



# S.D.N.Y. Refuses to Enforce European “Mail Interception Order” due to U.S. Privacy Concerns

August 19, 2011

*In Re Dr. Jürgen Toft, 2011 Bankr. LEXIS 2733 (Bankr. S.D. N.Y. July 22, 2011)*

On July 22, 2011, the Bankruptcy Court for the Southern District of New York refused to enforce an order from a court in Germany for e-mail accounts stored on the servers of two internet service providers (“ISPs”) located in the United States.

The Debtor in this Germany bankruptcy matter owed over seven million dollars to his creditors. During the course of the bankruptcy proceedings, the Munich District Insolvency Court issued a “Mail Interception Order,” which granted the insolvency administrator the power to intercept the debtor’s postal and electronic mail. The insolvency administrator then initiated an action in the Southern District of New York asking the court to “grant comity” to the court order issued in Germany and compel the ISPs “to disclose to [the insolvency administrator] all of the Debtor’s emails currently stored on their servers and to deliver to [the insolvency administrator] copies of all e-mails received by the debtor in future.”

After thoroughly analyzing the applicable bankruptcy laws and acknowledging the deference typically given to foreign courts, the District Court concluded that the relief requested was “manifestly contrary” to U.S. public policy. In doing so, the Court wrote:

*The fact that U.S. law differs from German law with respect to the disclosure of e-mail communications does by itself not mean that the relief sought by the Foreign Representative is manifestly contrary to U.S. public policy. As many cases have held, foreign law need not be identical to U.S. law. Here, however, the relief sought by the Foreign Representative is banned under U.S. law, and it would seemingly result in criminal liability under the Wiretap Act and the Privacy Act for those who carried it out. The relief sought would directly compromise privacy rights subject to a comprehensive scheme of statutory protection, available to aliens, built on constitutional safeguards incorporated in the Fourth Amendment as well as the constitutions of many States. Such relief “would impinge severely a U.S. constitutional or statutory right.”*

Moreover, the “powers that the Foreign Representative is seeking to exercise in this country go far beyond the powers that have traditionally been afforded to a U.S. estate representative.” Therefore, the Court denied the German insolvency administrator’s motion for ex parte relief.

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