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IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

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~~STATE OF FLORIDA~~, DEPARTMENT OF BANKING AND FINANCE, ex rel. GERALD LEWIS, as Comptroller and Head of The Department,

Appellant,

v.

CASE NO. 66,331

STANDARD FEDERAL SAVINGS AND LOAN ASSOCIATION, and K-MART CORPORATION,

Appellees.

Appeal from a Decision of
The First District Court of Appeal

BRIEF OF APPELLEES

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PRELIMINARY STATEMENT

Appellees accept the designations and conventions offered by the Appellant in its preliminary statement, except that Appellee, Standard Federal Savings and Loan Association, will be referred to in this brief as "Standard Federal," the designation used by both the circuit court and the First District Court of Appeal. Appellees have numbered their Appendix consecutively with that of the Appellant, so that references to the Appendix, page 43 and higher, will be found in the Appendix to Appellees' brief.

STATEMENT OF THE CASE

Standard Federal and K Mart accept the Department's Statement of the Case.

STATEMENT OF FACTS

Standard Federal and K Mart cannot accept the Department's Statement of Facts because it is both incomplete and seriously inaccurate. Before the First District, the Department represented that it did not take issue with the facts as outlined by the circuit court in its comprehensive order denying a preliminary injunction. Accordingly, the First District, expressly noting in its opinion the representation of the parties that the operative facts were not in dispute, adopted the statement of facts given in the circuit court order. State v. Standard Federal Savings and Loan Ass'n., 463 So.2d 297, 298 (Fla. 1st DCA 1984).[here-

inafter cited as Standard Federal].

Notwithstanding this, the Department goes on, in the highly truncated version of the facts set out in its brief, to twice describe the relationship between Standard Federal and KMI as a joint venture arrangement, although the contract between Standard Federal and KMI expressly disclaimed the creation of any joint venture and the trial court rejected this characterization, finding that the relationship was that of broker. (Ex. B, A-12). Similarly, the Department's Statement of Fact on four occasions asserts that KMI is receiving funds for deposit although it is undisputed that the only deposits KMI would accept under this program were checks or similar instruments, made payable to Standard Federal, which were immediately forwarded to Standard Federal in Michigan. (Ex. B, A-7).

These misstatements of fact are rendered more troublesome because they have been repeated before this Court after their inaccuracy was pointed out to the Department in the First District when the statements were made there. Moreover, they are reiterated even though the Department admitted in its First District brief that its characterization of the agreement between Standard Federal and KMI as a joint venture had been rejected by the circuit court, (R.61-62) and even though the First District opinion, in response to the Department's claim that KMI was "receiving funds

for deposit" took great pains to point out the precise nature of the activities of K Mart and KMI, stating:

> The function of K-Mart and KMI in the Standard Federal program is simply to acquaint potential depositors with the various accounts, to assist persons indicating an interest in opening such account to complete the necessary documents, and to accept, for forwarding to Standard Federal, an initial deposit in the form of a check or money order made payable only to Standard Federal.

Standard Federal, supra, 463 So.2d at 305 (emphasis in original).

Appellees do not desire to dwell unduly on these misstatements since they are peripheral in nature and should have no effect on the merits of the case even were the Department's characterizations correct. A more serious flaw in the Department's Statement of Facts is that it offers no comprehensive overview of the facts of this case, but consists simply of isolated fragments of fact which the Department apparently feels are particularly helpful to its arguments. As previously noted, the First District adopted the comprehensive statement of facts in the circuit court's order and incorporated a portion of that statement of the facts into its opinion. For the convenience of the Court, that portion of the opinion is reproduced below.

> "2. Defendant, Standard Federal Savings and Loan Association, hereafter referred to as 'Standard Federal,' is a federal savings and loan association chartered by the Federal Home

Loan Bank Board (FHLBB) pursuant to the Home Owner's Loan Act of 1933, 12 U.S.C. 1464. It is a large mutual savings and loan association, located in Troy, Michigan. Defendant, K-Mart Corporation, hereafter referred to as 'K-Mart,' is a large chain of retain stores operating in many parts of the country including Florida, and is chartered in Michigan. Its individual stores are in the category of large department stores engaged in the marketing of a vast variety of goods and services. K-Mart Insurance Service, Inc., (KMI), a wholly owned subsidiary of K-Mart, is a Texas corporation. Both K-Mart and its satellite subsidiary KMI are qualified to do business in Florida. Neither K-Mart nor KMI is registered as a broker/dealer under Florida or federal securities law.

"3. A written agreement was entered into December 22, 1983 between Standard Federal and KMI whereby KMI agreed to introduce members of the public, who come on the premises of certain K-Mart Stores, to Standard Federal's 'certificates' and money market deposit accounts, and to solicit their interest in opening such accounts with Standard Federal. For such accounts

as are opened pursuant to KMI efforts, a 'finders fee' would be paid by Standard Federal to KMI. In paragraph 10 of the agreement are certain representations of KMI with regard to its corporate authority and other capacity to perform the contract. The contract was executed by the chief officers of both Standard Federal and KMI. Also, K-Mart contracted to act as guarantor of all obligations and duties of KMI, 'and hereby makes all of the representations and warranties set forth in paragraph 10 hereof with regard to its execution of this Guaranty.'

"4. Pursuant to these agreements, Standard federal seeks to market through KMI, operating in stores of K-Mart, including three of K-Mart's Florida stores, three types of money accounts involving the placing with Standard Federal funds in exchange for certain certificates evidencing the terms of the account. One type is designated 'K-Mart Certificate,' with a term of as short as 91 days or as long as 120 months, with a minimum balance of $1,000 for 12 months or less and a less amount for 13 to 120 months. It provides for interest at market-money rates and allows withdrawals, and has other feature

similar to accounts of this kind. There is also a 'K-Mart Bonus Rate Certificate' which provides a higher interest rate for a limited initial period, and the third type is designated 'K-Mart Fund,' with a minimum balance of $2,500 and maximum of $100,000 with certain bonus interest on minimum balances of $25,000 and $50,000. Deposits and withdrawals with certain check writing features are provided. In the cities in which the accounts were offered, there were advertizements in daily newspapers in large type proclaiming that at K-Mart there could be procured high yielding insured savings accounts and describing generally the certificates available. In both the newspaper ads and the brochures the K-Mart logo is used and emphasized. Standard Federal is identified, and also the fact of the accounts being insured by Federal Savings and Loan Insurance Corporation is given some publicity. However, the emphasis is on K-Mart and its location. Its motto 'the place to save,' is given display. KMI is not mentioned in the literature or advertizements.

"5. The mode of operation pursuant to the contract is fairly simple. Space is provided

at a K-Mart store for an employee or employees of KMI to contact members of the public interested in the savings accounts offered. Such employees explain to the prospects the contracts available, answer any questions that are asked, and, if a customer is responsive, helps fill out an application for the account desired, accepts checks, money orders or other negotiable instruments payable to Standard Federal, and forwards them to Standard Federal in Michigan to be processed. The contract is complete upon acceptance by Standard Federal but the account is back dated to the date the application is made at K-Mart. After forwarding the application and check to Standard Federal, there is no further participation of K-Mart, KMI or its employees in the account. Standard Federal communicates by mail or telephone with the customer and all further dealings of any kind are made directly between the customer and Standard Federal. There is no contract of any kind between the customer and K-Mart of KMI.... The contract arises upon acceptance by Standard Federal and the relationship of creditor and debtor is thereby created between those parties."

Standard Federal, supra, 463 So.2d at 298-99.

RESPONSE TO JURISDICTIONAL STATEMENT

The Department has asserted jurisdiction for this Court to entertain this appeal under Art. V §3(b)(1), Fla. Const., and Fla.R.App.P. 9.030(a)(1)(A)(ii), both of which deal with decisions of district courts of appeal declaring invalid a state statute...." Appellees believed that a finding that a state statute had been preempted by federal law did not constitute a declaration of "invalidity" within the meanings of these provisions and rules and filed a motion to dismiss the Department's appeal on that basis. This motion was denied by order of this Court dated March 22, 1985.

While that order treats the issue of this Court's jurisdiction to review the finding of federal preemption as to Standard Federal, serious jurisdictional issues remain regarding the Department's attempt to have this Court also review the First District's holding with respect to K-Mart, an entirely separate party. Although conceding that the preemption holding, the sole basis upon which it predicates jurisdiction for this appeal, extends only to Standard Federal, the Department nonetheless asserts that this Court should review the First District's finding that the activities of K-Mart did not violate §658.74, Fla.Stat. The Department so argues based on decisions such as Lissenden Co. v. Bd. of County Commissioners, 116 So.2d 632 (Fla.1959), which

hold that this Court is not confined to deciding solely the precise issue upon which it obtained jurisdiction, but may in its discretion decide other issues raised by the case. What the Department overlooks, however, is that these authorities treat the Court's jurisdiction to decide other issues arising between the same parties as to whose dispute the Court has acquired jurisdiction; they do not stand for the proposition that this Court should reach out and determine not only different issues, but also different issues involving separate parties, merely because they arise in the proceeding which is under review.

While K-Mart has been unable to locate authority precisely on this point, two recent decisions of this Court strongly suggest that the identity of the affected parties is highly significant to this Court's jurisdiciton. In both Petrik v. New Hampshire Ins. Co., 400 So.2d 8 (Fla.1981), and in Davis v. Mandau, 410 So.2d 915 (Fla.1981), this Court held that it lacked jurisdiction to consider cases certified by the district courts of appeal to be either of great public interest (Petrik) or in conflict with other decisions (Davis) on the ground that the party adversely affected by the ruling on the certified issue had failed to seek further review of the decision. In both cases, other parties had sought to invoke this Court's jurisdiction; the Court, however, rejected these efforts, holding that parties not adversely

affected could not predicate jurisdiction on the fact that the decision had been certified with respect to another litigant in the appeal.

The holdings of Petrik and Davis refute the Department's implicit assertion that the establishment of this Court's jurisdiction to decide anything about a case automatically confers jurisdiction to decide everything about the case, particularly where different parties are involved. It is anomalous in the extreme to suggest, as does the Department, that it should have the right to seek review of the adverse determination of its claims against K-Mart solely by virtue of the fortuity that it was also unsuccessful with respect to its claim against Standard Federal on an entirely different ground. This reasoning has particular force when it is considered that, had the First District ruled in the Department's favor with respect to K-Mart, K-Mart would not have had a correlative right to seek review in this Court because it could not have established that it had been adversely affected by the First District's holding as to Standard Federal.

For these reasons, Appellees respectfully request that this Court decline the jurisdiction over the claims by the Department against K-Mart, and limit itself to the preemption issue upon which the jurisdiction for this appeal is founded. In order to avoid delay, however, Appellees

have responded in this brief to the substantive aspects of the Department's claims against K-Mart as well as Standard Federal.

ISSUE ON APPEAL

[As restated by Appellees.]

WHETHER THE FIRST DISTRICT ERRED IN AFFIRMING THE ORDER OF THE CIRCUIT COURT DENYING THE DEPARTMENT'S MOTION FOR A PRELIMINARY INJUNCTION ENJOINING THE STANDARD FEDERAL/KMI PROGRAM?

ARGUMENT

THE FIRST DISTRICT CORRECTLY AFFIRMED THE CIRCUIT COURT'S DENIAL OF THE DEPARTMENT'S MOTION FOR A PRELIMINARY INJUNCTION ENJOINING THE OPERATION OF THE STANDARD FEDERAL/KMI PROGRAM.

This appeal originally arose from an order of the Circuit Court of Leon County denying the Department's request for a preliminary injunction against Standard Federal and K-Mart to enjoin a program under which a K-Mart subsidiary, KMI, solicited savings deposits for Standard Federal in the state of Florida. The Department claimed in its complaint that these solitication activities were in violation of §§658.74 and 665.1001, Fla.Stat., which, in general, prohibit non-banks and out-of-state savings and loan associations from conducting banking activities in the state of Florida.

With respect to Standard Federal, a federally-chartered savings and loan association, each of the five judges who have been involved in this case, from Judge Hartwell, who heard the Department's emergency request for a temporary restraining order, to Judge Willis who heard the motion for preliminary injunction, and to Judges Zehmer, Smith, and Joanos, who comprised the three judge panel of the First District Court of Appeal, have had no difficulty in disposing of the Department's contentions on the ground that any possible effect of the statutes upon which it relies has been preempted by federal law and regulations under the

Home Owner's Loan Act, 12 U.S.C. §1464. As the circuit court noted in its opinion, the preemptive effect of these laws on the operation of federally-chartered savings and loan associations has now been settled by decisions of the United States Supreme Court, lower federal courts, and this Court. (Ex. B, A 8-9).

The doctrine of federal preemption arises from the Supremacy Clause of the United States Constitution, which provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof...shall be the supreme Law of the Land...

U.S. Const., art. VI, cl. 2.

Under the Supremacy Clause, Congress may exercise its constitutionally granted powers to occupy a legislative field and thereby preempt state laws. Parker v. Brown, 317 U.S. 342 (1943). It is well established that where Congress has so chosen to occupy a field, the doctrine of preemption applies and federal law controls. Campbell v. Hussey, 368 U.S. 297 (1961). The test for determining whether Congress has chosen to occupy a field, and thereby preempt state regulation, is congressional intent or, in the case of a regulation promulgated under authority derived from Congress, explicit or implicit regulatory intent.

While an express intention to preempt may appear in the language of the statute or regulation itself, intent

to implicitly preempt an area also may be apparent from the existence of several different factors. In Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-158 (1978), quoting in part Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), the Supreme Court summarized those factors as follows:

> "The Congressional purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it.... Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.... Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.... Even if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute. A conflict will be found 'where compliance with both federal and state regulation is a physical impossibility...,' ...or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." [Citations omitted.]

Elsewhere the Supreme Court has said that state regulation is preempted where its enforcement "frustrates the full effectiveness of federal law." Perez v. Campbell, 402 U.S. 637, 652 (1971).

There are numerous court decisions applying these principles of federal preemption specifically to federal savings and loan associations. Indeed, federal regulation of the operations of federally chartered savings and loan associations, such as Standard Federal, is so pervasive

and comprehensive that the courts have frequently held it totally occupies the field, leaving no room for state regulation. Significantly, the most often-cited language occurs in People of California v. Coast Federal Savings & Loan Association, 98 F.Supp. 311 (S.D.Cal. 1951), a case, like this one, involving attempted state regulation of the manner of soliciting deposits by a federal association. There the Superintendent of Banks for the State of California had obtained a state court injunction against Coast Federal's solicition of deposits in a manner contrary to California law. Coast Federal then commenced an action in federal court seeking to set aside the state court injunction. In holding that the regulation of federal savings and loan associations was preempted by the federal government, the court reasoned:

> "Congress expressly delegated the duty and authority to the [Federal Home Loan Bank] Board to make policy, including the power to make rules and regulations for the organization, incorporation, examination, operation, supervision and regulations of such associations which delegations of authority is constitutional....
>
> The Board has adopted comprehensive rules and regulations concerning the powers and operations of every Federal savings and loan association from its cradle to its corporate grave.... These rules and regulations have the force and effect of law, and are noticed judicially."

98 F.Supp. at 316.

Thus, the Court determined that primary jurisdiction over the subject matter (i.e., the solicitation and receipt

of deposits by a federal savings and loan association) rested with the Federal Home Loan Bank Board (FHLBB) and that the state court had no jurisdiction at all over the case. It followed that the state court could not issue an injunction or impose penalties against the federal association under state statutes.

Subsequently, in Conference of Federal Savings & Loan Associations v. Stein, 604 F.2d 1256 (9th Cir.1979) summarily affirmed, 445 U.S. 923 (1980), the court held that California had no right to enforce its civil rights laws against federal associations even though the court recognized that state's great interest in enforcing civil rights laws and despite the fact that the state argued that its civil rights laws were not inconsistent with applicable FHLBB regulations. Even more recently, the language of Coast Federal, supra, was quoted with approval by the United States Supreme Court in Fidelity Federal Savings & Loan Association v. de la Cuesta, 458 U.S. 141, 145 (1982), a U.S. Supreme Court decision likewise affirming the preemptive effect of FHLBB regulations. In that case, the Supreme Court overturned a California court of appeal decision holding that the state could restrict the use of due-on-sale clauses in mortgage contracts issued by a federal savings and loan association.

In de la Cuesta, the Supreme Court found that regulations issued by the FHLBB which permitted the use of due-on-

sale clauses preempted state law on the subject, despite the argument that real property law is a traditional and special concern of the states, and despite the state's contention that it was not impossible for an association to comply with both the federal regulation and state law. In so finding, the Supreme Court said the FHLBB, as authorized by Congress, had made a determination embodied in its regulation, both in what was included and in what was omitted, which was aimed at advancing and insuring the economic soundness of the thrift industry. The state's attempt to place greater restrictions on the practices of federal associations, the Court said, "has created an obstacle to the accomplishment and execution of the full purpose and objectives of the due-on-sale regulations." 73 L.Ed.2d at 677. Because such an obstacle was barred by the preemption doctrine, state law, as applied to transactions involving federal associations, was required to give way to FHLBB regulation. The same principles, and the same result, apply here.

This Court has also acknowledged the same principles in Washington Federal Savings and Loan Association of Miami Beach v. Balaban, 281 So.2d 15 (Fla.1973). In Washington Federal, this Court considered the propriety of a restraining order issued by a Florida circuit court relating to the efforts of Washington Federal to open a branch office, allegedly in violation of Florida law. In holding that

the issuance of the temporary restraining order was in error, this Court stated, at 17:

> By virtue of Title 12 U.S. Code Section 1464 et seq., the Federal Government has pre-empted the regulation and supervision of federal savings and loan associations and the organization, incorporation, examination and operation of the same and location of offices and branch offices of federal savings and loan association.

These same precedents are cited by the First District in the analysis of the federal preemption issue. In its brief, the Department claims that it does not disagree with either the First District's summary or the case law cited to support it. Department's Brief, at 11. Having said this, however, the Department proceeds to make arguments which literally stand these precedents on their ear.

Perhaps most interesting is the Department's treatment of this Court's decision in Washington Federal, supra. Despite its protestations to the contrary, the Department clearly recognizes this to be an adverse decision since it expressly urges the Court to "reexamine" the decision. Department's Brief, at 12. Before the First District, the Department sought to distinguish Washington Federal by asserting that the decision involved nothing more than the internal operations and activities of a federally-chartered savings and loan association, and specifically its ability to participate in a hearing before the FHLBB. In response, Appellees pointed out that the Department's purported

distinction was trivial in that it was obvious that the restraining order was not direct at the hearing per se, but rather was issued because the branch office for which the savings and loan association sought authorization from the FHLBB would not have been permitted by state law.

Apparently recognizing that the case cannot be so distinguished, the Department now attempts to deal with this decision by attempting to "impeach" this Court's statement of facts in Washington Federal by referring to undisclosed documents from "the files of this court and the briefs of the parties." Department's Brief, at 13. From these unnamed records, the Department argues that the restraining order which was vacated by this Court in Washington Federal had not been sought by the comptroller but rather by a competing savings and loan association. While the Department's effort is itself highly improper, particularly since it has made no effort to offer the documents on which it relies into the record in this case,[1/] the long and short of the matter is that the Department has simply missed the point. The fundamental holding of Washington Federal is that the supervision and regulation of federal savings and loan associations is preempted by federal law

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1/ "It is the rule in this State that a court shall not take judicial notice of what may be contained in the record of another distinct case unless it be brought to the attention of the court by being made a part of the record." In Re Freeman's Adoption, 90 So.2d 109 (Fla.1956).

and is therefore shielded from interference predicated on state law claims; it is immaterial whether that interference is instigated by the complaint of a state official, such as the comptroller, or by a private party claiming rights under state law.

The Department's analysis of the other preemption precedents with which it claims not to disagree is equally unfounded. In contradiction to the plain language of these authorities, the Department claims to distill from them the conclusion that preemption occurs only where the federal authority has promulgated a regulation covering the specific subject matter and has expressly claimed its preemptive effect over state law. The Department then asserts that there are no federal regulations which meet the stringent test that it has formulated, and therefore, since it is not a "physical impossibility" for Standard Federal to comply both with these Florida statutes and the federal regulations dealing with the use of finders, there is no federal preemption.

The legal and logical flaws in this argument are legion. First, of course, it grossly misstates the test for determining whether preemption has occurred. Contrary to the Department's assertion, it is now settled that the test is not whether a federal agency has expressly claimed preemptive effect for its regulations or programs. Rather, as the numerous authorities cited in this brief have

established, the initial inquiry is whether federal law has "occupied the field" by providing a scheme of federal regulations so pervasive as to give rise to the inference that no room has been left for state regulation. If, and only if, this question is answered in the negative, the inquiry then turns to whether the state statute is in conflict with federal law, either because compliance with both is a physical impossibility or because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objects of the federal law or regulation. Ray v. Atlantic Richfield, supra, 435 U.S. at 158.

Even simply accepting the Department's contention that there is no blanket preemption of state law with respect to federal savings and loan associations, decisions such as Coast Federal and this Court's decision in Washington Federal have now established beyond dispute that one specific area in which state law has been preempted by federal law is the method and manner by which federally-chartered savings and loan associations may solicit deposits. Moreover, even if federal law had not occupied the field in this area, the FHLBB's authorization to Standard Federal to engage in this program, and the Department's attempt to prohibit it as violative of state law, are in conflict under any interpretation of that term. Under the Supremacy Clause, that conflict must be resolved in favor of federal law.

Indeed, the Department's assertion that preemption does not occur because it is not "physically impossible" for Standard Federal to comply both with the Florida statutes and the federal regulations authorizing finders (because federal regulations merely authorize, but do not require, federal savings and loan associations to utilize finders) is astounding in light of the recent rejection of just such an argument in de la Cuesta. There the Supreme Court made short shrift of a suggestion that federal regulation did not preempt California's restrictions on due-on-sale clauses because the regulations merely permitted but did not require a lender either to incorporate such a clause or to enforce it, and that the association could therefore comply with both laws by enforcing the clause only when permitted by state law. In this case, of course, the Department seeks not only to restrict the circumstances under which an activity authorized by federal law can be undertaken, but to prohibit Standard Federal from utilizing finders in Florida entirely.

Not only is the Department's legal analysis seriously flawed, but the facts upon which it predicates that erroneous analysis are also inaccurate. Contrary to the Department's bald assertions in its brief, the regulations pursuant to which Standard Federal is authorized to issue the type of deposit accounts which are the subject of this suit, and to utilize finders to locate deposits for such accounts,

do contain an express statement of their preemptive effect. The FHLBB regulations which govern the operation of federal savings and loan associations are found is 12 C.F.R. 545. 12 C.F.R. 545.2 provides:

> The regulations in this Part 545 are promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of the operation of Federal associations, as set forth in section 5(a) Home Owner's Loan Act of 1933, 12 U.S. 1464, as amended. This exercise of the Board's authority is preemptive of any state law purporting to address the subject of the operations of a Federal association. (emphasis added).

Under the regulations of 12 C.F.R. 545, Standard Federal is authorized to solicit accounts, including the kinds of accounts for which KMI is acting as a finder. The regulations issued by the Depository Institutions Deregulation Committee, which are incorporated by reference into 12 C.F.R. 545 (see, 12 C.F.R. 545.11), clearly permit Standard Federal to use a broker or finder to solicit a deposit and to pay a finder's fee. 12 C.F.R. 1204.110; 12 C.F.R. 1204.202. Thus, as both the FHLBB has specifically found with respect to this deposit account program, (A. 49) and as the First District found in its opinion, Standard Federal is specifically permitted by federal regulation to pay a finder's fee to KMI for soliciting deposits on its behalf.

The Department's final argument on preemption is that the multitude of decisions which would dictate the conclusion that federal preemption has occurred were rendered inoperative

by the passage of the Garn-St. Germain Depository Institution's Act of 1982, Pub.L.97-320, a statute which, under certain circumstances, establishes state law as a guide for the FHLBB in making interstate branching decisions. Based upon its factual assumption that the solicitation of deposits by KMI at certain K Mart stores constitutes the establishment of a "branch office" of Standard Federal at each such store, the Department concludes that the inclusion of this language evidences a Congressional intent to abandon the preemptive effect of federal law and to defer to state law with respect to interstate branching.

Once again, however, the Department's analysis is both factually inaccuracte and legally flawed. Perhaps the simplest answer to the Department's argument is that this deposit account program is not the operation of an interstate branch by Standard Federal within the meaning of the federal regulations upon which the Department relies, but rather is simply the long-authorized practice of solicitation of interstate deposits through third persons acting as finders or brokers. Incredibly, and inexplicably, the Department fails to inform the Court that the FHLBB, the agency charged with the interpretation of the Home Owner's Loan Act, including the Garn-St. Germain amendments, has specifically and expressly addressed the question of whether the operation of <u>this deposit account program</u> constitutes

the unauthorized operation of interstate branches and has concluded that it does not.

Prior to the initiation of this program, Standard Federal, through its counsel, wrote to the FHLBB on September 30, 1983, requesting an opinion from the Board to the effect that, among other things, "the proposed program will not violate any FHLBB or FSLIC regulations." (A. 43-47). On November 21, 1983, the Board responded to Standard Federal stating, in part:

> "The principal question raised in your letter is whether such activities of Standard Federal would constitute the opening of branch offices. We concur in your opinion that by entering into an agreement with the Finder as an independent contractor to introduce depositors, Standard Federal would not be establishing a branch office pursuant to § 545.92 (12 C.F.R. § 545.92). Because the Finder's activities will be limited to distributing promotional materials, assisting potential customers in completing applications, forms and signature cards and receiving initial deposits for forwarding to Standard Federal, and because the Time Deposits and MMDAs will not be issued or opened by the Finder or at the Finder's stores, the Finder will not operate as an "office" of Standard Federal, and will not be a branch.

(A. 49).

It is hornbook law, of course, that this administrative interpretation by the FHLBB is entitled to great weight and deference. As the United States Supreme Court phrased it in Udall v. Tallman, 380 U.S. 1, 16 (1965):

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.' *** When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."

Accord, Department of Insurance v. Southeast Volusia Hospital District, 438 So.2d 815 (Fla.1983).

In light of this definitive interpretation by the FHLBB, it is startling that the Department has the temerity even to claim that the operation of this program amounted to the establishment of branch offices in Florida by Standard Federal, particularly when it is forced to concede in its brief that neither the current statute nor Board regulations define a branch, and the sole support which the Department can muster for its position is a provision in the original 1933 Act, dealing solely with associations incorporated in the District of Columbia, which apparently defined a branch for those purposes as "any office...at which accounts are opened or payments are received...." Department's Brief, at 22-23. While the citation given by the Department in its brief is insufficient to allow the Appellees to find this provision, the Department itself admits that, on its face, it has absolutely nothing to do with interstate branches and was apparently repealed long before the Garn-St. Germain

amendments were even conceived. In addition, the use of the term "payments" in the definition would appear to connote repayments of indebtedness, as opposed to deposits, which would appear to be covered by the phrase "any office...at which accounts are opened." Since it is undisputed that accounts under this program are not opened at the K Mart stores, but rather at Standard Federal after the applications are transmitted, even this irrelevant definition would not apply. While the Department's bald and unsupported assertion that Standard Federal is operating an unauthorized branch is difficult enough to understand by itself, when coupled with the failure to inform the Court that the FHLBB has ruled precisely to the contrary, the argument can only be characterized as highly disingenuous.

The Department's legal analysis is no sounder than its factual claims. The Department's contention that the enactment of the Garn-St. Germain amendments amounted to an abandonment of federal preemption with regard to interstate branching was considered carefully and at length by the First District in its opinion, and rejected as inconsistent with the statute, regulations, and pronouncements of the FHLBB. Specifically, the First District opined:

> We do not find the Department's argument persuasive. Neither the amendments in Garn-St. Germain, 12 U.S.C. § 1464(r), nor the Board's proposed rule implementing those amendments, 48 Fed.Reg. 20,930 (May 10, 1983), evidences

> any congressional intent to defer to state law for the regulation of interstate branch operations of federal associations. Section 1464(r)(2)(C) merely incorporates state law as the standard to be followed by the Board in approving the establishment of a branch office in a state other than that where the home office is located. The Board's proposed rule at 48 Fed.Reg. 20,930 operates in a similar fashion. Both the statutory amendments and the rule support the implication that Congress still intends to preempt statue regulation of this matter. Both the statute and the rule make it clear that the Board will have exclusive jurisdiction to regulate interstate branching, whether such branches are established contrary to state law or in a manner consistent with state law.

Standard Federal, supra, 463 So.2d at 303-04

It is submitted that, for the foregoing reasons, the circuit court and the First District Court of Appeal were correct in their analysis that application of §§665.1001 and 658.74, Fla.Stat., to Standard Federal was barred by the doctrine of federal preemption. Rather, Appellees would suggest that the most serious preemption issue involved in this appeal is whether the federal preemption extends only to Standard Federal or also embraces the activities of K Mart and KMI. Appellees would submit that both logic and precedent require the conclusion that K Mart and KMI are so protected, at least with respect to the Department's attempts totally to preclude KMI from acting as a finder for Standard Federal in Florida.

The rationale which requires this result is that of the United States Supreme Court in Fidelity Federal v. de

la Cuesta, supra. There, after stating the broad outlines of the preemption doctrine, the court noted that a statute or regulation entitled to the benefit of the preemption doctrine must be free of "conflicting state limitations" on the practice addressed in the regulations. Id. at 159. Accordingly, the Court overturned a state restriction on the enforcement of due-on-sale clauses in mortgages issued by federal savings and loan associations, notwithstanding the fact that FHLBB regulations merely permitted, but did not require, federal savings and loan associations to insert such clauses in their mortgages.

The interpretation of Florida statutes §678.74 urged by the Department is in every sense a "conflicting state limitation" on the federally-authorized practice of using a finder to locate interstate deposits. By purporting to define the activities of a finder as engaging in the business of banking, and accordingly prohibiting any person other than a bank from engaging in them, the Department seeks to eliminate the use of finders in Florida although, as to federal savings and loan associations, their use is authorized by federal law. The Department is thus attempting to accomplish indirectly what it is clearly not permitted to do directly. Under controlling law, the Department is no more entitled to do this than would a state be entitled to prohibit indirectly the enforcement of due-on-sale clauses

by making it illegal for any attorney licensed in the state to file a complaint seeking enforcement of a mortgage containing such a clause.

This conclusion draws additional support from holdings that the scope of the preemption doctrine is determined by the subject matter of the federal statute or regulation in question, not the identity of the parties involved. Thus, in Free v. Bland, 369 U.S. 663 (1962), the Supreme Court held that a United States savings bond, held in coownership as allowed by federal regulations, should pass to the co-owner upon the death of the other co-owner as a federal regulation provided, despite community property law which would have compelled a different result. Similarly in Perez v. Campbell, 402 U.S. 637 (1971), the Court held that a state could not withhold a driver's license from one of its citizens, under a state law which allowed it to do so when a judgment arising out of a traffic accident had not been paid, because the citizen's debts had been discharged in bankruptcy under the federal bankruptcy laws. These decisions make it clear that federal preemption applies to the subject matter of federal regulation, whether or not a federally-regulated entity is directly involved.

The circuit court found it unnecessary to reach the issue of preemption as to K Mart and KMI because of its conclusion that their activities did not violate §658.74.

The First District, howevever, while reaching the same conclusion as to §658.74, went on to state that it "refused" to extend the doctrine of federal preemption to K Mart and KMI because federal law did not purport to regulate such finders or brokers. Specifically, the First District stated:

> Appellees, Standard Federal and K-Mart, also contend the federal preemption doctrine should be further extended to prevent the Department from attempting to enjoin K-Mart or KMI from acting as a finder or broker of deposits for Standard Federal because the use of such finders by federal savings and loan associations is specifically authorized by federal law. Appellees argue that the Department, by defining the activities of K-Mart as "engaging in the business of banking" and by attempting to prohibit such activities through the enforcement of section 658.74, Florida Statutes, is seeking to eliminate the use of finders in Florida contrary to federal law. We refuse, however, to extend the doctrine of federal preemption to K-Mart and KMI. Although federal law does authorize Standard Federal's use of finders in Florida, federal law does not purport to regulate such finders or brokers. Accordingly, K-Mart and KMI are fully subject to regulation by Florida laws regulating their activities as a finder or broker in Florida.

Standard Federal, supra, 463 So.2d at 304-05.

From this quotation, it appears that the First District may have been confused both as to the legal prerequisites for finding that federal preemption extended to K Mart and KMI and the ramifications that such a finding would have if made. It is apparent that the First District's principal concern was that a holding that preemption extended to K Mart and KMI would result in totally exempting these entities from any type of state regulation and that, since federal

law did not comprehensively regulate their operations, such finders would be left effectively unregulated.

That, of course, is not the case. As previously discussed, in situations in which federal regulation is comprehensive or circumstances otherwise indicate that regulation of a particular activity is committed to federal law, state regulation, even of a complementary nature, is not permitted. However, when federal law has not "occupied the field," supplemental state regulation is generally allowed where it does not conflict with the federal regulation or prevent the accomplishment of its objectives and purposes. Thus, a finding that preemption has occurred does not necessarily mean that no state regulation of any kind is permissible.

In fact, the issue of the extent to which the state may regulate finders and brokers, such as with respect to financial responsibility, is simply not involved in this appeal and would arise only if and when the state were to attempt such regulation. Rather, the sole preemption issue presented by this appeal as to K Mart and KMI is whether federal law preempts the Department's efforts to use §§665.1001 and 658.74 not to regulate, but to absolutely prohibit Standard Federal and other federal savings and loan associations from utilizing finders in Florida. Appellees would suggest that the answer to that question

necessarily follows from the First District's conclusion that federal law authorizes the use of such finders. Since it does, the Department's attempt to prohibit the use of such finders in this state directly conflicts with the federal law and is therefore preempted.

As a second distinct argument in its brief, the Department raises the contention that the First District erred in concluding that K Mart and KMI's activities did not violate §658.74, Fla.Stat. Specifically, the Department argues that the First District erred in relying on this Court's holding in Greater Miami Financial Corp. v. Dickinson, 214 So.2d 874 (Fla.1968), for this conclusion because the statute construed by this Court in Greater Miami was subsequently amended.

Initially, Appellees would note that this point is not even involved in the appeal in the event that this Court declines to accept jurisdiction over it for the reasons set forth in Appellees' Response To Jurisdictional Statement, or if this Court concludes that federal law preempts the Department's attempts to prohibit KMI from acting as a finder for Standard Federal in Florida. If this point should be reached, however, it is clear the decision of the First District on this issue was correct.

Before the circuit court, the First District, and now this Court, the Department claims that the activities

of K Mart and KMI violate §658.74, Fla.Stat., which, among other things, provides that no person other than a bank shall "engage in the business of soliciting or receiving funds for deposit...." Both the circuit court and the First District Court of Appeal disposed of this contention on the authority of this Court's decision in Greater Miami, supra, construing a similarly-worded predecessor statute to §658.74. Greater Miami involved a challenge to the activities of a Florida savings account broker who assisted his customers in relocating their money into out-of-state savings and loan associations at more favorable interest rates. Just as in the present case, the Florida comptroller sought to attack the arrangement on the grounds that the activities of the broker constituted banking in violation of §659.52(1), Fla.Stat., the predecessor statute to §658.74. Concluding that the actions of the broker had "none of the characteristics of a savings and loan association," this Court interpreted §659.52(1) as "obviously designed to prevent non-banking institutions from exercising the powers or performing the functions of banks." Id. at 877. The Court then found the activities of the broker clearly outside the scope of the statute, stating:

> The appellant does not establish a debtor/creditor relationship with its customers. Unlike a bank, it does not accept deposits for which it has any responsibility of redemption. It does not

> pay interest, issue or honor checks drawn upon it, issue savings account passbooks, lend money, charge interest, or issue monthly statements or any other evidence of indebtedness by or to its customers.

214 So.2d at 876.

The Department concedes in its brief that the activities of KMI under the Standard Federal deposit account program are legally indistinquishable from those in Greater Miami.2/ Under this program, KMI's functions are acquainting potential depositors with these accounts, assisting those persons who indicate an interest in opening such an account to complete the necessary application, signature card and proxy card provided by Standard Federal, and accepting for forwarding to Standard Federal an initial deposit in the form of a check or money order made payable only to Standard Federal. All further transactions and contacts with respect to the account, including confirmations, subsequent deposits, withdrawals, questions and periodic statements are handled exclusively between the depositor and Standard Federal. Thus, just as in Greater Miami, KMI does not establish a debtor/creditor relationship with its customers, does not accept deposits for which it has any responsibility of redemption, does not pay interest, issue or honor checks

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2/ "The factual situation in Greater Miami, supra, is almost identical to the present K-Mart program." Department's Brief, at 28.

drawn upon it, issue savings account passbooks, lend money, charge interest, or issue monthly statements or any other evidence of indebtedness by or to its customers. On these undisputed facts, Greater Miami was found dispositive of the Department's claims of a violation of §658.74 by K Mart and KMI.

The Department's sole response is to assert that the Greater Miami decision is no longer applicable because of a minor wording change which occurred when §659.52(1), the statute construed in Greater Miami, was reenacted as §658.74 in 1980. The earlier statute provided that no person other than a bank shall "solicit or receive deposits....", while the present version states that such persons shall not "engage in the business of soliciting or receiving funds for deposit...." The Department claims in its brief that this change in statutory language was a direct reaction by the Florida Legislature to the decision in Greater Miami in which the legislature "corrected its prior omission" and eliminated any requirement of a debtor/creditor relationship under the revised unauthorized banking statute.

Once again, however, there are several reasons why the Department's interpretation of the reason for the change in statutory language makes no sense. The first, as noted by the First District, is that the statutory amendment upon which the Department relies occurred literally more than a decade after the decision in Greater Miami. As the First

District observed, this time lag alone belies any intention on the part of the Legislature to overrule the Greater Miami decision.

A second reason, also noted by the First District, is that the rationale utilized by this Court in Greater Miami is equally applicable to both the old and new statutes. The fundamental underpinning of the decision in Greater Miami was that the unauthorized banking statute was designed to prevent non-banks from performing the traditional function of banks. The brokering of savings deposits is not, as this Court observed in Greater Miami, such a traditional banking function. If the Legislature had intended to overrule this rationale, and to utilize the unauthorized banking statute to outlaw activities not normally considered banking functions, it certainly would have done so in much clearer terms.

The long and short of the matter is that this Court's interpretation of §659.52(1) in Greater Miami was correct and that this rationale continues to apply equally to §658.74. In fact, the Department's purported reading of the statute is absurd. If the Department is really serious in its contention that this statute was intended to proscribe any person other than a bank from receiving funds which are ultimately destined for deposit in a financial institution, it would mean that the United States Post Office, every

carrier or armored car service in the state of Florida, and indeed every person who routinely makes bank deposits for someone else, is acting in violation of this law. Patently, the statute means no such thing. Rather, as this Court noted in Greater Miami:

> This statute is obviously designed to present non-banking institutions from exercising the powers or performing the functions of banks. The context in which prohibition of deposit solicitation is placed clearly suggests that it relates to one of several aspects of the banking business. The prohibition of the conduct of other aspects of the banking business, all included in the same sentence with that relating to deposits, rather definitely reveals a legislative intent to deal with deposits in the orthodox banking connotation as the placing of money in the hands of a financial institution for safekeeping with a resultant creation of a debtor-creditor relationship.

214 So.2d at 877.

Perhaps the ultimate irony, however, is that the Department's absurd construction of §658.74 does not even apply to KMI. While the Department on several occasions baldly states that KMI is "receiving funds for deposit," it is undisputed that the only instruments that KMI accepts as deposits under this program are checks or money orders made payable solely to Standard Federal. Thus, KMI does not, and indeed cannot, reduce any of the funds represented by these checks or money orders to its possession and accordingly, is not "receiving funds for deposit." Thus, while in its zeal to halt this program the Department has championed a construction of §658.74 which would make

lawbreakers of uncounted Florida citizens, its effort fails to reach its sole intended target.

Finally, it is appropriate to note that this argument was made for the first time before the First District Court of Appeal, and was not raised before the circuit court. Since this Court's decision in Dober v. Worrell, 401 So.2d 1322 (Fla.1981), it is clear that such an argument is therefore improper.

In concluding, it is incumbent upon Appellees to address briefly one final aspect of the Department's argument. In a highly improper effort to urge this Court accept its interpretation of the 1980 amendments to the unauthorized banking statute, the Department argues that if the Court fails to accept its reasoning it will create a "potentially dangerous situation" which is "open to fraud and collusion" as a result of which "boiler-room operators and other fringe-level promoters will leap at the opportunity to create new and attractive 'Ponzi schemes.'" Department's Brief, at 30.

Such arguments are not only improper but outrageous and unbecoming to an agency of the state. First, they are factually outrageous in the context of this case in light of Standard Federal's standing as one of the largest federal savings and loan associations in the United States and a member of the Federal Savings and Loan Insurance Corporation, and K Mart's status as the second largest retailer in the

United States. They are even more outrageous when offered in a case in which the Department is well aware that it has stipulated to the lower courts that it is making no claim of fraud whatever with respect to Appellees' deposit account program.

The Department's arguments are also outrageous from a legal standpoint. While the historical facts belie the Department's purported concerns about the potential of abuse, even if fraud were to materialize in such a program, the proper approach would be to deal with it directly and not by the Department's approach of "throwing out the baby with the bath water." Stated simply, depriving Florida citizens of alternatives for investing their savings under the guise of preventing possible fraud makes no more sense than avoiding traffic injuries by banning automobiles or preventing medical malpractice by refusing to license doctors.

CONCLUSION

For the reasons stated, it is respectfully submitted that the Department's claims as to Standard Federal must be found to be barred by the doctrine of federal preemption. As to K Mart, this Court should decline to accept jurisdiction to review the decision of the First District Court of Appeal, find that the Department's claims are likewise barred by federal preemption, or alternatively that the activities

of K Mart are not in violation of §658.74, Fla.Stat. Accordingly, the order of the First District Court of Appeal denying the Department's request for a preliminary injunction against Appellees should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail this 1st day of May, 1985, to WALTER W. WOOD, ESQUIRE, Office of the Comptroller, The Capitol, Suite 1302, Tallahassee, Florida 32301.

Charles P. Schropp