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~~STATE OF FLORIDA~~ DEPARTMENT OF BANKING AND FINANCE, Appellant,	CASE NO. 66,331
vs.	1st DCA CASE NO. AY-101
STANDARD FEDERAL SAVINGS & LOAN ASSOCIATION and K-MART CORP., Appellees.	

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The parties to these proceedings and their status in the lower courts are as follows:

The State of Florida Department of Banking and Finance, ex rel. Gerald Lewis as Comptroller and Head of the Department, was the Plaintiff in the trial court and the Appellant in the Court of Appeal. References to the Department of Banking and Finance as used herein will be to the "DEPARTMENT."

Standard Federal Savings and Loan Association was one of two Defendants in the trial court and one of two Appellees in the Court of Appeal. As used herein references to Standard Federal Savings and Loan Association will be to "STANDARD."

K-Mart Corp. was one of two Defendants in the trial court and one of two Appelles in the Court of Appeal. As used herein references to K-Mart Corp. will be to "K-MART."

K-Mart Insurance Services, Inc. is a Texas Corporation and a wholly owned subsidiary of K-Mart. It was not a party to these proceedings in either the trial court or the Court of Appeal. As used herein references to K-Mart Insurance Services, Inc. will be to "KMI."

An Appendix containing several exhibits is attached to and incorporated by reference as a part of this Brief. References to the Appendix will be by use of an Exhibit Reference and/or the appendix page number as "Exhibit B, A-22." All pages of the Appendix have been sequentially numbered.

STATEMENT OF CASE

On January 30, 1984, the DEPARTMENT filed a Complaint for Preliminary and Permanent Injunction against the Appellees in the Circuit Court of the Second Judicial Circuit, Leon County, Florida. The DEPARTMENT also filed its Verified Motion for Temporary Restraining Order and was granted a hearing that same afternoon. The Appellees were provided with notice prior to filing. They were present, offered testimony, and made argument to the court at the hearing on the DEPARTMENT'S Motion for Temporary Restraining Order. On January 31, 1984, the Honorable Donald O. Hartwell entered an Order Granting In Part and Denying In Part Plaintiff's Motion for a Temporary Restraining Order and Order to Show Cause. (Exhibit A, A-1). Said Order indicates that Judge Hartwell was "of the view" that as to STANDARD, the doctrine of federal preemption may apply, but as to K-MART, the DEPARTMENT showed a likelihood of success on the merits. A Temporary Restraining Order was entered as to K-MART only.

Said Order further provided that Appellees were to appear, on February 8, 1984, before the Honorable Ben C. Willis in Quincy, Florida, to show cause why a preliminary injunction should not issue.

On February 8, 1984, a hearing was held in Quincy, before the Honorable Ben C. Willis. On February 17, 1984, Judge Willis entered his Order Denying the Motion for Preliminary

Injunction and vacating the Temporary Restraining Order previously issued. (Exhibit B, A-5). On March 15, 1984, the DEPARTMENT filed its Notice of Appeal of a Non-Final Order with the trial court.

Thereafter, Briefs were filed in the District Court of Appeal, First District (Case No. AY-101) and oral arguments were heard on July 23, 1984. The Court of Appeal issued its Opinion on December 11, 1984 affirming the Orders of the trial court. (Exhibit "C", A-14). See also Vol. 9, Florida Law Weekly, December 14, 1984, at page 2578.

STATEMENT OF FACTS

The Court of Appeal entered a rather extensive finding of fact in its opinion at page two (A-14). The Court, however, overlooked the important element in the K-Mart contract whereby K-MART was bound to solicit deposits exclusively for STANDARD and the fact that receipt of funds by K-MART constituted receipt by STANDARD. Briefly stated the facts are as follows.

STANDARD is a federally chartered mutual savings association with its principal place of business in Troy, Michigan. STANDARD is not otherwise authorized to engage in the business of a bank or savings and loan association in the State of Florida. K-MART is a Michigan corporation engaged in the business of retail sales. K-MART is authorized to conduct the business of retail sales in Florida. KMI is a Texas insurance corporation which is also authorized to do insurance business in this state. Neither K-MART nor KMI are authorized to engage in the business of a bank or savings and loan association by either state or federal law. Neither K-MART nor KMI are licensed or regulated by the federal Securities and Exchange Commission or the State of Florida to offer for sale or to sell securities in this state in or from offices in this state.

On December 22, 1983, STANDARD contracted with K-MART,

through its wholly owned subsidiary KMI, to engage in a joint venture whereby agents of KMI, at selected K-Mart locations in the State of Florida, would, through advertising and promotional materials paid for by STANDARD, solicit and receive funds for deposit, from members of the general public, for subsequent transmittal to STANDARD. The locations selected were: (1) Ft. Lauderdale; (2) Orlando; and (3) St. Petersburg. The funds, as solicited and received, were to be placed in three basic types of accounts: (a) K-MART Certificate; (b) Bonus-Rate Certificate; and (c) K-MART Money Market Fund. K-MART appears as guarantor, on behalf of KMI, on the contract. The program commenced on January 16, 1984. Between that date and the date the Temporary Restraining Order was issued (i.e., two week period), STANDARD received approximately four million dollars ($4,000,000), through K-MART, for deposit, in their institution from citizens of this state.

With minor modifications in advertising and promotional material, STANDARD, K-MART, and KMI, pursuant to the lifting of the Temporary Restraining Order by the Honorable Ben C. Willis, reinstituted the program. Funds for deposit are currently being solicited and received by K-MART and KMI, from citizens of this state, for transmittal to STANDARD pursuant to the joint venture arrangement of the Appellees.

JURISDICTIONAL STATEMENT

One of the principal issues involved in both the trial court and the appellate court was the question concerning the application of state law (Sections 658.74 and 665.1001, Florida Statutes) to a federally chartered savings and loan association. In the trial court, Judge Hartwell was "of the view" and Judge Willis "ruled" that these state laws were invalid as to STANDARD under the doctrine of federal preemption inherent in the supremacy clause of the federal constitution. See Judge Hartwell's comments in Exhibit A, A-2, at paragraph 4 and Judge Hartwell's conclusions in Exhibit B, A-8, at paragraph 9, et seq.

The Court of Appeal in its Opinion (Exhibit C, A-16 et seq.) discussed at some length the question of federal preemption and affirmed the findings of the trial court. The Court of Appeal specifically cited Article VI of the United States Constitution (A-16) as the basis for its Opinion. Both the trial court and the appellate court have therefor held that Section 658.74, Florida Statutes, as applied by the DEPARTMENT, is invalid insofar as it attempts to prohibit an out-of-state, federally chartered savings association from engaging in the business of "soliciting or receiving deposits" in this state by an agent or broker.

The Court of Appeal also held that Section 665.1001, Florida Statutes, was invalid under the preemption doctrine insofar as it attempted to prohibit a foreign savings association from operating a branch office in Florida.

This Court therefore has jurisdiction to hear this appeal under Article V, Section 3 (b)(1), of the Florida Constitution as amended in 1980 and Rule 9.030 (a)(1)(A)(ii), Florida Rules of Appellate Procedure, Snedeker v. Vernmar, Ltd. 151 So.2d 439 (Fla. 1963) at page 441, affirmed and followed in Reams v. State, 279 So. 2d 839 (Fla. 1973) at page 840; Richman v. Shevin, 354 So. 2d 1200 (Fla. 1978) at page 1201; and Matthews v. State, 363 So. 2d 1066 (Fla. 1978) at page 1068.

Since this Court has jurisdiction to hear this appeal under Rule 9.030 (a)(1)(A)(ii) on constitutional grounds, it may proceed to determine and dispose of all other issues arising out of the opinions of the courts below and herein properly presented. Lissenden Co. v. Bd. of County Commissioners, 116 So. 2d 632 (Fla. 1959) at page 635; Mournier v. State, 178 So. 2d 714 (Fla. 1965) at page 715; Williston Highlands Development Corp. v. Hogue, 277 So.2d 260 (Fla. 1973) at page 262; and State v. Carr,283 So. 2d 99 (Fla. 1973) at page 101.

THE ISSUES ON APPEAL

Fundamentally, the issues in this appeal are relatively simple and straightforward. As stated by the Court of Appeal (A14) they are:

1. Whether the circuit court erred in finding that "the federal government, by virtue of Title 12, U.S. Code, Section 1464, et. seq., has preempted the regulation and supervision of federal savings and loan associations" to the extent that Standard Federal's marketing program cannot be controlled or regulated by state law?

2. Whether the circuit court erred in finding that, pursuant to Greater Miami Financial Corp. v. Dickinson, 214 So.2d 874 (Fla. 1968), the activities of K-Mart and its subsidiary do not constitute "the business of soliciting or receiving funds for deposit," in violation of Section 658.74, Florida Statutes (1983), which restricts such activities to state or national banks.

However, the application of "federal preemption" is not a simple matter and cannot be determined by the application of broad general statements such as this Court's comments in Washington Federal Savings & Loan Assn. of Miami Beach v. Balaban, 281 So.2d 15 (Fla. 1973) nor by the "cradle to the grave" comments of the federal trial court in People of State of California v. Coast Federal Savings & Loan Assn., 98 F. Supp. 311 (S.D. Ca. 1951). The Court of Appeal held that the Washington Federal case was controlling (page 8 of the Opinion, A-20) in this matter despite the federal limitations placed on interstate branching by federally chartered savings associations in the Garn-St. Germain amendments to the Home Owners Loan Act (A-8) which occurred after this Courts' decision in Washington Federal.

Secondly, the Court of Appeal has held that the 1980 amendments to the Florida Financial Code wherein the language of former Section 659.52(1), Florida Statutes that prohibited "the solicitation and receipt of deposits" was changed to the language of the present statute, Section 658.74(1), Florida Statutes, to prohibit the "solicitation and receipt of funds for deposit" was of no force or effect under the interpretation of the former statute by this Court in Greater Miami Financial Corp. v. Dickinson, 214 So.2d 874 (Fla. 1968)

As to the first issue, the Department contends that the former broad powers of the Board originally given by the Home Owners Loan Act of 1933 (12 U.S.C. Section 1464, et seq.) have been substantially curtailed by the prohibitions against interstate branching contained in the Garn-St. Germain Depository Institutions Act of 1982. Public Laws 97-320, U.S. Code Cong. & Admin. News, Vol. 1, page 1504, Oct. 15, 1982. Federal preemption of state law is not taken lightly and is not something which should be inferred from passive agency action. If the Board does, in fact, have the power to preempt state law, then such preemption must be done by some positive act such as the adoption of specific regulations dealing with the specific topic which is the subject of state regulation. N.Y.S. Dept. of Social Services v. Dublino, 413 U.S. 405, 93 S.Ct. 2507 (1973) at page 2513 in 93 S.Ct. and cases therein cited.

The Department further contends that the 1980 amendments to Section 658.74(1), Florida Statutes, were of critical impact. The general rule that statutory amendments are of substantial significance and must be given full force and effect must be applied in this matter. This Court's opinion in Greater Miami Financial, supra, should be revised in light of this statutory change.

The issues in this matter, restated, would therefore appear to be as follows:

I. WHETHER THE COURT OF APPEAL ERRED IN HOLDING THAT FEDERAL LAW OR REGULATION PREEMPTED FLORIDA LAW PROHIBITING THE SOLICITATION OF DEPOSITS OR OPERATING A BRANCH IN FLORIDA BY A FOREIGN, FEDERALLYCHARTED, SAVINGS ASSOCIATION.

II. WHETHER THE COURT OF APPEAL ERRED IN HOLDING THAT THE 1980 AMENDMENT TO SECTION 658.74(1), FLORIDA STATUTES, HAD NO EFFECT ON THIS COURT'S OPINION IN GREATER MIAMI FINANCIAL CORP. V. DICKINSON, 214 So.2d 874 (FLA. 1968).

ARGUMENT I

The Court of Appeal summarized the doctrine of "federal preemption" on pages 4, 5, 6 and 7 of its opinion (A-16, 17, 18 and 19). The Department does not disagree with this summarization nor with the citations in support thereof. Fundamentally the DEPARTMENT does argue that the Home Owners Loan Act of 1933, 12 U.S.C.A. Section 1464 et seq. did not automatically preempt all state law concerning the operation, organization, management or control of federally chartered savings associations.

All federal decisions which appear to hold a contrary view, in support of preemption, are founded on the basic statutory provision creating the federal savings and loan system. Congressional intent is found in Title 12, U.S.C. Section 1464(a) and reads as follows:

> (a) In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations, or Federal savings banks, and to issue charters therefor, giving primary consideration to the best practices of thrift institutions in the United States. The lending and investment authorities are conferred by this section to provide such institutions the flexibility necessary to maintain their role of providing credit for housing.

The Board referred to is the Federal Home Loan Bank Board. It should be noted that Congress granted the Board plenary authority,

by rules and regulation, to provide for federal associations. The law does not contain any specific "preemption" clause. It does not deal with such subjects as interest rates, qualification of officers and directors, nor the subjects of advertising or solicitation of deposits. State courts have authority to determine the validity of proxies of federal associations since the Board has not acted in this area. Pearson v. Federal Savings and Loan Assn., 149 So.2d 891 (Fla. 2d DCA 1963). The Act therefore is not all encompassing or totally pervasive in scope and does not regulate every aspect of a federal association from its "cradle to its grave." Coast Federal, supra, Quaere, has the Board, in fact, by rule or regulation, preempted state law concerning the use of finders by federal associations?

While the Act may have given the Federal Home Loan Bank Board broad discretionary power to preempt state law, there was no blanket preemption. Obviously federal associations are subject to state and local laws relating to zoning, sign ordinances, real estate taxes, sales taxes, fire codes, etc. See Justice Blackmun's comments in de la Cuesta, infra., in 102 S.Ct. 3014 at page 3029, and Justice O'Connor's concurring opinion at page 3032. Consequently, until the Board, by some clear and unambiguous action, evidences an intent to regulate the particular sphere of action, state and local laws remain effective and can be enforced in state courts. See N.Y.S. v. Dublino, supra,

This Court should reexamine its decision in the Washington Federal case, supra, and restrict the broad language used to that limited factual situation.

From the opinion of this Court as reported in the journals, the Washington Federal case, supra, appears based on an injunction issued at the behest of the Comptroller of the State of Florida. See the factual statement of this case in 281 So.2d 15 (Fla. 1973) at page 15. From the files of this Court (Case No. 43,973) and the briefs of the parties, the Washington Federal case, in fact, involved a dispute between Washington Federal Savings & Loan Assn.; Chase Federal Savings & Loan Assn and American Savings and Loan Assn. for permission to open a branch office at the Kane Concourse in Miami, Florida. The initial action was a Petition for Declaratory Statement filed by Washington Federal in state court against the State Comptroller requesting a declaratory judgment and an injunction to enjoin the Comptroller from proceeding with the hearing on American's branch application.

The trial court (Judge Whitworth) issued an injunction and the Comptroller appealed. The Third District Court of Appeal reversed with instructions to dismiss the petition with prejudice. (Case No. 73-413). In the meantime, American Savings had filed a petition to intervene. On American's application,

the Chancellor determined that American had suffered irreparable harm and issued a temporary restraining order directing Washington Federal from proceeding before the Federal Home Loan Bank Board on its application for a branch. The injunctions issued by the trial court were not requested by the Comptroller and the Comptroller was not attempting to interfere with the conduct of the Board's affairs. The preemptive language used by this Court in that decision was directed at the jurisdiction of the state circuit court to interfere with the Board's functions as the primary regulator of a federal association. It did not deal with any conflict between state and federal law or any interpretation of the pervasive nature of the federal law as related to specific state statutory prohibitions.

The Court of Appeal in its opinion at page 7 (A-19) cites language from People of State of California et al. v. Coast Federal Savings & Loan Assn., 98 F. Supp. 311 (S.D. Ca. 1951) at page 316, as follows:

> Congress expressly delegated the duty and authority to the Board to make policy, including the power to make rules and regulations for the organization, incorporation, examination, operation, supervision, and regulation of such associations which delegation 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.

The Court of Appeal then goes on to note that this language from the federal trial court's opinion had been approved by the U.S. Supreme Court in Fidelity Federal Savings & Loan Assn. v. de la Cuesta, 458 U.S. 141, 102 S.Ct. 3014, (1982). See 102 S.Ct. 3014 at page 3018. What the Court of Appeal has overlooked, is that both of these federal opinions acknowledged that the Home Owners Loan Act authorized the Board to adopt rules and regulations preempting state law and that the Board, in each instance, had adopted rules or regulations dealing with the specific point in question.

In People v. Coast Federal, supra, the issue involved advertising used by the association which allegedly implied that the association was a "bank" in violation of California law. The court found that the Board had adopted regulations concerning advertising and had supplemented these regulations with a handbook. As a result, the Board had preempted contrary state laws. The use of the "cradle to the grave" concept expressed in this opinion was nothing but dicta and should not be carved in stone.

In de la Cuesta, the question involved enforcement of "due-on-sale" clauses in mortgage foreclosures. Again the Board had acted by adoption of regulations and these regulations specifically stated their preemptive effect. [12 C.F.R. Section 545.8-3(f.)(1982) sections now reserved, 100 Fed. Reg. 23032 (1983)] Consequently California real estate law which

appeared to prohibit enforcement of such clauses was deemed to be preempted by the Boards' Regulations. Until de la Cuesta, Florida courts had also refused to permit enforcement by federal savings associations of due-on-sale clauses without a showing of impairment of the security in spite of the Boards' Regulations. First Federal Savings Asso. of Englewood v. Lockwood 385 So.2d 156 (Fla. 2d DCA 1980) and cases therein cited in footnotes 6 and 7 on page 159. Preemption was not an issue in these Florida cases.

Furthermore the U.S. Supreme Court in de la Cuesta acknowledged that the Board's powers were not limitless and that the cited language from People v. Coast Federal was not to be construed literally. See majority opinion in 102 S.CT. at page 3029, footnote 14 on page 3025 and Justice O'Connor's opening remarks in her concurring opinion at page 3031.

Contrary to the findings of the Court of Appeal on page 13 of its opinion (A-25), there is no specific federal law nor is there any regulation of the Board that authorizes (or denies) STANDARD the right to employ or use K-MART, or anyone else, as a finder for the solicitation of funds for deposit in Michigan from Florida residents. The Court of Appeal did not cite any federal law or regulation in support of its conclusion.

The DEPARTMENT in the Appendix to its Initial Brief in the Court of Appeal included correspondence from the Home

Loan Bank Board and Standard Federal concerning the then proposed K-MART program. The Board stated in its letter to STANDARD dated 11/21/83 that the K-MART program would not constitute a branch under Section 545.92 (12 C.F.R. Section 545.92) and that finders fees were authorized under Sections 1204.110 and 1204.202 (12 C.F.R. Section 1204.110 and 12 C.F.R Section 1204.202) and that the Board had preempted state law by Section 545.02 (12 C.F.R. Section 545.02). Appellees in their Reply Brief filed in the Court of Appeal cite these Regulations and 12 C.F.R. Section 545.11 as the sole source of control or regulation by the Board over the use of interstate finders and hence the source of federal preemption over state law in this specific area.

The Regulations above referred to are all found in Title 12, Banks and Banking, of the Code of Federal Regulations. Chapter V contains the regulations of the Federal Home Loan Bank Board and Chapter XII contains the regulations of the Depository Institutions Deregulation Committee (DIDC). Copies of the pertinent portions of these regulations are included as Exhibit "D" of the Appendix at pages 30-42 inclusive.

Section 545.2 (12 C.F.R. Section 545.2) (A-36) relates solely to the preemptive effect under the Home Owners Loan Act of 1933, 12 U.S.C. 1464 et seq. of the FHLBB regulations. It is entirely silent on the subject of finders. Sections 1204.110 and 1204.202 (12 C.F.R. Sections 1204.110 and

1204.202) (A-41, 42) are regulations of the Depository Institutions Deregulation Committee not the Home Loan Bank Board. These DIDC regulations do not authorize or prohibit the use of finders but rather specify the manner of accounting for payment of finders fees if finders are used. Appellees claim that the DIDC regulations have been adopted by the FHLBB in Section 545.11 (12 C.F.R. 545.11), however, this regulation deals with insured accounts not incorporation by reference. (A-37)

If the Court of Appeal is correct that a court should exercise extreme caution before finding preemption based solely on agency action, Court of Appeal Opinion page 6 (A-18), these regulations cannot, be interpreted as dealing with finders and thus preemptive of state law. The Board has not regulated finders as it did advertising in People v. Coast Federal and "due-on-sale" clauses as it did in de la Cuesta. Hence there is no federal preemption and Sections 665.1001 and 658.74 may be enforced against STANDARD in state court.

The Court of Appeal in its opinion at page 5 (A-17) appears to agree with the DEPARTMENT, that there is no specific preemption in the Home Owners Loan Act and that the Board has not attempted, by rule or regulation, to provide for the use of finders. The Court of Appeal therefore has found preemption based on the pervasive nature of the Act or on a conflict between the state and federal regulatory schemes. The Court

of Appeal cites the following observations by the U.S. Supreme Court in Ray v. Atlantic Richfield Co., 435 U.S. 151, 157-58, 98 S.Ct. 988, 994 (1978):

> 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 States 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 is actually conflicts with a valid federal statute. A conflict will be found "where compliance with both federal and state regulations 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.

which in turn was citing these principals from Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947). While these two cases are undoubted authority for the above quoted principals of law, it is difficult to understand how they can be applied to the present situation.

In Ray the questions concerned tug escorts or pilots in Puget Sound required by the newly created State of Washington's Tanker Law vs. the federal Ports and Waterway Safety Act of 1972. In striking down portions of the Washington law, the Supreme Court found an actual preemption in the federal law dealing with coastwise pilots. See 98 S.Ct. at page 995. However, the Supreme Court also ruled that in the absence of

appropriate regulations by the Secretary of Transportation, as authorized by federal law, the Washington requirement of tug escorts would remain in effect. Exactly the same as the DEPARTMENT'S contention in this matter.

In Rice the questions involved the United States Warehouse Act supervised by the Secretary of Agriculture vs. regulations issued by the Illinois Commerce Commission. The Court found that the 1931 amendments to the Warehouse Act specifically exempted federal licensees from compliance with state law. See 67 S.Ct. at page 1148 continuing on 1149 and the further comments of Justice Douglas on page 1153.

Ray therefore stands for the proposition that while the Board may have authority to preempt state law, there is no preemption until such action has been taken. There was specific preemption in Rice not merely one created by conflict or pervasiveness.

While there is no mechanical formula for the determination of a conflict between state and federal laws as regards preemption, in de la Cuesta, supra (102 S.Ct. at page 3022) it was said:

> Such a conflict arises when "compliance with both federal and state regulation is a physical impossibility" Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217, 10 L. Ed. 2d 248 (1963) or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L. Ed. 581 (1941)

There is no conflict here between state and federal law. Federal law and the Board's regulations are entirely silent on the use of finders by federally chartered savings associations. STANDARD is not physically precluded from compliance with both laws. Section 658.74(1)(a) merely prohibits a foreign association from "soliciting or receiving funds for deposit" or from establishing or maintaining in this state a place of business for such purpose. Historically STANDARD has been in full compliance with both laws. Only now, with the initiation of the K-MART program has there been a violation. STANDARD has physically complied in the past and it can physically comply in the future.

The next question is one of federal intent as expressed by Congress. Did Congress intend to create such an all encompassing agency, one of such pervasiveness, that no area of control or regulation was left to the states? This issue raises the question of interstate branching by STANDARD through K-MART, which is prohibited by Section 665.1001, Florida Statutes.

The Court will take judicial notice of the fact that traditionally all savings associations, both state and federal have been considered local financing agencies aimed primarily at providing funds for home purchases. It has been only in recent years with the tremendous improvement in interstate communications and the invasion of money market funds into the traditional pool of savings that associations have made

a concerted effort to expand beyond the borders of their home states. These pressures have been recognized and dealt with at both the state and federal levels by the mass of new and innovative laws and amendments dealing with deregulation and regional banking. See Florida's Regional Reciprocal Banking Act of 1984, Laws of Florida, 84-42.

The original intent of Congress as to the local nature of federal savings associations was clearly expressed in the original opening paragraph of the Home Owners Loan Act of 1933 °12 U.S.C.S. Section 1464(a)l which read as follows:

> (a) Organization authorized. In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as "Federal Savings and Loan Associations," and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home financing institutions in the United States. (E.S.)

Nowhere in the original Act, nor in any subsequent amendments, is any authority given the Board to authorize or permit branching, intra-state or otherwise, by a federal association. Such authority has been exercised by the Board as part of its plenary authority to regulate federal associations. Community Savings & Loan Asso. v. Federal Home Loan Bank Board, 443 F. Supp. 927 (1978, DC Wis.); Independant Bankers Asso. v. Federal Home Loan Bank Board, 557 F. Supp. 23 (1982 DC Dist. Col.)

Furthermore, neither Congress nor the Board have defined branches under the Home Owners Loan Act as amended. However, in

the original Act [12 U.S.C.A. Section 1464(a) at page 449] when discussing associations incorporated in the District of Columbia a "branch" was defined as "any office, place of business or facility, other than the principal office....... at which accounts are opened or payments are received......" (E.S.). From the facts of this case, K-MART is receiving payments for transmittal to STANDARD. The activities of K-MART therefore constitute a branch of STANDARD in violation of Section 665.1001(2), Florida Statutes and the preliminary injunction should have been granted.

In the Garn-St. Germain Amendments to the Home Owners Loan Act of 1933 (Sec. 311 of P.L. 97-320, U.S. Code Cong. & Admin News, 96 Stat. 1496, 10/15/82) the intent of Congress was changed by amending the opening paragraph as follows:

CHARTERING AND PURPOSE

> Sec. 311. Section 5(a) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(a)) is amended to read as follows: "Sec. 5.(a) In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations, or Federal savings banks, and to issue charters therefor, giving primary consideration to the best practices of thrift institutions in the United States. The lending and investment authorities are conferred by this section to provide such institutions the flexibility necessary to maintain their role of providing credit for housing."

The local nature of federally chartered savings associations was deleted and the emphasis on local home financing was

restricted.

However, recognizing that these changes might be construed by the Board as unrestricted authority to create associations with branches from coast to coast and in deference to the concerns of state chartered associations who did not have such broad branching powers, Congress added the following specific restriction on branching:

BRANCHING

> Sec. 334. Section 5 of the Home Owners' Loan Act of 1933(12 U.S.C. 1464), as amended by sections 112, 121, and 331, is amended by adding at the end thereof the following: "(r)(1) No association may establish, retain, or operate a branch outside the State in which the association has its home office, unless the association qualifies as a domestic building and loan association under section 7701(a)(19) of the Internal Revenue Code of 1954 or meets the asset composition test imposed by subparagraph (c) of that section on institutions seeking so to qualify. No out-of-State branch so established shall be retained or operated unless the total assets of the association attributable to all branches of the association in that State would qualify the branches as a whole, were they otherwise eligible, for treatment as a domestic building and loan association under said section 7701(a)(19).
>
> "(2) The limitations of paragraph (1) shall not apply if-
>
> "(A) the branch results from a transaction authorized under section 408(m) of the National Housing Act;
>
> "(B) the branch was authorized for the association prior to the enacment of the Depository Institutions Amendments of 1982;
>
> "(C) the law of the State in which the branch is or is to be located would permit establishment of the branch were the association an institution of the savings and loan or savings bank type chartered by the State in which its home office is located; or
>
> "(D) the branch was operated lawfully as a branch under State law prior to the association's conversion to a Federal charter.
>
> "(3) The Board, for good cause shown, may allow associations up to two years to comply with the requirements of this subsection." (E.S.)

The plenary powers of the Board to authorize interstate branches have clearly been limited by this amendment to the specific exceptions provided. STANDARD has made no effort to prove that it complies with any of the exceptions and neither of the lower courts so found. The Court of Appeal in its opinion at page 10 (A-22) was clearly in error when it stated that the above underlined provision of this amendment did not defer to state law for the regulation of interstate branches. That is precisely the effect of exception (r)(2) above. If it did not defer to state law, it most assuredly prohibited STANDARD from opening a branch in Florida.

Furthermore, the comments of the Conference Committee on Banking, Housing and Urban Affairs in reporting favorably on the Garn-St. Germain Depository Institution Act of 1982 support the DEPARTMENT's position. See the Legislative History of this Act as enacted by the 97 Congress - Second Session, reprinted in [1982] U.S. CODE CONG. & AD. NEWS at 3071 where the Committee said:

> Section 334 of the bill limits interstate branching by Federal associations to those which have an asset composition such that they qualify for the benefits of the so-called "bad debt deduction" under the Internal Revenue Code. Furthermore, retention of out-of-State branches is contingent upon the Bank Board's determination that total assets attributable to branches in the foreign State are such that those branches, taken as a whole (assuming they otherwise would be eligible), qualify for the bad debt deduction. Federals with existing interstate branches are grandfathered, and State institutions with interstate branches that convert to Federal

charters are likewise not forced to give up their out-of-State facilities. In addition, Federals are able to branch into those States that permit such penetration by out-of-state thrifts. The provision clarifies that fact that branches resulting from the extraordinary powers granted the FSLIC under Section 123 of the bill are not affected by the Section 334 limitation. Finally, the section allows the Bank Board to give Federals up to two years to dispose of illegal branches.

And again at page 3109:

> Section 334. Limitation on Branching by Federal Associations. - This section would limit interstate branching by Federal associations to those which have an asset composition such that they qualify for the benefits of the so-called "bad debt deduction" under the Internal Revenue Code. Furthermore, retention of out-of-state branches would be contingent upon the Bank Board's determination that total assets attributable to branches in the foreign state are such that those branches, taken as a whole (assuming they otherwise were eligible), would qualify for the bad debt deduction. Federals with existing interstate branches would be grandfathered, and state institutions with interstate branches that convert to federal charters would likewise not be forced to give up their out-of-state facilities. In addition, Federals would be able to branch into those states that permit such penetration by out-of-state thrifts. The provision clarifies the fact that branches resulting from the extraordinary powers granted the FSLIC would not be affected by this limitation. Finally, the section would allow the Bank Board to give Federals up to two years to dispose of illegal branches.

From the foregoing, it is clear that there has been no federal preemption of state law concerning the solicitation and receipt of funds for deposit. Both the Home Owners Loan Act of 1933 as amended and the Regulations of the Home Loan Bank Board are entirely silent on this subject. If there is no federal law or regulation, there can be no conflict and hence no preemption. Furthermore, if there ever was an all inclusive

right of the Board to preempt state law by adopting regulations to permit interstate branching, that right has been specifically removed by the Garn-St. Germain Amendments in the Depository Institutions Act of 1982. That authority has clearly been removed by the language that "no association may establish, retain, or operate a branch outside the State in which the Association has its home office,... ." This positive statement by Congress removes any question concerning the pervasiveness of the Board's powers. The opinion of the Court of Appeal should be reversed and this cause remanded to the Circuit Court with instructions to issue the preliminary injunction.

ARGUMENT II

The second question presented in this appeal is the effect of the 1980 amendments to what is now Section 658.74 (1)(a), Florida Statutes, on the decision of this Court in Greater Miami Financial Corporation v. Dickinson 214 So.2d 874 (Fla. 1968).

The factual situation in Greater Miami, supra, is almost identical to the present K-MART program. The primary difference being that K-MART acts exclusively on behalf of STANDARD, whereas in Greater Miami, the broker apparently placed the funds in various financial institutions depending on the interest rates available. The case also involved a question or issue concerning the use of the word "Savings" in the name under which the Appellant, Greater Miami Financial Corporation, conducted its business. While this Court ruled that the use of the word "Savings" in the d/b/a title was prohibited by statute, it held that the Appellant was not soliciting or receiving "deposits" since no debtor/creditor relationship was created. This Court (Justice Thornal) said "[T]he 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 the resultant creation of a debtor-creditor relationship."
As shown hereafter, the legislative amendments in 1980 eliminated the need for any debtor/creditor relationship from the statutory prohibition.

At the trial level, Judge Hartwell distinguished this case on the grounds that K-MART was not a registered securities dealer or broker under Florida law and granted the Temporary Restraining Order as to K-MART only. See paragraph 3 of Judge Hartwells opinion at A-1. Judge Willis, however, concluded that the activities of K-MART, under the new statute, were of no greater concern than those of Greater Miami under the old statute and that K-MART was equally subject to some type of regulatory control through the FHLBB and STANDARD. See the Willis opinion at paragraph 12, 13 and 14 (A-10, 11 and 12). He therefore denied the Motion for Preliminary Injunction.

The Court of Appeal also found Greater Miami controlling on the basis that there was no debtor/creditor relationship created between K-MART and its customers. The Court of Appeal (Judge Zehmer) also found that the statement of this Court in Greater Miami "that this statute is obviously designed to prevent non-banking institutions from exercising the powers or performing the functions of banks" and the underlying rational

of Greater Miami are equally applicable under both statutes. See Court of Appeal opinion at pages 13, 14 and 15 (A-25, 26 and 27).

It is respectfully submitted that this decision of the Court of Appeal, if not revised, creates a potentially dangerous situation and one open to fraud and collusion. Discovery process at the trial level revealed that the K-MART program had collected some $4,000,000 in deposits within a period of only fifteen days. Boiler-room operators and other fringe-level promoters will leap at the opportunity to create new and attractive "Ponzi schemes." The Court of Appeal has in effect said that the sale of "certificates of deposit" are outside the scope of banking regulations and every convenience store, gas station or haberdashery is free to solicit and receive funds for deposit, albeit the depository is totally unknown, financially unsound and miles away or in some foreign country.

Judge Willis found comfort in the fact that K-MART may be subject to regulation of some type through the FHLBB. However, the Board has not yet seen fit to regulate finders. In recent news articles, the Federal Savings and Loan Insurance Corporation and the Federal Deposit Insurance Corporation have expressed concern with brokered deposits and their volatile effect on savings institutions. While the Corporations have proposed regulations limiting the insurance on brokered deposits to

$100,000 from any one broker, these regulations have not, and may not become effective.

The Court of Appeal in the last paragraph of its opinion seems to imply that some regulation of K-MART may be available under the state's securities laws. Appellees point out in their Answer Brief in the Court of Appeal that the U.S. Supreme Court has ruled that Certificates of Deposit are not securities under the definition contained in the Securities Act of 1933 nor the Securities and Exchange Act of 1934. Marine Bank v. Weaver, 455 U.S. 551, 102 S.Ct. 1220 (1982). Ultimately, if this Court follows the Marine Bank decision, the solicitation and receipt of these huge amounts of deposits will be totally unregulated and Florida investors will once again be subject to potentially gigantic fraud.

At the time this Court rendered its decision in Greater Miami, supra, the applicable statute was Section 659.52(1)(a), Florida Statutes (1967). That law read, in part, as follows:

> (1) No person other than banks shall:
> (a) Solicit or receive deposits, issue certificates of deposit, with or without provision for interest.

In 1980, as part of a major revision of the financial code under Florida's sunshine provisions, by Section 97, Laws of Florida 80-260, effective 7/1/80, this statute was amended and

renumbered as Section 663.821, Florida Statutes. This latter statute was then editorially renumbered as Section 658.74, Florida Statutes by the Statutory Review Commission in 1980. The current law as amended in 1980 reads, in part, as follows:

> (1)(a) No person other than a state bank or a national bank having its principal place of business in this state shall, in this state, engage in the business of soliciting or receiving funds for deposit or of issuing certificates of deposit or of paying checks; and no person shall establish or maintain a place of business in this state for any of the functions, transactions, or purposes mentioned in this subsection.

The Court of Appeal finds that the time lag between the decision in Greater Miami, supra, (1968), and the passage of this amendment in 1980 precluded any assumption that the legislature intended to modify or change the ruling of this Court in Greater Miami. While the DEPARTMENT acknowledges the reluctance of the Court of Appeal to disagree with this Court that the banking code (past and present) was not intended to apply to Greater Miami Financial Corporation in that factual situation, this decision overlooks and is in direct conflict with the fundamental principal that the legislature is presumed to know the law, including court interpretations thereof, when it enacts new or amends existing legislation. Collins Investment Co. v. Metropolitan Dade County, 164 So.2d 806 (Fla. 1964) at page 809.

In this amendment the legislature used much broader language

than previously. The keystone of the Greater Miami decision was the finding by this Court that the acceptance of funds for transmittal to a savings association did not create a debtor/creditor relationship and hence did not violate the proscription to "solicit or receive deposits." In the new amendments the legislature has changed this language to provide that no person, other than a bank, shall "engage in the business of soliciting or receiving funds for deposit." The Court of Appeal found no significance in the use of the words "funds for deposit" yet this is the crux of the amendment. Soliciting funds is exactly what Greater Miami Financial Corporation was and what K-Mart is doing. The Legislature must therefore be presumed to have corrected its prior ommission as determined by this Court in Greater Miami, supra.

Furthermore, the legislature expanded the statute and expressly made it applicable to out-of-state banks or financial institutions. The Court should take note of the economic and historic changes taking place at the time this omnibus banking bill was being fashioned by the legislature. State ex rel. Parker v. Lee, 113 Fla. 40, 151 So. 491 (Fla. 1933). Federal deregulation was a political catch word. Billions of dollars had been siphoned from the assets of the nations savings associations as savers transferred their funds to higher yielding money market accounts. Failures, mergers and consolidations of the nations financial institutions were increasing rapidly.

The legislature was therefore justified in attempting to protect the citizens of this state by preserving the economic security of the states financial institutions. These economic pressures and conditions clearly warrant a finding by this Court of an express legislative intent to restrict the out-of-state solicitation of funds in Florida.

To hold that the 1980 Amendments had no significant impact on the decision of this Court in Greater Miami, supra, is to say that black is white or that an apple is in fact a pear. It completely ignores the maxim that the legislature is presumed to know the meaning of the language used and to have intended what is clearly expressed in the statute. Florida State Racing Com. v. Bourquardez, 42 So. 87 (Fla. 1949); Carson v. Miller, 370 So. 2d 10 (Fla. 1973). Consequently, this Court should restrict the language used in Greater Miami, supra, to the facts of that case or alternatively determine that is is no longer valid precedent under the current statute.

CONCLUSIONS

It is respectfully submitted that the legal conclusions of the Circuit Court and of the Court of Appeal were in error. Without some conflict between federal and state law there can be no preemption. As set forth in this brief there are a number of areas concerning the regulation and control of federally chartered savings associations which have not been addressed by either the Home Owner's Loan Act of 1933 as amended or by regulations of the Federal Home Loan Bank Board adopted pursuant to the authority given the Board under this Act. Finders are not regulated. Interstate branch offices are prohibited under the Garn-St. Germaine amendments to the HOLC. Therefore there is no federal preemption either express or implied. The legislative amendments to former Section 659.52(1)(a), Florida Statutes in the omnibus banking bill of 1980 (Section 97, Laws of Florida, 80-260) must be given effect. The decision of this Court in Greater Miami is no longer a valid interpretation of Section 658.74(1)(a), Florida Statutes. Therefore both Section 665.1001(2) and Section 658.74(1)(a), Florida Statutes may be enforced in state court against both STANDARD and K-MART.

The opinion of the Court of Appeal should be reversed and this matter remanded to the Circuit Court with instructions to issue a Permanent Injunction as requested in the Petition of the DEPARTMENT.

Respectfully submitted,

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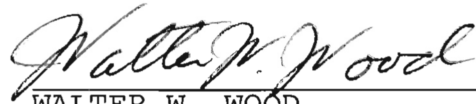

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing Initial Brief of Appellant and of the Appendix attached thereto were duly sent by U.S. mail to Charles P. Schropp, Esquire and David T. Knight, Esquire of Shackleford, Farrior, Stallings and Evans, P.A. as attorneys for Appellees, Post Office Box 3324, Tampa, Florida 33601, this 1st day of February, 1985.

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