" to "banking corporation," but the policy remained the same. This Court itself had occasion to reflect on that policy: "The purpose of Congress in the amendment of 1910 to section 4 [was] . . . to leave to local winding up statutes the liquidation of such companies; that, since the states commonly kept supervision over them during their lives, it was reasonable that they should take charge on their demise." *In re Union Guarantee & Mortgage Co.*, 75 F.2d 984, 984 (2d Cir. 1935) (citations omitted) (*per curiam* opinion by panel of L. Hand, Swan, and A. Hand, *JJ.*).

Amendments to the Bankruptcy Act in 1932 retained the bank exclusion. *See* H.R. Rep. No. 72-98 (1932) (explaining history of bank exclusion). Moreover, reflecting the policy of deference to regulatory regimes that operate independent from bankruptcy law, the list of regulated entities that were exempt was enlarged: Under the amendment, building and loan associations were excluded from the ambit of federal bankruptcy law. *See* 11 U.S.C. § 22(a) (1976).

Congress did not exclude banking operations from the coverage of the federal bankruptcy laws merely because of the nature of the banking business itself. Rather, the presence of *regulation* of such businesses, and the regulatory purposes associated with bank liquidation requirements, drove the exclusion. As this Court explained in a thorough survey of the history of the banking exclusion: "it was apparently not the circumstance of being in the banking business that controlled . . . . *It was rather the existence of federal or state regulation* of chartered banks." *Israel-British Bank v. FDIC*, 536 F.2d 509, 513-14 (2d Cir. 1976) ("*IBB*") (emphasis added). Congress understood that the interests generally served by the bankruptcy laws were better served, in the case of licensed and regulated banking operations, by the special liquidation provisions applicable to such banks. *See id*. at 514

("The distribution of federal-state power was not between a detailed liquidation statute and no statute at all. It was between control by the state . . . of the liquidation of certain quasi-public corporations, and the liquidation of all other corporations through the federal bankruptcy laws.").

In adopting the Code, Congress not only continued this longstanding policy but also expressly affirmed its application to regulated foreign banking operations in this country. The legislative history of the Code, building on 80 years of prior bankruptcy law practice, expounded the basis for this treatment:

> Banking institutions and insurance companies are excluded from liquidation under the bankruptcy laws because they are bodies for which alternate provision is made for their liquidation under various [federal and state] regulatory laws. Conversely, when a foreign bank or insurance company is not engaged in the banking or insurance business in the United States, then those regulatory laws do not apply and the bankruptcy laws are the only ones available for liquidation of any assets found in the United States.

H.R. Rep. No. 95-595, at 318 (1977); *see also* S. Rep. No. 95-989, at 31 (1978). The legislative history thus confirms Congress's judgment that federal and state banking laws would govern the liquidation of foreign bank operations that are regulated in the United States, and that the Bankruptcy

Code would apply only to foreign banks not under any such regulation in the United States.

II. THE ORDERS FAIL TO APPRECIATE THE DISTINCTION BETWEEN REGULATED AND UNREGULATED BANKS FOR THE APPLICATION OF § 304 OF THE CODE

The Orders rest on the premise that the general provisions of § 304 of the Code give a Bankruptcy Court judge the discretion to preempt and displace the comprehensive federal and state banking regulatory regime that applies to licensed foreign bank offices subject to banking regulation in the United States. However, it is inconceivable that, without a trace in the legislative history, Congress intended to displace indirectly through § 304 the bank liquidation rules that Congress directly affirmed in § 109(b)(3). *See D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 207-08 (1932) ("General language of a statutory provision [in the federal bankruptcy laws], although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling.").

This Court's prior decisions, the wording of the Code, and the legislative history all confirm that Congress intended to give effect to bank

regulatory requirements and that the provisions of the Code would apply only in cases where such regulation does not exist.

A. Second Circuit Case Law Establishes that the Federal Bankruptcy Laws Apply to Foreign Banks Only When They Are Not Already Controlled By a Federal or State Bank Regulatory Regime

As described above, § 109 of the Code (and the legislative history) reflect a clear distinction between regulated foreign banks (i.e., foreign banking operations that are licensed in the United States—and hence regulated in the United States) and unregulated foreign banking operations (i.e., foreign banks that are not licensed in the United States—and hence are not regulated in the United States). The same distinction underlies the Second Circuit's reasoning in two prominent pre-Code decisions that carefully considered the issues raised by foreign bank insolvencies and their relationship to federal bankruptcy laws. *See IBB*; *Banque de Financement, S.A. v. First Nat'l Bank of Boston*, 568 F.2d 911 (2d Cir. 1977) ("*Finabank*"). Central to this Court's analysis in these cases was whether the assets of the foreign bank were already subject to a regulatory regime in the United States.

IBB involved the case of a foreign bank that was not licensed to conduct a banking business in the United States, but that had assets in the United States in the form of deposits in American banks. The issue before the Court was whether an unregulated foreign bank could be the subject of a voluntary bankruptcy proceeding under the Bankruptcy Act. The Bankruptcy Act expressly excluded a "banking corporation" from eligibility for filing as a voluntary bankrupt. In deciding *IBB*, the Second Circuit wrote:

> We can find no convincing reason why a foreign banking corporation, *not licensed to do business in the United States*, conducting no semblance of a banking business here, *and not under the regulatory supervision of any state or federal agency*, should not qualify for the benefits of the Act as a voluntary bankrupt.

IBB, 536 F.2d at 513 (emphases added).

In reaching that conclusion, the Court rejected a simplistic "plain meaning" analysis of the bankruptcy laws, cautioning that "'one must . . . listen attentively to what it [the statute] does not say.'" *IBB*, 536 F.2d at 512 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 536 (1947)). The Second Circuit comprehensively reviewed the legislative history of and policy considerations for the

exclusion from the bankruptcy law of banking corporations, and noted that "[n]ational banks were *always* subject to separate federal supervision and regulation, *including their liquidation*. State banks, chartered by the states, were subject to similar state regulation." *Id*. at 513 (emphases added). Congressional policy behind the exclusion also relied upon the "public or quasi-public nature" of banking institutions that did not "warrant their estates being adjudicated through bankruptcy proceedings." *Id*. at 514 (quoting *Hearing on H.R. 18694 Before Subcommittee No. 1 of the House Committee on the Judiciary*, 60th Cong., 2d Sess. (1909)) (internal quotation marks omitted). The Court further noted that "considerations of federalism required that the states be allowed to liquidate as well as regulate their own creations." *Id*. at 514.

Applying these policy and considerations to the foreign bank at issue in *IBB*, the Second Circuit found that the bank "was never licensed to do business in New York and was never under the supervision of its Banking Department. There [was] no statute providing for its liquidation under the aegis of the Superintendent of Banks." *Id*. at 515. The Second Circuit held that the foreign bank could be subject to the general bankruptcy laws

precisely because it was not regulated by the federal or state banking authorities and was not subject to the accompanying bank liquidation rules.

Soon after *IBB*, the Second Circuit had occasion to consider a Chapter XI filing, under the Bankruptcy Act, by an unregulated foreign bank. As was the case in *IBB*, the foreign bank in question in *Finabank* neither did business nor maintained any office in the United States. It did, however, have assets in the United States in the form of deposits.

In its decision in *Finabank*, the Second Circuit anticipated the approach that Congress would subsequently take in enacting § 304. The Court noted that the foreign bank, in filing a reorganization petition, was not seeking to undertake a traditional reorganization, but rather "to obtain an administration of assets located in this country *ancillary* to an administration of assets located in its foreign domicile." 568 F.2d at 918 (emphasis added). Despite certain difficulties presented by the requirements of Chapter XI for a foreign debtor, the Court allowed the proceeding to go forward.

B. The Code Codifies the Second Circuit's View of Bankruptcy Policy That Unregulated Foreign Bank Assets Should Be Administrable Through the Code While Regulated Foreign Banks Should Be Administered Through the Special Banking Liquidation Rules

Congress had the problem of unregulated foreign banks in mind when enacting the Code. The cases of *IBB*, *Finabank*, and Herstatt—another unregulated foreign bank that had famously failed in 1974—featured prominently in the discussions leading up to the adoption of the Code. *See, e.g.*, Edward Samuels, *Unregulated Foreign Banks in Bankruptcy: Section 4 of the Bankruptcy Act*, 23 N.Y.L. Sch. L. Rev. 47 (1977); Roger Howard, *United States Bankruptcy Jurisdiction over Unregulated Foreign Banks*, 17 Harv. Int'l. L.J. 359 (1976); *see also Bankruptcy Act Revision: Hearing on H.R. 31 and H.R. 32 Before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary*, 94th Cong. 1444 (1976) (statement of Kurt H. Nadelmann, Harvard Law School); *Bankruptcy Reform Act: Hearing on S. 2266 and H.R. 8200 Before the Senate Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary*, 95th Cong. 1027 (1977) (statement of Kurt H. Nadelmann, Harvard Law School); Joseph D. Becker, *International Insolvency: The Case of Herstatt*, 62 A.B.A. J. 1290 (1976); Kurt H. Nadelmann,

Rehabilitating International Bankruptcy Law: Lessons Taught by Herstatt and Company, 52 N.Y.U. L. Rev. 1, 21 (1977).

Congress dealt with the problems presented by unregulated foreign banks in § 109(b)(3) and § 304. In § 109(b)(3), Congress confirmed the holding of *IBB* that an unregulated foreign bank (i.e., a foreign bank that was not "engaged in such business in the United States") was eligible for protection under the Code. 11 U.S.C. § 109(b)(3). As this Court stated in *In Re Maidman*, "The rule of [*IBB*] was followed by the [Bankruptcy] Code." 668 F.2d 682, 685 n.8 (2d Cir. 1982) (citing S. Rep. 95-989, at 31 (1978); 1978 U.S.C.C.A.N. 5787)). In § 109(b)(3), Congress also confirmed that a regulated foreign bank (i.e., a foreign bank engaged in the banking business in the United States) was not eligible for protection under the Code. Regulated foreign banks were instead to be dealt with exclusively under the alternative bank liquidation rules. *See* H.R. Rep. No. 95-595, at 318 (1977); S. Rep. No. 95-989, at 31 (1978). This was a continuation of the longstanding policy of excluding regulated banking institutions from the federal bankruptcy laws.

In enacting § 304 as part of the Code, Congress also provided a streamlined procedure for foreign debtors generally as an *alternative* to a full

bankruptcy case under Chapter 7 or Chapter 11.[3] Section 304 provides the Bankruptcy Courts with discretion to issue orders to assist foreign insolvency proceedings. There is not the slightest hint in the history of the Code, however, that a Bankruptcy Court's discretionary powers in an ancillary proceeding were intended to abrogate or undermine the statutorily recognized exclusion from the Code for banking institutions that are subject to a regulatory bank liquidation regime, or to give the Bankruptcy Courts the discretion to nullify such a regime.

As Justice Cardozo reasoned, a statute is "freighted with the meaning imparted to [it] by the mischief to be remedied." *Duparguet Huot & Moneuse Co. v. Evans*, 297 U.S. 216, 220-21 (1936). It is clear that the problem before Congress when it came to adopt §§ 109(b)(3) and 304 was unregulated foreign banks. In enacting § 304, Congress intended to provide the representatives of unregulated foreign banks with an alternative to a full

[3] See Richard A. Gitlin & Evan D. Flaschen, *The International Void in the Law of Multinational Bankruptcies*, 42 Bus. Law. 307, 316 (1987); Stacey A. Morales & Barbara A. Deutsch, *Bankruptcy Code Section 304 and U.S. Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 Bus. Law 1573, 1583 (1984); Brian J. Gallagher & John Hartje, *The Effectiveness of § 304 in Achieving Efficient and Economic Equity in Transnational Insolvency*, 1983 Norton Ann. Surv. Bankr. L. 1 (1983).

bankruptcy proceeding and thereby to resolve the problems posed for some foreign representatives in commencing a full bankruptcy case. However, Congress did not intend to supplant the very same banking regulatory regime that Congress itself affirmed when it enacted § 109(b).

III. CONGRESS DID NOT DELEGATE TO BANKRUPTCY COURT JUDGES THE DISCRETIONARY AUTHORITY TO PREEMPT STATE LAW

Preemption analysis begins with the assumption that Congress does not intend to displace state law. *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Congress may preempt a state law (i) expressly; (ii) by creating a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or by "touch[ing] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject;" or (iii) by enacting federal legislation that irreconcilably conflicts with state law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Here, there is no evidence that Congress intended to preempt state banking law. Congress neither expressly provided for such preemption nor occupied the entire field of insolvency law in the Code; indeed, § 109(b) is a

clear indication that Congress did not intend to occupy the entire field of insolvency law. *See* 11 U.S.C. § 109(b) (excluding from the definition of debtor "a railroad," "a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, . . . a foreign insurance company, bank, savings bank," and other entities).

When properly interpreted, §§ 109(b) and 304 provide a consistent and complementary approach to foreign banking operations in the United States based on the distinction between regulated foreign banks and unregulated foreign banks. A regulated foreign bank (i.e., a foreign bank that is licensed to engage in the banking business in the United States) is not subject to a proceeding under Chapter 7 or an ancillary case under § 304 as to its regulated operation. That operation is instead subject only to the applicable bank liquidation regime. By contrast, an unregulated foreign bank (i.e., a foreign bank that is not licensed to engage in the banking business in the United States) is subject to a proceeding under Chapter 7 or, alternatively, to an ancillary proceeding under § 304 if a foreign proceeding has been commenced. A foreign bank that conducts a licensed banking business in the United States and in addition has *other* assets in the United

States that are not subject to the bank regulatory and liquidation regime may be subject to an ancillary proceeding with respect to those *other* assets, while its regulated operation is subject only to the bank liquidation regime. *See, e.g.*, *United States v. BCCI Holdings (Luxembourg)*, 69 F. Supp. 2d 37, 41 n.7 (D.D.C. 1999) ("the assets in the state-law liquidations were fully carved out of the [§ 304] proceeding and left with the state-law liquidators exclusively").

Under the District Court's reading of the Code, however, § 304 would empower the Bankruptcy Court to displace state law on a purely discretionary basis in the very set of cases in which Congress recognized the primacy of state law. This defies common sense. It is also inconsistent with the wording of § 304. For example, in determining whether to grant relief a Bankruptcy Court judge is directed by the statute to consider whether the requested relief is consistent with "distribution of proceeds of such estate substantially in accordance *with the order prescribed by this title*." *See* 11 U.S.C. § 304(c)(4) (emphasis added). The broad reference to the provisions of "this title" entitles a Bankruptcy Court adjudicating a § 304 petition to incorporate § 109(b) considerations into its reasoning, as the Bankruptcy Court did in this case after a trial. Moreover, § 304 directs the Bankruptcy

Court to consider "comity" and the "protection of claim holders in the United States." *See* 11 U.S.C. § 304(c)(2) and (c)(5).

Deference to the New York bank liquidation law reflects "comity" to the regulatory interests of New York State and effectuates the regulatory policy of protecting customers and other creditors who deal with regulated offices of foreign banks. The Bankruptcy Court properly gave deference to the state regulatory policy and properly dismissed the § 304 petition. *See In re Treco*, 240 F.3d 148, 154 (2d Cir. 2001) (holding that § 304 embraces only "a modified form of universalism," reserving the protection of "the interests of local creditors"); *In re Taylor*, 176 B.R. 903, 908 n.13 (Bankr. C.D. Cal. 1995) (where relief under § 304(b) is to be denied, a court may refuse to grant the § 304(a) petition).

It would be perverse for a court to find that Congress deferred to federal and state bank regulatory rules through § 109(b) while at the same time giving Bankruptcy Court judges the discretion, in ancillary proceedings, to preempt and dispense with such regulation in wholly unpredictable ways. At the very least, such a scheme would require a clear statement specifically delegating such broad authority—one absent here.

CONCLUSION

The Orders err in not giving effect to the critical statutory distinction between regulated and unregulated foreign banks, a distinction appreciated by the Bankruptcy Court below, by Second Circuit case law, and by Congress itself in the legislative history to the Code. The distinction between regulated and unregulated foreign banks harmonizes §§ 109(b) and 304 as well as their underlying policies; both can and should be accommodated by reversing the Orders and upholding the reasoning of the Bankruptcy Court. The exclusion of banking institutions from the Code effectuates important public policy considerations and promotes an effective system of banking regulation. The Orders contravene the intention of Congress and the settled expectations of financial market participants necessary to the stable operation of the banking system.

For all of the foregoing reasons, the Clearing House supports reversal of the Orders.

Dated: New York, New York
December 16, 2004

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RULE 32(a)(7) CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,074 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

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I certify that the foregoing is true and correct.

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