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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER FOR MANNING SAVINGS AND LOAN
ASSOCIATION, Petitioner V. HAROLD J. TICKTIN,
ET AL.
CASE NO: 87-1865
PLACE: WASHINGTON, D.C.
DATE: February 27, 1939
PAGES: 1 - 34

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 FEDERAL SAVINGS AND LOAN INSURANCE :
4 CORPORATION, AS RECEIVER FOR :
5 MANNING SAVINGS AND LOAN :
6 ASSOCIATION, :

7 Petitioner :

8 v. : No. 87-1865

9 HAROLD J. TICKTIN, et al. :
10 -----x

11 Washington, D.C.

12 Monday, February 27, 1989

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:01 o'clock a.m.

16 APPEARANCES:

17 RICHARD G. TARANTO, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; on
19 behalf of the Petitioner.

20 JAMES B. KOCH, ESQ., Chicago, Illinois; on behalf of the
21 Respondents.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

RICHARD G. TARANTO, ESQ.

On behalf of the Petitioner

3

JAMES B. KOCH, ESQ.

On behalf of the Respondents

23

1 P R O C E E D I N G S

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in No. 87-1865, Federal Savings and
5 Loan Insurance Corporation v. Ticktin.

6 Mr. Taranto?

7 CRAL ARGUMENT OF RICHARD G. TARANTO

8 ON BEHALF OF PETITIONER

9 MR. TARANTO: Mr. Chief Justice, and may it
10 please the Court.

11 This case presents the question whether the
12 FSLIC, or FSLIC, as the receiver of an insolvent
13 state-chartered savings and loan has access to Federal
14 court to bring a damages action against directors and
15 officers of the institution for their violations of
16 duties imposed by Federal as well as state law.

17 Two Jurisdictional statutes are involved:
18 Section 1345 of Title 28 which provides generally for
19 Federal agency jurisdiction in Federal court, and
20 Section 1730(k)(1) of Title 22 -- of Title 12 which more
21 specifically addresses jurisdiction in cases involving
22 FSLIC.

23 The court of appeals held that there was no
24 Federal jurisdiction over this case under either of
25 those statutes.

1 QUESTION: Mr. Taranto, do I understand that a
2 new statute has been introduced that would abolish FSLIC?

3 MR. TARANTO: Yes, a new bill has been
4 introduced. It was introduced last Wednesday, the
5 administration's comprehensive FSLIC bail-out bill. We
6 sent a letter up to the Court on Friday that attempted
7 to outline some of the provisions that would be -- would
8 be relevant. As of now, of course, the bill is merely
9 proposed and --

10 QUESTION: Were it to be enacted, though, that
11 would end this case, would it not?

12 MR. TARANTO: It -- It may well end this case.
13 The -- the new bill would create a new transition entity
14 that would take the place of FSLIC for all current
15 receiverships and receiverships for the next three
16 years. That new entity has a special jurisdictional
17 provision which contains no exception to Federal
18 jurisdiction. We would believe that that would, in
19 fact, solve the jurisdictional problem here, although
20 there may be some argument about that.

21 This case arose as a result of two dividends
22 declared by Respondents as directors of the Manning
23 Savings and Loan Association, a state-chartered thrift
24 that was insured by FSLIC. In 1980 Manning's directors
25 declared a dividend of more than \$400,000. The dividend

1 was doubly illegal and it was excessive by more than
2 \$300,000 because Manning had insufficient net worth and
3 reserves under the FSLIC's regulations and, therefore,
4 also under state law.

5 In late 1981 after FSLIC charged Manning
6 --Manning's directors with having violated the Federal
7 requirements, a cease and desist order was entered by a
8 Federal court prohibiting Manning's directors from
9 paying any dividends except in accordance with state law.

10 In April 1982, FSLIC issued new charges
11 advising Manning's directors that Manning now had
12 operating losses of roughly \$300,000 per month and had a
13 negative net worth of more than 2 million -- of more
14 than \$500,000 which was more than \$2 million short of
15 the amount required to maintain its FSLIC insurance.

16 Despite those charges, Respondents as
17 directors of Manning declared a dividend worth more than
18 \$300,000 the following month. That dividend, like the
19 1980 dividend, was illegal under both Federal and state
20 law and was, therefore, also a violation of the Federal
21 cease and desist order.

22 In February 1983, the Federal Home Loan Bank
23 Board found that Manning was insolvent and had incurred
24 substantial dissipation of assets as a result of illegal
25 and unsafe practices. The Board therefore placed

1 Manning in receivership and appointed FSLIC to be the
2 receiver. In that capacity, FSLIC brought this suit
3 against Respondents in May 1983.

4 The complaint, among other things, sought
5 damages under state law for Respondents' breach of their
6 state law fiduciary duties. In support of the claim,
7 FSLIC alleged that Respondents violated Federal
8 obligations in several ways: by declaring dividends
9 that were illegal under the Federal net worth and
10 reserve requirements, by causing Manning to violate the
11 Federal conflict of interest regulations, and by causing
12 Manning to violate the cease and desist order.

13 Respondents moved to dismiss for lack of
14 Federal jurisdiction. The district court found that
15 there was jurisdiction, but certified an interlocutory
16 appeal on the question. The court of appeals reversed
17 concluding that under Section 1730(k)(1) there was no
18 Federal jurisdiction in this case.

19 Section 1730(k)(1) has four parts. The first,
20 Clause (A), declares that FSLIC is an agency within the
21 meaning of the definitional section of Title 28.

22 The second part, Clause (B), sweepingly
23 declares that all civil suits to which FSLIC is a party
24 are deemed to arise under the laws of the United States
25 and are within the district court's jurisdiction.

1 Clause (C) grants broad removal authority, but
2 is not specifically at issue in this case.

3 Finally, there is the proviso which declares
4 that any suit to which FSLIC is a party in its capacity
5 as receiver of a FSLIC-insured state-chartered
6 institution and "which involves only the rights or
7 obligations of investors, creditors, stockholders and
8 such institution under state law shall not be deemed to
9 arise under the laws of the United States."

10 The court of appeals concluded that the
11 proviso applied to this case and precluded Federal
12 jurisdiction.

13 First the court ruled that the proviso's
14 requirement that the case involve "only the rights or
15 obligations of investors, creditors, stockholders and
16 the institution" is satisfied whenever, as in this case,
17 the only rights in the case are those of the failed
18 thrift.

19 Second, the court ruled that a case involves
20 "only rights or obligations under state law" whenever,
21 as is true here, the cause of action arises only under
22 state law, even if Federal law questions are involved in
23 determining if state law was violated. Since Manning
24 was a state-chartered thrift and the claims at issue
25 were brought by FSLIC in its capacity as receiver of

1 Manning, the court of appeals held that the proviso
2 applied and precluded the broad Federal question
3 jurisdiction granted by Clause (B) of Section 1730(k)(1).

4 The court further concluded that despite the
5 declaration in Clause (A), that FSLIC is an agency for
6 Title 28 purposes, the proviso must also preclude the
7 Federal agency jurisdiction that would otherwise be
8 available under 28 U.S.C. 1345.

9 In the court's view, the Section 1730(k)(1)
10 proviso was designed to state an absolute limit on
11 Federal jurisdiction under any jurisdiction granting
12 statute.

13 My argument today is that the court of appeals
14 was incorrect in all three of its conclusions and that
15 both Section 1730(k)(1)'s Clause (B) and Section 1345
16 furnish jurisdiction over this case.

17 QUESTION: (Inaudible).

18 MR. TARANTO: Yes, that's correct. We have to
19 win on -- on only -- only one of the arguments. The
20 --there is something of a difference in the relative
21 importance for other cases of the -- the various
22 positions. The -- the -- our first point about the
23 limitation of the proviso to disputes among proviso
24 parties is the one that has divided the courts of
25 appeals, but the other issues are also important in

1 other cases.

2 QUESTION: And your reliance on 1345 goes back
3 through Subsection A of (k)(1).

4 MR. TARANTO: Yes. We -- we think that 1345
5 would apply even without Clause (A) of -- of Section
6 1730(k)(1) because Clause (A) merely confirms what would
7 be evident in any case; namely, that FSLIC, when acting
8 as a receiver, is a Federal agency carrying out Federal
9 programs. And hence, for example, the very similar
10 jurisdictional statute that applies to the FDIC, which
11 contains no analogue to Clause (A), would reach -- we
12 would reach the same result. There would also be
13 Section 1345 jurisdiction for the FDIC.

14 QUESTION: Does Section 1345 jurisdiction
15 vindicate the government's position here more
16 extensively than your reliance on part B of the statute?

17 MR. TARANTO: I can't tell you which covers a
18 larger number of cases. There is a very substantial
19 overlap because most of the cases that involve
20 non-proviso parties, directors, officers, debtors, are
21 also cases that are brought by FSLIC and, hence, there
22 would be jurisdiction under -- under both of them. I'm
23 not sure whether one of the classes of cases is -- is
24 actually larger than the other.

25 It is a rare thing for FSLIC to sue one of the

1 proviso parties, and that -- that suggests that maybe
2 the -- our first argument about the limitation of the
3 proviso to the named parties is -- is a somewhat broader
4 argument.

5 QUESTION: Mr. Taranto, which is the wrongest
6 of the three?

7 (Laughter.)

8 MR. TARANTO: Well, I -- I hesitate to -- to
9 say which -- which error is of greater magnitude. The
10 --the one that probably jumps more plainly off the face
11 of the statute is the -- is the Section 1345 argument
12 because that argument is one that -- that we think is
13 --is just flatly inconsistent with the language of the
14 proviso. Our other two arguments are arguments for the
15 better interpretation of the --

16 QUESTION: But -- but if that is correct, why
17 is not the proviso totally redundant?

18 MR. TARANTO: Well, the proviso would still
19 cover ordinary cases involving claims by -- by
20 creditors, shareholders, investors seeking to, in
21 effect, get a piece of the pie to divide up the
22 receivership estate. Ordinarily those would be claims
23 brought simply to enforce the state law rights of --

24 QUESTION: But -- but there would be no
25 Federal Jurisdiction in those claims anyway, would there?

1 MR. TARANTO: Well, absent the proviso, there
2 would under Clause (B) because Clause (B) says there is
3 always Federal jurisdiction whenever FSLIC is a party.

4 QUESTION: There's always a Federal question.

5 MR. TARANTO: Yes, and hence, there would be
6 -- there would be Federal jurisdiction. Clause (B)
7 eliminates the usual --

8 QUESTION: Whereas the agency rationale only
9 applies when FSLIC brings the case. Is that the
10 difference?

11 MR. TARANTO: Yes, that's right.

12 QUESTION: Yes.

13 MR. TARANTO: That's right.

14 QUESTION: Okay.

15 MR. TARANTO: And the court of -- under the
16 court of appeals' view, Clause (A) would -- would
17 effectively be read out of the statute because if the
18 proviso eliminates jurisdiction under 1345, as well as
19 under Clause (B), then Clause (A) adds nothing whatever
20 to the -- to the statute.

21 The jurisdictional provisions at issue here
22 reflect the important Federal programmatic interests
23 that are at stake when FSLIC as receiver tries to
24 recover from directors and officers whose violations of
25 their legal obligations have led to the failure of

1 thrifts all across the nation. Congress provided for
2 FSLIC to act as receiver of state thrifts precisely
3 because of the important Federal interest at stake, and
4 the present crisis in the FSLIC-insured thrift system
5 starkly confirms Congress' judgment.

6 The ability to collect from directors and
7 officers of failed thrifts, among others, directly
8 affects the amount of money that the FSLIC fund can
9 recover for its payouts in a particular receivership.
10 It also may affect the health of the FSLIC insurance
11 fund as a whole and, hence, the ability of FSLIC to
12 handle other thrift failures and ultimately the U.S.
13 Treasury if, as has happened, the fund proves
14 inadequate.

15 In addition to the financial effect,
16 recovering from directors and officers in particular
17 serves the broader Federal interest in deterring future
18 misconduct and future thrift failures.

19 In all of those ways, there is a strong
20 Federal interest in -- in FSLIC's ability to pursue
21 claims in each receivership, and that is why Section
22 1730(k)(1) Clause (B) broadly declares that there is
23 Federal jurisdiction whenever FSLIC is a party, and that
24 is why Clause (A) confirms that FSLIC, like any other
25 agency that is specifically authorized to sue, may bring

1 its suits in Federal court.

2 The proviso as an exception to those grants of
3 jurisdiction should be read against this background.
4 And all three grounds for reversing the court of appeals
5 reflect the important Federal interests at stake in
6 suits like the present one.

7 QUESTION: Well, does the proviso apply only
8 to Subsection B or does it apply to Subsection A too?

9 MR. TARANTO: Well, we think that -- that it
10 -- it does not apply to Clause (A) because Clause (A) in
11 confirming that FSLIC is an agency, confirms that
12 Section 1345 of Title 28 grants jurisdiction. That's a
13 jurisdiction that does not depend at all on whether
14 there's a Federal question.

15 And the proviso merely says in cases in which
16 it applies, those cases shall not be deemed to arise
17 under laws of the United States. So, the proviso
18 eliminates Federal question jurisdiction, but leaves any
19 other basis of jurisdiction that would otherwise be
20 available unimpaired. Section 1345 is just such a basis
21 of jurisdiction.

22 Our first argument concerning the non-proviso
23 parties was that the court of appeals erred in
24 concluding that this case, to quote the proviso,
25 "involves only the rights or obligations of investors,

1 creditors, stockholders and the failed thrift." That is
2 not so in this case. This case involves, in addition to
3 the rights of Manning, the failed thrift, also the
4 obligations of directors and officers, and -- and
5 directors and officers are not among those listed in the
6 proviso. The proviso we think by its terms is properly
7 construed not to apply unless the dispute is solely
8 among parties listed in the proviso with FSLIC
9 representing the failed thrift.

10 This construction is the only one that
11 accounts for the decision by Congress to list particular
12 parties as it did, listing those with claims against the
13 receivership, as well as the -- the failed thrift and
14 omitting such persons as directors, officers and debtors
15 who are commonly sued by a receiver. If the court of
16 appeals were correct that the proviso applies whenever
17 the only rights involved are those of the failed thrift,
18 then the listing of investors, creditors and
19 stockholders would be read out of the statute.

20 The listing also undermines Respondents' view
21 that the provision contemplates FSLIC's representing the
22 interests of the named parties, for FSLIC as a receiver
23 of a failed thrift always must represent the failed
24 thrift and the collective interests of its investors,
25 creditors and stockholders. The listing is simply given

1 no effect in Respondents' view.

2 In addition, Respondents' suggestion invokes a
3 wholly unrealistic picture of a unity of interests among
4 the listed parties. In fact, a very substantial number
5 of suits involving FSLIC as receiver pilt the obligations
6 of the failed thrift against those of investors or
7 creditors or stockholders.

8 And as we explained in our brief, it is
9 entirely plausible that among all the persons who might
10 be parties to a suit involving FSLIC as a receiver,
11 Congress omitted the likely defendants in suits brought
12 by the receiver and instead listed only those who have
13 claims against the receivership estate, insiders who are
14 more likely to initiate suit to recover from the estate
15 than to be sued.

16 The process of dividing up the estate among
17 claimants is traditionally centralized in the single
18 forum having jurisdiction over the estate property, and
19 where that forum was a state authority for state
20 thrifts, the proviso was needed to make possible the
21 continued centralizing of claims by insiders in that
22 forum.

23 By contrast, the process by which a receiver
24 brings suit against outsiders to collect debts to the
25 receivership estate is not traditionally centralized,

1 and there was, therefore, no corresponding need to carve
2 out an exception to the broad grant of Federal
3 jurisdiction.

4 The second way we believe that the court of
5 appeals erred was in concluding that this case "involves
6 only rights or obligations under state law." That is
7 not so in this case. This case also involves the
8 obligations of Respondents under Federal law.

9 In particular, the complaint alleges a central
10 support for the claimed breach of duty that Respondents
11 violated their obligations under the Federal regulation
12 requiring the maintenance of specified reserves and net
13 worth under a Federal conflict of interest regulation
14 and under the Federal cease and desist order.

15 The court of appeals was wrong because it read
16 the proviso to apply whenever the cause of action arises
17 under state law, as the right to damages does in this
18 case. But the proviso does not use that familiar term
19 in referring to the rights or obligations that are
20 involved in covered cases. By contrast, Section
21 1730(k)(1) elsewhere twice uses the "arises under"
22 language, once in the proviso itself. The proviso does
23 not apply where the case involves obligations under
24 Federal law, as this one does.

25 That Congress granted Federal jurisdiction

1 whenever questions under Federal law are involved in a
2 case is fully in keeping with the policy reflected in
3 the sweeping declaration of Clause (B), that all cases
4 involving FSLIC are deemed to arise under Federal law.
5 And it also is consistent with our first point, that the
6 proviso was designed in claims against the receivership
7 assets in mind. Such suits, unlike suits brought by
8 FSLIC as receiver, often involve only state law
9 questions. Suits against directors and officers, by
10 contrast, often involve Federal duties that are imposed
11 in order to maintain a sound thrift system.

12 The third way we believe the court of appeals
13 erred was in ruling that the proviso ousts Federal
14 courts of jurisdiction under Section 1345. The language
15 of the proviso will not support such a ruling. The
16 proviso simply declares that cases within its coverage
17 "shall not be deemed to arise under the laws of the
18 United States." That language eliminates only arising
19 under Federal question jurisdiction. It leaves
20 jurisdictional bases for no Federal question is
21 necessary wholly unaffected.

22 Section 1345 establishes one such basis. A
23 Federal agency may bring suit in Federal court
24 regardless of whether its claim arises under Federal or
25 state law. The proviso, therefore, leaves Section 1345

1 Jurisdiction unimpaired.

2 There is no reason to depart from this plain
3 reading of the proviso. To the contrary, as I have
4 explained, reading the proviso to eliminate Federal
5 agency jurisdiction, as well as Section 1730(k)(1)'s
6 Clause (B) Federal question jurisdiction, would render
7 Clause (A) redundant because Clause (A) and the Section
8 1345 jurisdiction -- it confirms would then be -- never
9 be available unless Clause (B) jurisdiction were not
10 also --

11 QUESTION: So, your argument -- your argument
12 is that even though a case might be literally within the
13 meaning of the proviso, 1345 saves it.

14 MR. TARANTO: A case that comes literally
15 within the meaning of -- within the coverage of the
16 proviso would still come within 1345 jurisdiction
17 because the proviso merely says there's no Federal
18 question jurisdiction. It doesn't say there's no
19 Federal agency jurisdiction, there's no diversity
20 jurisdiction, there's no other jurisdiction that might
21 otherwise be available without regard to whether the
22 case arises --

23 QUESTION: So, you don't think the proviso
24 should even be -- even -- it wasn't a general intent to
25 keep this kind of litigation out of Federal court.

1 MR. TARANTO: Well, I think that's right. The
2 history of the proviso accounts for what may well have
3 been some inadvertence to the full range of -- of
4 implications. This proviso for FSLIC was enacted in
5 1966. It was essentially copied from the FDIC's
6 proviso, its jurisdictional statute, which had been
7 enacted back in 1935.

8 QUESTION: Well, if Congress wanted to keep
9 --keep state law cases out of Federal courts, it's a
10 little odd to say that they nevertheless would let them
11 in under 1345.

12 MR. TARANTO: Well, we don't think that there
13 is any evidence that Congress broadly wanted to keep all
14 state law cases out of Federal court. In fact, Clause
15 (B) suggests exactly the opposite. It says that in
16 general all you need is for FSLIC to be a party, and we
17 deem it to arise under Federal law, and the case will be
18 in Federal court even if absent FSLIC's party status,
19 the case would be entirely one under state law. We
20 think that the better interpretation here is that the
21 proviso was aimed only at this process of dividing up
22 the estate --

23 QUESTION: Well, what about the -- what about
24 the Federal law claims that -- that are stated here?

25 MR. TARANTO: Well, those -- those claims have

1 been dismissed and -- and we have not appealed from the
2 ruling that the particular Federal --

3 QUESTION: So, you would say that the -- the
4 Federal law claims that were stated in this complaint
5 would -- if they're covered by the proviso, they also
6 cannot be litigated under 1345.

7 MR. TARANTO: Well, the Federal -- I'm -- I'm
8 not quite sure I understand. Federal law claims --

9 QUESTION: Well, you say there were Federal
10 law claims stated in the complaint.

11 MR. TARANTO: Yes. And the district court
12 ruled that there was no private right of action or no
13 right of action to -- to sue under this.

14 QUESTION: I know, but my question is suppose
15 that those Federal law claims are covered by the proviso.

16 MR. TARANTO: Well, they -- they wouldn't be
17 because the proviso specifically covers only cases
18 involving rights or obligations under state law.

19 QUESTION: I see.

20 MR. TARANTO: So, they would -- they would be
21 outside the proviso in any --

22 QUESTION: But -- but so you could litigate
23 the -- the Federal law claims under 1345 also.

24 MR. TARANTO: Yes, or under 1331 --

25 QUESTION: Yes.

1 MR. TARANTO: -- or under Clause (B).

2 QUESTION: Okay.

3 MR. TARANTO: With -- If there were actual
4 Federal questions involved, there would be numerous
5 bases of jurisdiction.

6 QUESTION: Mr. Taranto, may I -- maybe this is
7 a stupid question, but what is the constitutional basis
8 for agency jurisdiction?

9 MR. TARANTO: Well, it is at least the
10 provision of Article III that gives the Federal courts
11 jurisdiction over all controversies involving -- to
12 which the United States is a party, which is a separate
13 jurisdictional basis from arising under jurisdiction.

14 In fact, I think there is a very substantial
15 argument that any of -- any case involving the rights or
16 obligations of a Federal agency can be made by Congress
17 into a case arising under Federal law. That would be
18 consistent with the traditional approach that this Court
19 has taken in Federal common law cases.

20 QUESTION: Well, if you treat it as a case
21 arising under Federal law, you would run into the
22 language of the proviso I suppose.

23 MR. TARANTO: Well, except -- except that the
24 -- the arising under heading of Article III I think has
25 always been broader than the arising under jurisdiction

1 of 1331, there being no well-pleaded complaint rule and
2 such. Congress --

3 QUESTION: I see what you're saying.

4 MR. TARANTO: Congress here says that whenever
5 the -- whenever FSLIC is a party to a case, we deem all
6 of those cases to arise under Federal law. We think
7 that's -- that would be -- even absent the -- the
8 Article III heading of controversies involving the
9 United States, which is in any event the primary basis
10 -- even absent that, that would be consistent with this
11 Court's cases in Kimball Foods and other -- and other
12 cases --

13 QUESTION: In the proviso language it says
14 shall not be deemed to arise under the laws of the
15 United States would mean not under the laws of the
16 United States within the meaning of Article III, but
17 rather within the meaning of the statute granting
18 Federal question jurisdiction. The proviso only -- only
19 -- only cuts back on statutory Federal question
20 jurisdiction in other words.

21 MR. TARANTO: I think that -- I think that's
22 right.

23 QUESTION: One could read it the other way. I

24 --

25 MR. TARANTO: Right. In -- In any event, it

1 wouldn't -- It wouldn't extend into those Jurisdictional
2 bases that don't depend on Federal question jurisdiction
3 either --

4 QUESTION: But then -- then one has to assume
5 that at Federal agency is "The United States" within the
6 meaning of Article III.

7 MR. TARANTO: Yes, that's right.

8 QUESTION: Has that -- have we had any cases
9 deciding what the constitutional foundation of Federal
10 agency jurisdiction is? I'm not -- I'm not aware of
11 any, but I just --

12 MR. TARANTO: I'm -- I'm not aware of any off
13 the top of my head either.

14 QUESTION: Thank you.

15 MR. TARANTO: If the Court has no further
16 questions, I would like to save the balance of my time.

17 QUESTION: Very well, Mr. Taranto.

18 Mr. Koch, we will hear from you now.

19 ORAL ARGUMENT OF JAMES B. KOCH

20 ON BEHALF OF THE RESPONDENTS

21 MR. KOCH: Mr. Chief Justice, and may I
22 please the Court.

23 It is a matter of congressional intent that
24 state courts in the first instance should decide an
25 issue of state law and Federal courts in the first

1 Instance should decide an issue of Federal law.

2 However, it's Petitioner's position in this case that
3 due to the significance of their role as a Federal
4 regulator, the volume of litigation and the spate of
5 failures, for their own convenience, they seek a
6 uniformity of decisions through the Federal courts.

7 The problem with following that policy lies in
8 the fact that in this specific instance and in numerous
9 others, the Federal court is bound by the state's
10 highest court when it has considered that same issue.
11 And in a case such as this where the state court has not
12 ruled, the Federal court could rule. That could be
13 appealed to the Federal appellate court on up to this
14 Court and then at that or any other time, the state
15 court could rule contrary to the decision of the Federal
16 courts. And you would, in fact, develop a dual body of
17 law.

18 I believe that this case and the construction
19 of 1730(k)(1) can't properly be decided without some
20 notion of the specifics involved and the general policy
21 as determined by the Senate report on the Financial
22 Institution Supervisory Act which states -- and I quote
23 -- that "the general policy for the supervision and
24 regulation of state savings and loans are primarily the
25 states' affairs."

1 The specific cases we are talking about here
2 are collection cases. When the FSLIC comes into state
3 court as a receiver for a state savings and loan, the
4 type of cases that flood the state courts are student
5 loan defaults, car defaults, eviction notices, letters
6 of credit. It's that huge volume of cases that the
7 Congress I believe determined to keep out of Federal
8 courts. And that's why they set up for the FDIC and the
9 FSLIC a unified integrated scheme of jurisdiction. In
10 that scheme the FDIC or the FSLIC, under either 12
11 U.S.C. 1819 Fourth or 12 U.S.C. 1730(k)(1), in its
12 corporate capacity as the Federal Insurer would go into
13 Federal court, but as the receiver would take those
14 cases which properly belong in state court to state
15 courts.

16 And quoting from the courts that have
17 previously determined this, for example, FDIC v.
18 Elefant, in referring to the legislative history, the
19 courts noted that it was designed to prevent the fact of
20 receivership from transferring wholesale to Federal
21 court the money collection suits and related litigation
22 in which a failed thrift will become embroiled.

23 QUESTION: Well, Mr. Koch, how do you explain
24 the existence of Subsection A then where they say FSLIC
25 shall be deemed to be an agency of the United States?

1 And then 1345 says when the United States is plaintiff,
2 the court has jurisdiction.

3 MR. KOCH: That -- I would explain it as
4 follows. In 1966 there was pending in the Ninth Circuit
5 the case of Acron v. FSLIC. Prior to 1966, the only way
6 FSLIC could come into Federal court was if it was a
7 Federal agency, and 13 -- and the district court in that
8 case determined that FSLIC was a Federal agency, deemed
9 it -- there was a dispute as to the question of law
10 --certified it to the Ninth Circuit.

11 And contrary to Petitioner's brief -- and I
12 believe I have it in the footnote at my last page of my
13 brief -- the fact is in -- in March the Congress added
14 to clarify that it, in fact, was a Federal agency. I
15 believe that's the reason for it, and I don't believe
16 the reason was to wipe out or read out of existence the
17 proviso, merely to clarify that the FSLIC was an agency.

18 QUESTION: Section A was added after the rest
19 of 1730(k)(1) was in place?

20 MR. KOCH: Section A was added in 1966 to
21 clarify that -- that FSLIC was an agency, and that was
22 the -- under the Financial Institution Supervisory Act
23 which amended both 1819 and drafted 1730(k)(1).

24 QUESTION: Well, but once you provide that the
25 FSLIC is an agency, why doesn't 1345 kick in?

1 MR. KOCH: Thirteen forty-five begins with the
2 phrase "except as otherwise provided." And I believe
3 that the proviso in this case is just that. To read
4 1345 as precluding all cases which would come under the
5 proviso would send into Federal court this floodgate of
6 litigation that I've just described and, in effect, read
7 out of the proviso. The proviso would have no effect
8 whatsoever.

9 QUESTION: Well, that's not so. It -- it
10 would have an effect in suits against FSLIC where FSLIC
11 -- I mean, 1345 only -- only applies where FSLIC is the
12 -- is the plaintiff.

13 MR. KOCH: That's correct.

14 QUESTION: So, why do you say it would have no
15 effect whatsoever?

16 MR. KOCH: Well, on those suits brought
17 against -- where the FSLIC came in as a receiver and
18 went after debtors, presumably if -- if 1345
19 jurisdiction overrode that proviso --

20 QUESTION: It wouldn't have effect in those
21 suits, but it would have effect in other suits, wouldn't
22 it?

23 MR. KOCH: Yes, that's -- I agree.

24 QUESTION: It would also -- it wouldn't
25 require the receiver to go into Federal court. He would

1 just have a choice.

2 MR. KOCH: That's true. He would have the
3 choice. But if they're seeking a uniformity of law in
4 Federal courts and if that's the policy reason -- I
5 think the difference I have with the Petitioner is that
6 they see that statute as being to determine the rights
7 of the claimants against the assets of the receivership,
8 whereas both the Senate report and policy would indicate
9 that the FSLIC is there on its own behalf on the rights
10 of the institution, the parties named. The investors,
11 the creditors and the stockholders are generally those
12 parties who would have an interest in common with the
13 FSLIC in its pursuit of suits going after debtors in the
14 type of cases I've referred to.

15 QUESTION: Mr. Koch, you said the purpose of
16 adding A was to clarify that FSLIC was a Federal agency.
17 I mean, that's -- that's very nice, but what was the
18 purpose of clarifying it? Wasn't the -- the main
19 consequence of being a Federal agency is coming under
20 1345 and I assume the removal statute as well. It
21 doesn't make any sense to me or it is no explanation to
22 me anyway to simply say, well, the only purpose of A was
23 to clarify that it was a Federal agency.

24 MR. KOCH: But it --

25 QUESTION: Why was it clarified? It was

1 clarified principally because of 1345 I would think.

2 MR. KOCH: I believe it was clarified -- and
3 the Congressional Code bears this out -- that -- to make
4 clear that the corporation is an agency of the United
5 States because at that time in the Acron case there was
6 a dispute in the Ninth Circuit whether or not it was an
7 agency so they could have access to the Federal courts.

8 QUESTION: Well, yes, but I mean disputes
9 don't arise in the abstract, two people saying I am
10 agency. No, you're not. I am. You're not. I mean, who
11 cares? MR. KOCH: Well --

12 QUESTION: Unless something hinges upon it.
13 And the main thing that hinges upon it is 1345, isn't it?

14 MR. KOCH: I agree.

15 QUESTION: And that's what hinged on it in the
16 Ninth Circuit case, isn't it? Wasn't that a
17 jurisdictional dispute?

18 MR. KOCH: It was.

19 QUESTION: And so, Congress resolved that by
20 saying there shall be jurisdiction in such a case.

21 MR. KOCH: It did. And -- and I would still
22 submit that the "except as otherwise provided" language
23 -- when you -- again, when you take a step back and look
24 at the Federal policy of keeping all the volume of
25 receiver and collection cases out of Federal court, that

1 to read 1345 as saying that all those cases when FSLIC
2 comes in on behalf of a failed thrift, a savings and
3 loan, would in effect read out -- read the proviso out
4 of existence.

5 The original proviso in this case, 12 U.S.C.
6 1819, upon 1730(k)(1) is based contained only the grant
7 of original jurisdiction and the limiting proviso. And
8 substantially similar language in 1730(k)(1) I would
9 submit is also a grant of original jurisdiction and the
10 limiting proviso.

11 QUESTION: Well, you wouldn't -- you don't
12 --you don't say that the proviso keeps out of Federal
13 court suits by -- by the agency asserting a Federal law
14 claim.

15 MR. KOCH: If there was a -- a Federal law
16 claim that predominated or was the cause of action in
17 the suit, no, I would submit that that would be exactly
18 what the proviso and this statute had in mind. In this
19 case it's whether there is a breach of fiduciary duty
20 under state law.

21 QUESTION: You -- you say -- there is just no
22 bona fide Federal claim in this case you say?

23 MR. KOCH: I think that anytime that FSLIC
24 comes --

25 QUESTION: But that isn't the way I understood

1 the United States.

2 MR. KOCH: Well, I would -- I would disagree.
3 I think the Seventh Circuit was correct in pointing out
4 that anytime FSLIC or FDIC or a Federal agency is
5 involved in the regulation of a state savings and loans
6 or a thrift, there is always going to be a Federal
7 issue. For example, he cites in his brief the -- the
8 criminal allegations. In fact, those were separated
9 from this case. One of the Respondents in this case,
10 Harold Ticktin, was in fact prosecuted in Federal
11 court. That would have no place in the state.

12 QUESTION: Assuming that there's a bona fide
13 Federal issue stated in a -- in a suit like this and a
14 bona fide state law claim made, you would say you would
15 have to go to different courts.

16 MR. KOCH: No, I would -- I would -- what is
17 the cause of action in this suit? If, in fact, that
18 there were both, I would say that they would have the
19 right to go into Federal court. But in this specific --

20 QUESTION: And take the state cause of action
21 there too?

22 MR. KOCH: No, I think not.

23 QUESTION: So, you would think -- have to
24 pursue the claims in separate courts.

25 MR. KOCH: Well, I think that specifically in

1 this case the cause of action is a breach of fiduciary
2 duty under state law. FSLIC is saying that the
3 Respondents issued dividends in violation of the state
4 Savings and Loan Act, which made no reference whatsoever
5 to FSLIC requirements. And that's what the Seventh
6 Circuit actually described as the cause of action in
7 this court.

8 The resolution of that issue is the resolution
9 of the case regardless of other Federal causes of action
10 that -- that may arise. None are -- none predominate in
11 this case. All support the -- the theory that it's a
12 state savings and loan construction statute. That's a
13 cause of action that must ultimately be construed.

14 With respect to the subject of proviso
15 parties, I would submit the Seventh Circuit was -- made
16 the proper decision here. In the case of FDIC v.
17 Elefant, the FDIC informed the Seventh Circuit in that
18 case that the presence of a non-proviso party would
19 still deprive the Federal courts of jurisdiction. That
20 was their position in the Seventh Circuit as recently as
21 1986.

22 Directors are those type of adverse parties
23 that the FSLIC would naturally come into court to
24 proceed against. And I would submit that when the FSLIC
25 comes into court to enforce the rights of the

1 institution and the resolution of those rights is the
2 only question in the suit, then the suit involves only
3 the rights or obligations of the institution regardless
4 of who the defendants are.

5 And interpreted in that fashion and
6 interpreted with a policy basis to keep these many, many
7 collection cases out of Federal court, the focus being
8 brought by the receiver, both the FSLIC and the FDIC,
9 serves that useful purpose. Again, it keeps those case
10 out of Federal court.

11 I would submit that the Financial Institution
12 Supervisory Act which set out this jurisdictional scheme
13 for both the FDIC and the FSLIC and a contrary ruling in
14 today's case in the FSLIC would set up a separate
15 scheme. The FDIC could go into state court, state causes
16 of action on an identical case if it was the same cause
17 of action for -- for a bank as opposed to a savings and
18 loan. I would submit that that's not the provision --
19 or not the intent of Congress.

20 Finally, with respect to the agency argument,
21 I would only point out that it was added, according to
22 Congress, to clarify a reading or a construction of --
23 of Section A that would read out of existence. The
24 proviso would not fulfill policy and, in fact, would say
25 that all those cases that came into -- or the FSLIC went

1 into Federal court to resolve could then automatically
2 go into -- to Federal court. To give Federal courts
3 indirectly what they couldn't have through the proviso I
4 believe would be a -- a fractured route to go.

5 I have nothing further.

6 QUESTION: Thank you, Mr. Koch.

7 Mr. Taranto, do you have rebuttal?

8 MR. TARANTO: Nothing further.

9 CHIEF JUSTICE REHNQUIST: Very well. The case
10 is submitted.

11 (Whereupon, at 10:37 o'clock a.m., the case in
12 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1865 - FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, AS RECEIVER
FOR MANNING SAVINGS AND LOAN ASSOCIATION, Petitioner V.
HAROLD J. TICKTIN, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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