

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

95 DEC -6 A8:29

RECEIVED
SUPREME COURT, U.S.
MARSHALS OFFICE

CAPTION: BANK ONE CHICAGO, N.A., Petitioner v.
MIDWEST BANK & TRUST COMPANY
CASE NO: No. 94-1175
PLACE: Washington, D.C.
DATE: Tuesday, November 28, 1995
PAGES: 1-42

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X

3 BANK ONE CHICAGO, N.A., :

4 Petitioner :

5 v. : No. 94-1175

6 MIDWEST BANK & TRUST COMPANY :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, November 28, 1995

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:08 a.m.

13 APPEARANCES:

14 ROBERT A. LONG, JR., ESQ., Washington, D.C.; on behalf of
15 the Petitioner.

16 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
17 General, Department of Justice, Washington, D.C.; on
18 behalf of the United States, as amicus curiae,
19 supporting the Petitioner.

20 ROBERT G. EPSTEEN, ESQ., Chicago, Illinois; on behalf of
21 the Respondent.

22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF ROBERT A. LONG, ESQ. On behalf of the Petitioner	3
ORAL ARGUMENT OF JEFFREY P. MINEAR, ESQ. On behalf of the United States, as amicus curiae, supporting the Petitioner	13
ORAL ARGUMENT OF ROBERT G. EPSTEEN, ESQ. On behalf of the Respondent	17
REBUTTAL ARGUMENT OF ROBERT A. LONG, JR., ESQ. On behalf of the Petitioner	38

1 PROCEEDINGS

2 (10:08 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 94-1175, Bank One Chicago v.
5 Midwest Bank & Trust Company.

6 Mr. Long.

7 ORAL ARGUMENT OF ROBERT A. LONG, JR.

8 ON BEHALF OF THE PETITIONER

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

11 The issue in this case is whether Federal courts
12 have jurisdiction to decide interbank claims for damages
13 under the Expedited Funds Availability Act and its
14 implementing regulations.

15 In the civil liability section of the act, which
16 is codified at 12 United States Code, section 4010,
17 Congress provided in subsection (d) that any action under
18 this section may be brought in Federal court or State
19 court.

20 In subsection (f) of Section 4010, Congress
21 provided for liability under this subsection for damages
22 for violation of rules governing the interbank check
23 payment system promulgated by the Federal Reserve Board.

24 The natural reading of this statutory language
25 is that banks have an action under subsection (f) for

1 violations of the check-processing rules, and Federal
2 courts have jurisdiction to decide such actions under
3 subsection (d).

4 Congress placed subsection (f) in the civil
5 liability section of the statute, section 4010 provides
6 that depositor claims under subsection (a) maybe brought
7 in Federal court, and there is simply no indication that
8 Congress intended interbank claims to be adjudicated in a
9 different forum. The --

10 QUESTION: Mr. Long, is there any possibility
11 that Congress intended the regulations promulgated under
12 subsection (f) to be enforced under the Uniform Commercial
13 Code some way?

14 MR. LONG: We think that's not a possible
15 interpretation here. First of all, it's not consistent
16 with the language of the statute, which says, liability
17 under this subsection, that is, liability under Federal
18 law rather than liability under State law.

19 Also, it would be highly unusual for Congress to
20 provide for liability for damages under a Federal statute
21 for a violation of Federal standards and rules, and yet
22 not provide for a Federal cause of action. It would be
23 particularly unusual in this context, where Congress
24 clearly provided that depositors have a cause of action in
25 Federal court sometimes for very small claims, for claims

1 of as little as \$100, and the much larger interbank claims
2 we think ought to be treated the same.

3 QUESTION: Mr. Long, would it make any
4 substantive difference whether Federal courts had
5 jurisdiction under section 4010 immediately, or whether
6 they had it only indirectly under section 1331 of title
7 28?

8 MR. LONG: I think the short answer is no.
9 Those are two routes to the same conclusion that Federal
10 courts have jurisdiction.

11 QUESTION: I take it, in line with your answer
12 to Justice O'Connor, the board has promulgated regulations
13 that require that the checks be honored with diligence and
14 in good faith. Those, I take it, are Federal standards to
15 be interpreted as a matter of Federal common law.

16 MR. LONG: Yes, Justice Kennedy, they're Federal
17 standards, and they really are a substantial change in
18 this area. When Congress passed this act, it federalized
19 to a substantial extent an area that had been an area of
20 State law, and the Federal standards that the Federal
21 Reserve Board has adopted under Regulation CC do impose
22 significant new obligations on banks, including a duty of
23 expeditious return of checks.

24 QUESTION: If the board had determined that it
25 should be the one to determine what is good faith, and

1 that it should adjudicate these claims, could it have set
2 up an adjudicative mechanism under the existing statute,
3 or do you think additional authority would be required for
4 that?

5 MR. LONG: I think additional authority would be
6 required. Under this Court's decision in Coit v. FSLIC
7 Courts are not quick to imply agency authority to
8 adjudicate private claims for damages, particularly in a
9 context, and we're in that context here --

10 QUESTION: And there's no statutory mechanism
11 for review, for judicial review of any such
12 administrative --

13 MR. LONG: That's right. Congress said nothing
14 about what procedure should be followed, said nothing
15 about judicial review, and in other areas where the
16 Federal Reserve does have enforcement authority and
17 adjudicatory authority, Congress was quite careful -- this
18 is in 12 U.S.C. section 1818 -- to spell out the
19 procedural requirements and to provide for judicial
20 review.

21 QUESTION: Well, we have an Administrative
22 Procedure Act which does all of that. I mean, most
23 agencies that conduct both adjudication and rule-making
24 don't have special provisions. That's not a real
25 obstacle, is it?

1 MR. LONG: Well, I agree that presumptively
2 under the APA there would be judicial review, but under a
3 decision such as Coit, where Congress has demonstrated
4 that when it wants an agency to adjudicate --

5 QUESTION: That's a question of whether --
6 whether we should interpret the statute in such a way as
7 to give the board the authority, but if it -- if the board
8 has the authority, there's really no problem about what
9 procedures it would have to use, is there?

10 MR. LONG: Well, there would be a problem about
11 what procedures the agency would use. There would be
12 presumptively judicial review under the Administrative
13 Procedure Act, but courts are supposed to be careful about
14 telling the agency what --

15 QUESTION: But that's not all that the
16 Administrative Procedure Act contains. It also contains
17 rather specific provisions concerning the procedures the
18 agency has to use, right?

19 MR. LONG: Yes, I agree with that, but again,
20 the Coit decision says that in the context where Congress
21 has been quite specific and precise and explicit about
22 giving adjudicatory authority to an agency to adjudicate
23 private claims, the Court will not infer that authority
24 where it's not been expressly given.

25 QUESTION: Mr. Long, is it appropriate for us to

1 give any weight to the Fed's own view that it does not
2 have this adjudicatory authority?

3 MR. LONG: Yes, I think it is, Justice Ginsburg.
4 The board's view that it lacks jurisdiction to decide
5 these claims is entitled to deference.

6 QUESTION: Well, don't you think there's a
7 difference when the board is just speaking about its own
8 house, and when the board is not -- I mean, when the board
9 says, we don't have it, the board is also saying, you have
10 it, that is, the Federal courts. I mean, that's as much
11 our bailiwick as it is the board's.

12 MR. LONG: Well --

13 QUESTION: That's different from the usual
14 deference situation when the board is just talking about
15 its own ox. Here, it's talking about its own ox and also
16 our ox, and it seems to me the courts ought to be able to
17 look after their own ox.

18 MR. LONG: I agree the two questions are closely
19 related. If it were a question of whether Federal courts
20 have jurisdiction, I think there would be a serious
21 question about whether to defer, but here Congress
22 provided, I think in very clear language, that any action
23 under this section may be brought in Federal court.

24 QUESTION: Well, there wouldn't just be a
25 serious question if the board purported to say that there

1 was Federal jurisdiction, there would be no deference at
2 all, I take it.

3 MR. LONG: I would concede that, Mr. Chief
4 Justice, but here it's not a question of jurisdiction,
5 because we have subsection (d). At most, it's a question
6 of whether there's an action under subsection (f), and
7 Congress did give a very broad grant of authority to the
8 agency to promulgate interbank liability rules under that
9 subsection.

10 I think certainly at a minimum the board's view
11 that it does not have the authority to adjudicate claims
12 for violations of those rules is entitled to deference. I
13 would go a step further and say that the board's view that
14 there is an action under subsection (f) is also a matter
15 that the Court could properly defer to the agency.

16 The text of section 4010 is consistent with the
17 purpose of the statute. Congress was primarily concerned
18 with expediting customer access to deposited funds, and to
19 achieve that goal, it legislated funds availability
20 schedules, and it required banks to disclose their funds
21 availability policies to customers and also required banks
22 to begin paying interest promptly, but Congress was also
23 concerned with speeding up the interbank check payment
24 system.

25 Congress recognized that the slowness of the

1 system was a principal reason for the lengthy holds on
2 checks, and it also recognized that if it required banks
3 to make deposited funds available more quickly but did
4 nothing about the slowness of the interbank payment
5 system, banks would be exposed to a risk of loss of the
6 checks ultimately were not paid.

7 Now, Congress addressed this more technical
8 issue about how to improve the check payment system not by
9 legislating a particular solution, but by giving the
10 Federal Reserve Board broad authority to regulate the
11 system.

12 It directed the board to consider a variety of
13 possible improvements to the system which are set out in
14 12 U.S.C. section 4008, it gave the Federal Reserve a
15 broad grant of authority to regulate any aspect of the
16 payment system, also in section 4008, and in 4010(f) it
17 gave the board an additional grant of authority to
18 establish liability rules for damages.

19 QUESTION: Mr. Long --

20 MR. LONG: Yes.

21 QUESTION: -- subsection (e) of 4010 says that
22 no provision of this section imposing any liability shall
23 apply to any act done or omitted in good faith in
24 conformity with any rule, regulation, or interpretation
25 thereof by the Board of Governors of the Federal Reserve

1 System.

2 Now, in what context would the board have
3 occasion to interpret some of its rules and regulations
4 pertaining to these matters unless it is in the context of
5 adjudicating whether those rules or regulations have been
6 violated?

7 MR. LONG: I think, Justice Scalia, the Federal
8 Reserve would have authority to interpret its rules, and,
9 indeed, it's issued an extensive commentary to the rules
10 that accompanies them without conducting any
11 adjudications.

12 QUESTION: Just issue interpretive bulletins?

13 MR. LONG: Yes, Your Honor.

14 QUESTION: Which would be binding on the
15 courts -- well, at least as far as assessing liability
16 when anybody's acting in good faith reliance on --

17 MR. LONG: To that extent, yes, I think so.

18 But to return to purpose for a moment, in giving
19 this additional grant in subsection (f) of authority not
20 only to regulate any aspect of the system but to impose
21 liability for damages, to establish liability rules,
22 there's no indication that Congress intended civil
23 liability claims for violations of these check processing
24 rules to be adjudicated in a different forum, or handled
25 differently from other civil liability claims under the

1 statute.

2 The Seventh Circuit held that interbank claims
3 should be adjudicated by the Federal Reserve Board. There
4 are at least five reasons why that interpretation is not
5 correct. First, it doesn't fit with the language of the
6 statute. Congress authorized the Federal Reserve Board to
7 impose on or allocate among banks risk of loss and
8 liability, not to impose actual liability through
9 adjudication. That language is consistent with rule-
10 making.

11 Second, it's inconsistent with the Coit
12 principle that we've discussed that authority to
13 adjudicate is not to be lightly inferred.

14 Third, the administrative enforcement mechanisms
15 available to the Federal Reserve Board simply don't
16 include a mechanism for imposing liability for damages on
17 a private party. They have remedies for cease and desist
18 orders, civil penalties, the usual gamut of enforcement
19 provisions, but not authority to have an adjudicative
20 tribunal.

21 Fourth is the deference that's owed to the
22 board's view that it lacks jurisdiction, and fifth is the
23 sort of fragmented adjudications that would result under
24 the court of appeals view.

25 Bank claims would go to an agency. In fact,

1 there are several agencies that share authority for
2 enforcing this, so there could be intraagency
3 jurisdictional problems.

4 If a bank had a State law claim, presumably that
5 would go to State court. If there were depositor claims
6 arising out of the same set of facts, that could go to
7 Federal court or State court, and it seems quite unlikely
8 that Congress would have intended that sort of
9 fragmentation.

10 I'd like to reserve the balance of my time for
11 rebuttal.

12 QUESTION: Very well, Mr. Long.

13 Mr. Minear, we'll hear from you.

14 ORAL ARGUMENT OF JEFFREY P. MINEAR

15 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

16 SUPPORTING THE PETITIONER

17 MR. MINEAR: Mr. Chief Justice, and may it
18 please the Court:

19 The civil liability provisions of the EFA act
20 indicate that Congress intended State and Federal courts
21 to have jurisdiction over both depositor and interbank
22 claims.

23 Section 4010(d) expressly provides that Federal
24 district courts and other courts of competent jurisdiction
25 may hear liability claims, and that jurisdictional

1 provision draws no distinction between depositor claims
2 and interbank claims.

3 Section 4010 does create two different causes of
4 action. Subsection (a) establishes rules that apply to
5 depositor claims, while subsection (f) authorizes the
6 board to promulgate or establish rules that apply to
7 interbank claims, but that distinction makes no difference
8 with regard to Federal jurisdiction.

9 Both subsections create a legal right to
10 redress, and both subsections -- and a party who can state
11 a cause of action under either subsection is entitled to
12 invoke the Federal court's jurisdiction under subsection
13 (d).

14 QUESTION: Mr. Minear, isn't it odd, the
15 placement of this statute? You would expect the
16 substantive provisions to be together, (a) and (f), and
17 then (d) to follow both of them.

18 MR. MINEAR: I think the answer to that is found
19 in the legislative history of the act, that when Congress
20 first provided the bills that -- the initial bills, both
21 the House and Senate bills, they provided a provision,
22 subsection (a), that covered any person, including
23 depository institutions.

24 In the formulation of the bill -- in the
25 formulation of the legislation, Congress realized that the

1 interbank question required special expertise, and it
2 therefore added subsection (f) later, and also added
3 language to (a) that excluded depository institutions from
4 among the plaintiffs that might invoke that cause of
5 action, so the placement actually reflects the genesis of
6 the legislation, and that is the reason why it actually
7 was added later in the statute.

8 QUESTION: It might have been better drafting,
9 then, if they switched to put the jurisdictional provision
10 at the end.

11 MR. MINEAR: It certainly would have. It would
12 have been better organized, but that still doesn't detract
13 from the substance of the subsections that we're
14 discussing.

15 Now, the United States also disagrees with t he
16 court of appeals' conclusion that a agency tribunal should
17 resolve interbank claims.

18 As this Court has indicated in cases such as
19 Coit v. FSLIC, when Congress decides to allow agencies to
20 adjudicate private disputes, it says so explicitly, and
21 there is no such explicit statement in this statute at
22 all. The EFA act nowhere states that the board has the
23 power or authority to adjudicate claims.

24 The board's regulations reflect that limitation.
25 The board has discerned within section 4010(f) a

1 delegation of authority to establish liability rules, but
2 it has not discerned any delegation of authority to
3 establish standards or to establish -- or to create a
4 agency tribunal for adjudicating interbank disputes.
5 Instead, the board's regulations recognize that the
6 customary mechanism should be employed in this situation,
7 and the customary mechanism is a judicial action in
8 Federal or State court.

9 The United States also disagrees with
10 respondent's suggestion that Congress intended that State
11 courts would have exclusive jurisdiction over interbank
12 disputes. Respondent acknowledges that Federal courts and
13 State courts have concurrent jurisdiction over depositor
14 claims, and there's no basis for drawing a distinction
15 with regard to interbank claims.

16 Congress authorized the board to regulate the
17 payment system in order to improve the interbank check
18 collection process, and it would be quite anomalous to
19 provide Federal court jurisdiction over depositor claims
20 but not interbank claims.

21 There is simply no basis for providing a Federal
22 forum for depositor claims no matter how small, while
23 denying a Federal forum for interbank claims, no matter
24 how large, and no matter what impact they might have on
25 the interbank payment system.

1 QUESTION: Mr. Minear, do you agree that it
2 doesn't make any difference whether the Federal court has
3 jurisdiction under 4010 or under section 1331 of title 28?

4 MR. MINEAR: I agree with Mr. Long that
5 ultimately it leads to the same place. We believe that
6 the jurisdiction question should be resolved within the
7 four corners of the EFA act, because Congress has
8 specifically addressed the question here, but 1331
9 jurisdiction would be consistent as well, and in fact
10 section 1331 indicates the general tendency, at least
11 since the Civil War, for Congress to provide a Federal
12 forum to vindicate or address Federal rights.

13 In sum, we believe that the court of appeals
14 erred in concluding that there was no Federal jurisdiction
15 in this case. The Court should reverse the decision below
16 and remand the case for further proceedings.

17 QUESTION: Thank you, Mr. Minear.

18 Mr. Epstein, we'll hear from you.

19 ORAL ARGUMENT OF ROBERT G. EPSTEEN

20 ON BEHALF OF THE RESPONDENT

21 MR. EPSTEEN: Mr. Chief Justice, and may it
22 please the Court:

23 I'd like to start out to clarify one point here,
24 and that is that Regulation CC is not promulgated pursuant
25 to 611(f). 611(f), when it talks about rule-making in

1 that title, is not talking about the kind of regulations
2 that are involved in Regulation CC, which is the
3 regulation that the suit sought to enforce, and I call the
4 Court's attention to a portion of the legislative debate
5 which is quoted at pages 17 and 18 of our brief.

6 And if I may just read one paragraph of the
7 joint conference report, which points out that it is
8 section 609 where these regulations would be promulgated
9 under, not under 611(f), and it -- in the report, and I'm
10 quoting from page 18 of my brief, the report says, for
11 example, under this subsection -- and they're referring to
12 611(f) -- the Federal Reserve may allocate or impose
13 liability on depository institutions for risks of losses
14 incurred by other depository institutions, their
15 accountholders or other owners or holders of a check due
16 to a depository institution's failure to handle the check
17 in accordance with regulations imposed under section 609.
18 That is 12 U.S.C. 4008, so --

19 QUESTION: I'm not sure that that proves your
20 point, because it speaks -- as you were quoting it, it
21 speaks of allocating risks, not of imposing liability,
22 which sounds to me as though what it's talking about under
23 (f) is the promulgation of rules which determine who will
24 bear the liability, i.e. the risk of loss, and not a rule
25 which actually imposes liability in a -- or an act of the

1 agency which imposes liability in a specific case.

2 MR. EPSTEEN: Justice Souter, my point being is
3 in this case the claim was that Midwest Bank failed to
4 exercise ordinary care as required by 12 C.F.R. 229.38,
5 that that rule, which is part of Regulation CC, is not
6 promulgated under 611(f). That's promulgated under 4008.

7 QUESTION: Okay, so you were not quoting that
8 language to show that, or to prove your claim that (f) is
9 an adjudicatory authorization.

10 MR. EPSTEEN: No. I was --

11 QUESTION: That was a separate point.

12 MR. EPSTEEN: I was -- right. I was quoting
13 this language to point out that if there is rule-making
14 authority, and 611(f), the language of 611(f) doesn't talk
15 specifically about rule-making authority but the heading
16 or the title to it does, and if you view 611(f) to be
17 ambiguous so that you resort to the caption or the title
18 of that subsection, then you would also look to
19 extrinsic such as the legislative history --

20 QUESTION: Well, if you do get into the
21 legislative history, I suppose you do rely on the words,
22 impose liability, in the second paragraph --

23 MR. EPSTEEN: Absolutely.

24 QUESTION: -- of the thing you quote, which is
25 different from allocating risks, I suppose you say.

1 MR. EPSTEEN: Yes, and I would point out that
2 the language and the structure of 611, subpart 6511(a),
3 subsection 611(a) and 611(f) are very different, that
4 under section 611(a), which the petitioner and the United
5 States say are parallel provisions, the language is quite
6 different.

7 Under (a) they say, is liable to anyone other
8 than another depository institution. In our briefs we use
9 the term banks to refer to depository institutions
10 generally, but --

11 QUESTION: I must say, I don't understand what
12 language in (f) you are hanging this legislative history
13 on. What ambiguity in (f) is it clarifying? It seems to
14 me (f) is clear and straightforward. The board is
15 authorized to impose liability in connection with any
16 aspect of -- do you read it risks of loss and liability
17 mean risk of loss and risk of liability?

18 MR. EPSTEEN: No. No, I don't. Your Honor --

19 QUESTION: Well then --

20 MR. EPSTEEN: -- what I'm suggesting is, it
21 doesn't say rule-making in (f) anywhere, either, and I'm
22 saying that since the Court raised the rule-making
23 question, and seem to believe that rule-making was
24 authorized by (f) and that Regulation CC, the
25 regulation --

1 QUESTION: Why not just look up above to (e),
2 reliance on board rulings, which says no provision of this
3 section imposing any liability shall apply to any act done
4 or made in good faith in conforming with any rule,
5 regulation, or interpretation thereof? I mean, doesn't
6 that make it very clear that they have rule-making under
7 this section?

8 MR. EPSTEEN: I think the rule-making is under
9 section 609, Your Honor.

10 QUESTION: Did the board purport to be applying
11 either 611 or 609 when it issued Regulation CC? Did it
12 cite either section and say that it was proceeding under
13 one or the other?

14 MR. EPSTEEN: I don't believe it is specific as
15 to which section it is relying on in the act.

16 QUESTION: I mean, just -- I'm not certain what
17 the relevance of this argument is to the case question in
18 front of us, but if it is relevant, looking at 609, and I
19 just looked at it briefly, it sounds as if 609 says you
20 can promulgate regulations to tell banks what to do, and
21 it sounds as if 611(f) is saying you can do another thing,
22 too.

23 The other thing is to impose liability of
24 certain kinds upon them to certain people when they don't
25 do what you told them to do under 609, and if that's so,

1 on its face, Regulation CC seems to be a regulation that
2 talks about imposing liability for failing to do something
3 that some other regulation probably told them to do, so on
4 its face, Regulation CC looks as if it comes after --
5 under 611, and not under 609.

6 Now, I mean, that's just a very quick look at
7 it, and because I hadn't looked at that before, but what's
8 your response to that?

9 MR. EPSTEEN: Well, I agreed with Your Honor
10 until you got to the last part, with all due respect. I
11 believe it is the prescribing, or the passage of the
12 promulgation of the regulations comes under 609.

13 QUESTION: The liability part -- for example, it
14 says, a bank that fails to act in good faith under this
15 subpart may be liable for other damages. Then it talks
16 about standard of care, and it talks about liability, so
17 why isn't the liability part of CC being promulgated under
18 611?

19 MR. EPSTEEN: Because, as that they point out, I
20 believe, in the legislative history, that Congress
21 intended all of the regulation, of these regulations to be
22 promulgated under 609, that I think the rules that they're
23 talking about are perhaps rules for procedures for
24 imposing liability. I think 611(f) gives the board
25 authority to impose liability.

1 QUESTION: Mr. Epstein, is this your second view
2 of the case? As I understand it, this argument was raised
3 by the Seventh Circuit panel on its own motion, and you
4 had not questioned Federal court jurisdiction up until the
5 Seventh Circuit.

6 MR. EPSTEEN: That's true. We had -- I'm
7 embarrassed to say that we had not raised the argument on
8 our own when we should have.

9 QUESTION: So you're kind of fleshing out the
10 rather terse Seventh Circuit explanation of what it did.

11 MR. EPSTEEN: Well, when the Seventh Circuit
12 raised the issue and we looked at it, we became convinced
13 that the Seventh Circuit was correct that there was no
14 Federal question jurisdiction.

15 One of the things is that there have been
16 Federal regulations for some years governing interbank
17 check disputes. Regulation J, which is 12(c) of our part
18 210 -- it's the one we referred to in the briefs. It's
19 been around since October of 1980.

20 When we started looking at it, we were unable to
21 find a single case under Regulation J or Regulation CC
22 where the Federal courts had found Federal subject matter
23 jurisdiction under 1331 to enforce a claim for violation
24 of Regulation J or Regulation CC, that regulation -- but
25 we were able to find cases where under State law, and

1 we've cited a couple as examples in our brief, where,
2 under the Uniform Commercial Code, which incorporates the
3 Federal regulations as part of State law -- under 4-103 of
4 the Uniform Commercial Code these become part of the State
5 law in all of the States, and they have been applied
6 throughout the States, and it is our position that there
7 is nothing within this act with respect to interbank
8 disputes which changes that.

9 QUESTION: So we're sort of at the mercy of the
10 States. I mean, if a State wants to repeal the UCC
11 entirely -- does Louisiana have the whole UCC?

12 MR. EPSTEEN: As far as I know, every State,
13 Your Honor, has the provision which would, with respect to
14 banks incorporates these regulations.

15 QUESTION: Well, I guess that's a lucky thing,
16 because otherwise on your theory there wouldn't be any
17 relief in any court in that State, neither Federal nor
18 State courts. Its only by grace of the States having
19 adopted that UCC provision that this liability is
20 enforceable anywhere.

21 MR. EPSTEEN: Well, but that has been around for
22 sometime, Your Honor, and I think the regulations that are
23 promulgated by the Federal Reserve Board and their
24 official commentary throughout them recognizes the
25 interplay between the regulations and the Uniform

1 Commercial Code.

2 QUESTION: Mr. Epstein, is that indeed your
3 position, or are you recognizing that there is Federal
4 jurisdiction but it's in the agency in the first instance,
5 or are you saying that the only forum for these interbank
6 disputes is the State court?

7 MR. EPSTEEN: Well, I think there would be
8 jurisdiction within the agency if the agency sought to
9 exercise it, but since the agency has declined to exercise
10 it, our point is that there certainly is still a forum in
11 which these claims could be adjudicated in the State
12 courts.

13 QUESTION: So if the agency chose to exercise
14 that authority, where would the next stop be? Where would
15 the review be of the agency's initial adjudication?

16 MR. EPSTEEN: Well, I think the agency's
17 adjudication would then, if it decided -- and I think
18 under (f) it can pass and promulgate some rules for its
19 process of adjudication, and I think it would then be
20 subject to judicial review under the Administrative
21 Procedures Act.

22 QUESTION: Where?

23 MR. EPSTEEN: I don't have a specific -- I'm not
24 sure I understand your question.

25 QUESTION: Well, would it be the D.C. Circuit,

1 would it be any district court where the bank -- the same
2 venue as the bank, or what -- where would it be?

3 MR. EPSTEEN: I think it would be -- I must
4 apologize. I have not focused on the APA act's
5 procedures.

6 QUESTION: Maybe the district court. The
7 fallback -- the fallback jurisdiction is in the district
8 court under the APA.

9 MR. EPSTEEN: I believe it would be in the
10 district court.

11 QUESTION: May I ask, if a proceeding were
12 brought in the State court under your view, trying to
13 enforce the regulation, would we have jurisdiction to
14 review a decision of the State court?

15 MR. EPSTEEN: This is the only Federal court
16 that I know of that has jurisdiction to review decisions
17 of State courts.

18 QUESTION: But you said there would be a Federal
19 question, in your view. They would be subject to review
20 on direct -- subject to our review under direct appeal,
21 and so forth, and certiorari.

22 MR. EPSTEEN: Well, I think that this Court
23 always has the jurisdiction to review the decision of the
24 State court. It's the highest court of any State, and in
25 that sense I say that it has, but it is incorporated into

1 State law, and it's really a State law question, and if
2 Congress wanted to make this a Federal law question it
3 certainly could have.

4 QUESTION: Well, if it's a State law question,
5 then we would not have jurisdiction. I'm really -- that's
6 what I'm probing for. Do you think in final analysis it
7 is a State law question or a Federal law question?

8 MR. EPSTEEN: I think it is a State law question
9 under the Federal regulations. I think --

10 QUESTION: Well then, how could the agency, if
11 it chose to adjudicate -- I mean, if you're right in what
12 you answered before, that the agency if it wanted to could
13 adjudicate, then you'd have APA review in the appropriate
14 district court, it would all be Federal, only you get at
15 the ground floor an agency instead of a court, then it
16 would all be Federal.

17 MR. EPSTEEN: That is correct, but I understood
18 Justice Stevens' question to be that if it were brought in
19 the State court, where the Federal regulations become a
20 part of the State law, they become agreements under the
21 State law under 4-103 of the code, of the Uniform
22 Commercial Code, then it's really proceeding under State
23 law, although I guess construction of any regulations
24 promulgated by the board, if we're talking about how the
25 interpretation or construction, it would be Federal --

1 QUESTION: Of course it has to be a Federal
2 question.

3 MR. EPSTEEN: -- would be Federal --

4 QUESTION: Of course.

5 MR. EPSTEEN: Yes.

6 QUESTION: And since it is a Federal question,
7 why doesn't section 1331 get you to the same destination
8 anyway?

9 MR. EPSTEEN: Well --

10 QUESTION: I know you claim section 1331 is not
11 at issue here, but just indulge me that I think it is, and
12 even if it isn't, if I think that 1331's going to lead you
13 to the same destination anyway, I'm not going to -- you
14 know, I'm not going to bend over backwards to hold that,
15 you know, (f) doesn't apply, because what's the
16 difference, you may as well -- if it's at all ambiguous
17 you may as well hold that (f) gets you there and have it
18 all in the same statute.

19 Why do you say 1331 doesn't govern?

20 MR. EPSTEEN: Well, first of all, 1331 has
21 not -- as far as I know never conferred jurisdiction in
22 any Federal regulation case involving the check collection
23 process, and these Federal regulations have been around
24 for some years, and --

25 QUESTION: Was that merely a matter of fact, or

1 because of the word laws in 1331? You're saying a
2 regulation is not a law under 1331.

3 MR. EPSTEEN: No, but what I'm saying is that
4 first of all --

5 QUESTION: Well, is a regulation a law under
6 1331?

7 MR. EPSTEEN: I view a regulation promulgated
8 pursuant to a statute to be a law. I don't view it to
9 have -- I don't elevate it to a statute, but I accept that
10 it is a law, but --

11 QUESTION: I mean, the explanation for the
12 phenomenon you describe is simply that there is a specific
13 jurisdictional provision that covers all these other
14 things.

15 MR. EPSTEEN: But --

16 QUESTION: When there isn't one, then you go to
17 the fallback jurisdiction of 1331, and why wouldn't that
18 apply?

19 MR. EPSTEEN: Well, Your Honor, I think when
20 Congress in 611, and I agree with the United States'
21 position on this that we ought to really confine ourselves
22 to the four corners of this act, when Congress
23 specifically says under (a) there is no juris --

24 QUESTION: It doesn't say there's no
25 jurisdiction on the --

1 MR. EPSTEEN: It doesn't say there's no -- it
2 says there's no cause of action under (a).

3 QUESTION: Under (a), that's --

4 MR. EPSTEEN: Under (a), no cause of action for
5 interbank disputes.

6 QUESTION: Right.

7 MR. EPSTEEN: And under (d) --

8 QUESTION: That isn't quite right. It just says
9 (a) itself doesn't create a cause of action for interbanks
10 disputes.

11 MR. EPSTEEN: Correct.

12 QUESTION: Yes.

13 MR. EPSTEEN: I misspoke if I said something
14 differently. What I'm saying is that (a) is specific in
15 excluding an action brought by a bank against another
16 bank. It says there's no cause of action that Congress is
17 authorizing here, and we don't believe that (f) authorizes
18 a cause of action.

19 If (f) does authorize a cause of action, you
20 don't need to go to 1331. Then you are to 611(d).

21 QUESTION: It says, liability under this
22 subsection. What does that refer to in (f), if it doesn't
23 refer to liability created by the subsection?

24 MR. EPSTEEN: Well --

25 QUESTION: It says, liability under this

1 subsection shall not exceed the amount of the check giving
2 rise to the loss or liability, blah, blah, blah, blah,
3 blah. Liability under this subsection. I don't -- can't
4 imagine clearer --

5 QUESTION: Moreover, the --

6 QUESTION: -- indication that the subsection is
7 creating liability.

8 QUESTION: Moreover, the title to 4010 is civil
9 liability. That covers all the subsections, I would
10 think.

11 MR. EPSTEEN: That's true, but if you are
12 looking at titles, it is (a), then --

13 QUESTION: I know (a) also says --

14 MR. EPSTEEN: -- as to civil liability, and (f),
15 which has a very different --

16 QUESTION: Right.

17 MR. EPSTEEN: -- a very different title --

18 QUESTION: Yes.

19 MR. EPSTEEN: -- and so if you -- if the Court
20 were to view (f) as creating a cause of action, I would
21 suggest that when Congress picked the language for (a), it
22 knew that this language in (a) would create a cause of
23 action. It took it from the Federal Truth in Lending Act,
24 which the courts have held creates a cause of action.

25 (f)'s language, if you put the two side-by-

1 side, is very different from --

2 QUESTION: Well then, there's no Federal cause
3 of action. You're saying there's no Federal cause of
4 action, so then you should change your answer as to
5 whether we could review a State decision. There's no
6 Federal cause of action being created here.

7 MR. EPSTEEN: I say there is no Federal cause of
8 action created --

9 QUESTION: Well, then the States can decide it,
10 and they can all come out different ways about what the
11 Federal regulation means, because this is not a Federal
12 question.

13 MR. EPSTEEN: Well, if that were a problem and
14 the Federal Reserve Board perceived a problem in
15 uniformity, and Congress perceived such a problem, it
16 certainly could change the legislation.

17 QUESTION: But if that's your answer, then you
18 would have to go back and revise what you said about the
19 agency, if it wants to get into this act, could set itself
20 up as an adjudicator, and then you'd have district court
21 review, so you can't have it both ways. If it's State,
22 well then the agency can't get into it even if it wanted
23 to.

24 MR. EPSTEEN: Well, I think that the issue of
25 whether the agency could or couldn't do it really arises

1 out of the dicta in the Seventh Circuit's opinion, because
2 the agency has not attempted to do it. It has been our
3 position since this issue has been raised that these
4 claims are properly asserted in the State courts under the
5 Uniform Commercial Code, and if Congress wants them to be
6 in the Federal courts, it has to amend the statute.

7 We don't believe that this statute creates a
8 cause of action under (f). It permits a bank -- and let
9 me suggest that under --

10 QUESTION: Well, again, are you saying that
11 Congress has not provided for the agency either?

12 I think you're now shifting your position,
13 because initially you said it could be the State court, or
14 if the agency wanted to, could be the agency. Now you
15 seem to be saying there can be no Federal adjudicator, the
16 only adjudicator is the State unless Congress amends the
17 statute. Which one is your position?

18 MR. EPSTEEN: If -- I believe that these actions
19 are to be adjudicated under the Uniform Commercial Code in
20 the State courts between banks. I believe Congress has
21 not created a Federal cause of action.

22 QUESTION: Which means that the agency could not
23 adjudicate even if it wanted to.

24 MR. EPSTEEN: I think that -- yes. If that
25 is --

1 QUESTION: That's a different position than the
2 one you were taking up till now.

3 MR. EPSTEEN: Yes. Yes. Yes -- it is -- if it
4 is not a cause of action that is a -- certainly in our
5 view it is not a cause of action that is a judicially
6 enforceable cause of action, the way I understand the term
7 cause of action, and --

8 QUESTION: But then what do you make of the
9 Seventh Circuit, that says disputes such as this are to be
10 handled administratively before the Board of Governors of
11 the Federal Reserve System --

12 MR. EPSTEEN: Well --

13 QUESTION: -- and then went on to say the board
14 has informed us it doesn't have any mechanism to do this,
15 but that's the board's problem?

16 MR. EPSTEEN: Well, I think -- I think there are
17 times when clearinghouses -- and in my experience, I have
18 seen situations where clearinghouses administratively deal
19 with claims of banks without a hearing based on written
20 submissions, but I believe that this is not a Federal
21 cause of action that is enforceable in Federal courts, as
22 cause of action is talked about, let's say in Davis v.
23 Passman, which is cited in the Government's brief.

24 I don't think that Congress has given banks the
25 right to bring an action under this act specifically,

1 under 611(f), and if --

2 QUESTION: You have a different spin on it than
3 the Seventh Circuit, because as I read the Seventh
4 Circuit's opinion, the Seventh Circuit was pretty sure
5 about the Federal Reserve System but not so sure about
6 State courts, because it said, or perhaps in State court,
7 so the Seventh Circuit seemed to think of this as an
8 agency adjudication, correct?

9 MR. EPSTEEN: That's -- they did, and the
10 initial decision of the Seventh Circuit didn't refer to
11 the State courts, and there was some concern that they
12 might have been blocking out the State courts, and then on
13 rehearing they revised their opinion and put their phrase
14 in, oh, perhaps in State courts.

15 QUESTION: But -- so that theory, whatever it
16 was, is quite different from yours, because theirs did not
17 turn on the State courts as being the adjudicator. They
18 had a question mark about State courts.

19 MR. EPSTEEN: They had a question mark about
20 State court, they -- but they believed that the board
21 could administratively decide interbank disputes, that's
22 true, but I don't believe that they create a type of cause
23 of action that would be a judicially enforceable cause of
24 action that would trigger 611(d).

25 QUESTION: May I ask you a question,

1 Mr. Epstein? This is a case of first impression, as I
2 understand it, and since we granted cert, has it arisen in
3 any other court, do you know, other than the Seventh
4 Circuit? I know there was one there that was dismissed.

5 MR. EPSTEEN: There is -- in the district court,
6 the Standard Bank case. That's the only case that I'm
7 familiar with, Your Honor.

8 QUESTION: It's kind of interesting, because
9 there must be zillions of these transactions, and so
10 scarce litigation. I guess the banks normally work these
11 things out informally.

12 MR. EPSTEEN: Well, one of the things we did in
13 preparing for this case, Your Honor, was went to the
14 computer research and punched in the regulations, and to
15 see the cases, and I was unable to find a single Federal
16 case where there was Federal question subject matter
17 jurisdiction in Regulation J or Regulation CC.

18 I found Federal cases, but they were diversity
19 cases that did not find their jurisdiction on a Federal
20 question but on grounds of diversity, and I found State
21 cases.

22 QUESTION: But just a few, isn't that correct,
23 or were there a lot of them?

24 MR. EPSTEEN: Not a large number, but I'd say
25 maybe a dozen cases.

1 QUESTION: Yes, and that's since -- Regulation J
2 has been on the books about 15 years, hasn't it?

3 MR. EPSTEEN: Yes, since 1980, although
4 Regulation J was amended a few times and got certainly
5 more substance in '85 and '86, and one of the interesting
6 parts of Regulation J in '86 is that the Federal Reserve
7 Board, while these were all being enforced through State
8 courts, said there's one area of nonuniformity which is a
9 statute of limitations, and in 1986 they put a 2-year
10 statute of limitations in Regulation J so that when it was
11 enforced through the Uniform Commercial Code in all the
12 State courts, there would be a uniform statute of
13 limitations.

14 QUESTION: Mr. Epstein, I ought to know this,
15 but I don't, does the board do any other adjudication? Do
16 they have administrative law judges down there that -- is
17 it purely a rule-making body? Does it adjudicate any
18 other disputes?

19 MR. EPSTEEN: Your Honor, I do not know the
20 answer to that question, I'm sorry. I just don't know the
21 answer.

22 I think the Court really understands our view on
23 deference from prior questions, and I would just like to
24 make a brief comment that the crop of fragmented --
25 fragmented or multiple adjudication concerns here really

1 don't exist, since the supplemental jurisdiction statute
2 under 28 1367(a) has been enacted.

3 I believe that there is not a problem there. If
4 an individual or a person other than a bank brings a suit
5 in the Federal court, and then there is a dispute between
6 two banks, it could be brought in under 1367(a) of title
7 28.

8 And I have really no further comments if the
9 Court has no further questions.

10 QUESTION: Thank you, Mr. Epstein.

11 MR. EPSTEEN: Thank you.

12 QUESTION: Mr. Long, you have 6 minutes
13 remaining.

14 REBUTTAL ARGUMENT OF ROBERT A. LONG, JR.

15 ON BEHALF OF THE PETITIONER

16 MR. LONG: When the Expedited Funds Act was
17 passed, the Federal Reserve Board had no administrative
18 law judges at all. It borrowed them on the rare occasions
19 when it needed them. Even today, there is only a pool of
20 administrative law judges that is shared by the various
21 Federal agencies that supervise banking and financial
22 institutions.

23 QUESTION: They need them at least for personnel
24 matters on occasion, and would have to borrow them for
25 that, I would assume.

1 MR. LONG: Yes, sir.

2 QUESTION: Does the fact that they get their
3 administrative law judges out of a pool cut one way or
4 another in this case?

5 MR. LONG: Well, I think it emphasizes how
6 unusual it would be to assume that Congress intended the
7 agency to start adjudicating all these interbank claims.

8 QUESTION: But not if you don't expect there to
9 be very many. Not if it's a fairly rare --

10 MR. LONG: Well --

11 QUESTION: -- piece of litigation. It doesn't
12 happen -- they don't -- banks don't fight with each other
13 all that often, do they?

14 MR. LONG: Very few checks are returned, but it
15 still adds up to hundreds and hundreds of millions a year.

16 QUESTION: But still, 10 or 12 cases in 15 years
17 out of hundreds and hundreds of millions of transactions
18 indicates it's a fairly rare situation when you get into
19 court over something like this.

20 MR. LONG: I think banks seem to be fairly good
21 at working out their differences, but it does come up, and
22 they need a place to go to work them out.

23 QUESTION: I wonder what their secret is. Do
24 you think you could --

25 (Laughter.)

1 MR. LONG: Good rational --

2 QUESTION: Well, their secret is that a bad
3 settlement is better than a good lawsuit.

4 (Laughter.)

5 MR. LONG: Justice Scalia, you had mentioned
6 4010(e) in the interpretations of the board. I'm told
7 that other statutes such as the Truth in Lending Act have
8 similar provisions, but it's -- the agency has no
9 adjudicatory authority under those statutes.

10 On the interplay between 609 and 611, I think
11 Justice Breyer I agree with completely. 609 gives the
12 board authority to regulate any aspect of the payment
13 system, but the additional authority to promulgate rules
14 imposing liability for damages goes beyond just
15 prescribing or proscribing behavior, and that's where you
16 need the 4010(f).

17 QUESTION: Do you have any explanation for the
18 lack of lawsuits in Federal court under other board
19 regulations? How --

20 MR. LONG: Well, Regulation J has been around
21 for quite a long time. There has been significant
22 litigation in Federal court under Regulation J.

23 Generally, Regulation J regulates the
24 relationship of Federal Reserve banks to other banks in
25 check processing, and there's a statute, 12 U.S.C section

1 632, that provides whenever a Federal Reserve bank is a
2 defendant or a party the action is deemed to arise under
3 Federal law, so there are those cases, and when the
4 Federal Reserve is in the case, as it frequently is, that
5 solves all the jurisdictional problems.

6 This particular provision in Regulation J
7 requiring banks to notify the depository bank if it's a
8 big check and they were returning it only came in in 1985.
9 It was shortly before the act, which was 1987, so there
10 really wasn't a great deal of time for courts to deal with
11 that.

12 QUESTION: The Federal Reserve bank
13 jurisdictional provision, it doesn't just mean if you're
14 insured. It actually has to be a Federal Reserve bank
15 before jurisdiction is deemed --

16 MR. LONG: I believe so, Mr. Chief Justice. The
17 citation is 12 U.S. Code section 632. I believe it's just
18 a Federal Reserve bank. I'm not certain of that.

19 Puerto Rico I believe does not have this
20 provision of the UCC that incorporates by reference the
21 Federal Reserve regulations. Puerto Rico is covered by
22 the Expedited Funds Act.

23 QUESTION: But you're not disputing that the
24 State courts are an appropriate forum.

25 MR. LONG: Oh, no, and 4010(d) gives the

1 concurrent jurisdiction. It's concurrent.

2 And finally, on the titles, it is true that 4010
3 says civil liability and 4010(a) says civil liability, but
4 if you look at 4009, it says administrative enforcement,
5 and 4009(a) also says administrative enforcement, so there
6 seems to be a pattern here of repeating in the first
7 subsection the title.

8 I have nothing further.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Long.

10 The case is submitted.

11 (Whereupon, at 11:00 a.m., the case in the
12 above-entitled matter was submitted.)

13

14

15

16

17

18

19

20

21

22

23

24

25

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:

BANK ONE CHICAGO, N.A., Petitioner v. MIDWEST BANK & TRUST COMPAN

CASE NO.: 94-1175

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

BY *Ann Marie Federico*

(REPORTER)